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CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES

SEPTEMBER—OCTOBER, 1910

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS

UNION SULPHUR CO. v. PERCY et al.

(Circuit Court of Appeals, First Circuit. July 19, 1910.)

No. 862.

1. SHIPPING (§ 181*)—DEMURRAGE—LAY DAYS FOR LOADING—CONSTRUCTION OF CHARTER PARTY.

A schooner was chartered to carry a cargo of sulphur from Sabine Pass, Tex. The charter provided that lay days for loading should commence "from the time the vessel is ready to receive * * * cargo and notice thereof is given. * * * Vessel to take turn in loading * * * if required." The latter clause was written in, while the former was in the printed form. Such provisions were expressly called to the attention of the owner's agents, who also knew that the charterer was chartering other vessels, and that it had but one loading berth at Sabine Pass. When the schooner arrived for loading and gave notice of her arrival, there were other vessels ahead of her, and she was obliged to wait her turn. *Held*, that her lay days did not commence until she received her berth; there being no unnecessary delay.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 589-592; Dec. Dig. § 181.*]

2. PRINCIPAL AND AGENT (§ 97*)—AUTHORITY OF AGENT TO DETERMINE—DEMURRAGE.

Where, after a vessel was loaded, a question of demurrage arose, a telegram from the charterer directing its local agent to "indorse on bills of lading when lay days commenced and when vessel loaded. Demurrage, if any, settled at destination," did not confer upon such agent authority to determine the question of lay days under the charter, but merely to indorse the facts with respect to the arrival and loading of the vessel, and his indorsement stating the number of days for which the vessel was entitled to demurrage was unauthorized, and not binding on the charterer.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 97.*]

Appeal from the District Court of the United States for the District of Maine.

Suit in admiralty by Samuel R. Percy and others, as owners of the schooner Cora F. Cressy, against the Union Sulphur Company. Decree for libelants (173 Fed. 534), and respondent appeals. Reversed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
180 F.—1

Howard S. Harrington (D. Roger Englar, on the brief), for appellant.

Edward C. Plummer, for appellees.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

COLT, Circuit Judge. This is an action for demurrage brought by the owners of the schooner Cora F. Cressy under a charter party dated January 11, 1907. The vessel was chartered by the respondent, the Union Sulphur Company, to carry a cargo of sulphur from Sabine Pass, Tex., to Baltimore, Philadelphia, or Portland.

The Cressy arrived at Sabine Pass and reported March 18, 1907, but she did not reach her berth and begin loading until April 8th. This detention was caused by the previous arrival of four other vessels chartered by the respondent to carry cargoes of sulphur, so that the Cressy had to take her turn in loading; the respondent having only one loading berth at Sabine Pass.

The claim for demurrage turns upon the single question when the lay days began to run. The libellant contends that they began to run when the Cressy arrived and reported on March 18th. On the other hand, the respondent insists that in case the vessel was required to take her turn in loading, owing to the previous arrival of other vessels, the lay days did not begin to run until the vessel reached her berth on April 8th.

If the lay days commenced to run on March 18th, the libellant is entitled to the demurrage claimed, while, if the lay days commenced to run on April 8th, there was no wrongful detention, and the libel must be dismissed.

The lay day clause in the charter party reads as follows:

"It is agreed that the lay days for loading and discharging shall be as follows (if not sooner dispatched) commencing from the time the vessel is ready to receive or discharge cargo, and notice thereof is given to the parties of the second part. *Shippers to furnish cargo at the rate of 300 tons per day, Sundays and holidays excepted, and discharge 300 tons per day, Sundays and holidays excepted. Vessel to take turn in loading and discharging if required.*"

In the charter party the first portion of this clause is a part of the printed form used by the parties, and the latter portion, in italics, is the typewritten matter inserted by the parties before signing.

It will be observed that this clause contains two provisions relating to lay days, the printed provision, which says that the lay days commence when the vessel arrives and gives notice, and the subsequently inserted typewritten provision that the vessel is to take her turn in loading if required. Effect is to be given to both these provisions, if possible, but, if they are contradictory, the inserted written matter, as a general rule, must govern, as expressing the intention of the parties. In our opinion, however, these two provisions are neither contradictory nor inconsistent when construed in the light of the circumstances existing at the time the charter party was made. It was known to the parties at that time that the respondent had only one berth for loading at Sabine Pass, and it was also known that the respondent was at that time chartering other vessels to proceed to Sabine Pass for the

purpose of carrying cargoes of sulphur, as appears from the following stipulation:

"It is stipulated, by and between the proctors for the respective parties herein, that at the time of the execution of the charter party upon which this action is brought, it was understood by the parties thereto that the Union Sulphur Company was at that time chartering other vessels to proceed to Sabine for the purpose of carrying sulphur cargoes."

There is also this further stipulation as to the arrival of four of these vessels prior to the arrival of the Cressy:

"It is hereby stipulated and agreed by and between the proctors for the respective parties to the above-entitled suit, that the steamer Hector and the schooners Harwood Palmer, Edward H. Cole and Mary F. Barrett had arrived at Sabine, Texas, and reported to the Union Sulphur Company for cargo, prior to the 16th day of March, 1907."

The evidence shows that the provisions of the charter party were expressly brought to the knowledge of the libelant. Mr. Jones, of the firm of James W. Elwell & Co., ship brokers, who acted as the agent of both parties during the negotiations, testifies as follows:

"Q. May I ask if prior to the execution of this charter party you had submitted these conditions to Messrs. Winslow & Co.? A. Yes, sir.

"Q. Had you submitted to Messrs. Winslow & Co. the provision that the vessel was to take her turn in loading and discharging, if required? A. Yes, sir.

"Q. At the time you executed this charter party on behalf of J. S. Winslow & Co. did you understand that the Sulphur Company had only one loading berth at Sabine? A. Yes.

"Q. Did you understand that the Union Sulphur Company had only one loading berth at Sabine? A. Yes, sir.

"Q. And you understood that the loading provided for in the charter party was on the basis of shipper's furnishing as the charter party states, 300 tons per day? A. Yes.

"Q. And, as far as the owners of the vessel were concerned, that was the only rate that you were interested in? A. Yes.

"Q. And you relied only upon the shipper's having facilities to furnish that amount of cargo per day? A. Yes, sir."

Mr. Clark, of the firm of J. S. Winslow & Co., ship brokers, agents for the libelant, testified as follows:

"Q. As a matter of fact, did Elwell's people sign this charter party both for the Cressy and the Sulphur people? A. They signed it for us as agents for the Cressy. * * *

"I authorized Mr. Jones, of J. W. Elwell & Co., to close with the Cora F. Cressy by conversation over the phone on or about January 11, 1907."

There is nothing in the record to show that Mr. Jones did not act with fairness towards the libelant during the negotiations; nor is there anything to show that Mr. Clark did not fully approve the provisions of the charter party.

As for the contention of counsel that the libelant was misled with respect to the loading capacity of the plant at Sabine Pass, we need only refer to Mr. Clark's testimony, where he says:

"Well, I usually rely on the agreements we make, and that agreement [in the charter party] was 300 tons a day."

Taking the whole record as it stands, and interpreting the lay-day clause of the charter party in the light of the surrounding circumstan-

ces and conditions, there can be no reasonable doubt as to the meaning of the provisions relating to lay days. These provisions mean that the lay days were to commence when the Cressy arrived and reported, if there were no other vessels ahead of her, but, in case other vessels had reported first, and she was required to take her turn (a condition which was subsequently found to exist at Sabine Pass, and which it had been anticipated might arise), then necessarily the lay days were not to commence until the Cressy had come to her berth. Any other construction of this lay-day clause would fail to give effect to the words "vessel to take turn in loading and discharging if required," and thus render this specific condition written into the charter party meaningless.

It is not claimed that there was any delay in loading the Cressy after she came to the berth, nor any delay in loading the vessels ahead of her after they reached the berth. The claim of the libellant is based solely on the proposition that the Cressy's lay days commenced when she reported on March 18th, notwithstanding the provision in the lay-day clause that she was to take her turn in loading if required.

The remaining question is what effect, if any, is to be given to the telegram sent to respondent's agent at Sabine Pass, and his subsequent indorsement on the Cressy's bills of lading, in determining the rights of the parties under the lay-day clause in the charter party. When the Cressy was loaded and ready to clear on April 11th, her master, Capt. Haskell, made a claim for demurrage, and refused to sign the bills of lading until the claim had been adjusted.

In this situation the following telegram was sent by Mr. Jones to C. H. Dickinson, local agent of the respondent at Sabine Pass, and it is agreed that this dispatch was sent by authority of the respondent:

"April 12, 1907.

"C. H. Dickinson,

"C/o The Union Sulphur Co.,

"Sabine, Texas.

"Schooner Cressy endorse on bills lading when lay days commenced and when vessel loaded. Demurrage if any settled at destination.

"Jas. W. Elwell & Co."

Upon the receipt of this telegram Mr. Dickinson made the following indorsement upon the bills of lading:

"Sabine, Texas, April 12, 1907.

"The schooner Cora F. Cressy was ready for cargo at 9.00 a. m., on March 18, 1907. Finished loading at noon, April 11, 1907. Assuming that her cargo consists of 3000 tons, her lay days expired on April 11, 1907, at 9.00 a. m. as per charter party, dated January 11, 1907; hence demurrage is due this vessel for 13 days and 3 hours.

Union Sulphur Company,

"C. H. Dickinson, Agent."

The meaning of the telegram sent to Dickinson appears to be free from any serious doubt. He was directed to indorse on bills of lading when the lay days commenced and when the vessel was loaded, and the question of demurrage, "if any," was to be settled at destination; that is, Dickinson was directed to state the facts with respect to the arrival and loading of the vessel, leaving the question of the right to any demurrage to be adjusted when the vessel reached her destination.

This is the natural construction of the telegram. On the other hand, it would be, in our opinion, a strained and forced construction of this telegram to hold that it conferred upon Dickinson the authority to determine the question of lay days under the charter party, leaving only the payment of the amount found due, if anything, to be settled when the vessel reached her destination.

The indorsement which Dickinson made on the bills of lading was not in strict accordance with the telegram, and on its face it is ambiguous and contradictory. If, as stated, the "lay days expired on April 11, 1907," the day the Cressy was loaded and ready to clear, there could be no claim for demurrage, and hence no warrant for saying that "demurrage is due this vessel for 13 days and 3 hours." If, however, we are to treat the date, April 11th, as an error, and that Dickinson intended to write March 28th in place of April 11th, which would make the whole indorsement consistent, then it is sufficient to say that he had no authority under the telegram sent him to bind his principal as to any claim for demurrage. Dickinson was a mere local agent of the respondent at Sabine Pass, where its loading plant was located, and there is no evidence other than the telegram that he was authorized to act for the respondent on the question of its rights under the charter party. Nor is there any evidence that the respondent subsequently ratified the Dickinson indorsement. In our opinion the ultimate rights of the parties under the charter party were in no way finally determined by the telegram and indorsement. The legal effect of these acts was simply to postpone the settlement of any demurrage claim until the Cressy reached her destination.

The decree of the District Court is reversed, and the case is remanded to that court with directions to dismiss the libel, with costs; and the appellant recovers its costs of appeal.

LONG POLE LUMBER CO. v. GROSS.

(Circuit Court of Appeals, Fourth Circuit. July 14, 1910.)

No. 939.

1. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—RAILROADS—CONSTRUCTION—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to an engineer on a logging road by the collapse of a trestle, whether defendant exercised due care in the construction of the trestle was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010-1050; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 112*)—INJURIES TO SERVANT—SAFE PLACE TO WORK—RAILWAYS.

The duty of a master to maintain a safe place to work, which in the case of a railway means a safe roadbed, etc., applies to every railway, of whatever description, including a logging road.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 218-223; Dec. Dig. § 112.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. PLEADING (§ 430*)—ISSUES AND PROOF—VARIANCE—OBJECTIONS—TIME.
An objection that there was a variance between the pleading and proof when first made after verdict is too late under the laws of Virginia.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1438-1441; Dec. Dig. § 430;* Trial, Cent. Dig. § 266.]
4. MASTER AND SERVANT (§ 226*)—INJURIES TO SERVANT—RAILROADS—ENGINEERS—ASSUMED RISK.
While a locomotive engineer assumes such risks as are open and obvious, including risks incident to patent defects in the machinery, he does not assume the risk of latent, unobservable defects including the dangers incident to running over a defective bridge which had been improperly constructed, and was in disrepair.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659-667; Dec. Dig. § 226.*]
Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]
5. MASTER AND SERVANT (§ 295*)—INJURIES TO SERVANT—RAILROADS—DEFECTIVE BRIDGE—KNOWLEDGE OF DANGER—INSTRUCTIONS.
Where, in an action for injuries to an engineer by reason of the collapse of a bridge improperly constructed and in disrepair, defendant claimed that plaintiff had been instructed to examine all trestles along the road before crossing them, which plaintiff denied, the court properly submitted such question to the jury by an instruction that it was not incumbent on plaintiff to discover or anticipate and guard against any dangerous condition in the roadbed, tracks, or bridges which the exercise of ordinary care on defendant's part would have prevented, unless such condition was known to plaintiff prior to his injury, or was so open and obvious that it ought to have been known to any one in his situation at the time, had he used his senses; the burden being on defendant to prove that plaintiff did in fact have such knowledge, or that the condition of the bridge and the danger were so open and obvious that it ought to have been known to plaintiff had he used his senses.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1168-1179; Dec. Dig. § 295.*]
6. MASTER AND SERVANT (§ 226*)—INJURIES TO SERVANT—ASSUMED RISK.
Where plaintiff, an engineer on a logging road, when injured was operating an engine pushing a train of cars, and the track foreman was on the front car under orders from the superintendent to keep a lookout and determine whether the roadbed was in safe condition, plaintiff was entitled to rely on the foreman's faithful performance of his duties, and did not assume the risk of the foreman's failure to examine a defectively constructed bridge which had become in disrepair, by the collapse of which plaintiff was injured.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659-667; Dec. Dig. § 226.*]
7. MASTER AND SERVANT (§ 190*)—INJURIES TO SERVANT—FELLOW SERVANTS—NONASSIGNABLE DUTY.
Where defendant's track foreman at the time plaintiff was injured was riding on the front car of the train being pushed over the road, in order to examine the condition of the roadbed, and ascertain whether it was safe, he was performing a nonassignable duty of the master, and was not a fellow servant of the engineer of the locomotive pushing the train.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. § 190.*]
Who are fellow servants, see notes to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Flippin v. Kimball, 31 C. C. A. 286.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

8. PLEADING (§ 237*)—AMENDMENT TO CONFORM TO PROOF.

Code Va. 1904, § 3384, provides that, where a variance between the issues and proof appears, the court to promote substantial justice, if the opposite party cannot be prejudiced thereby, may allow the pleadings to be amended on such terms as to payment of costs, or postponement of the trial, or both, as may be deemed reasonable, or the court may direct the jury to find the facts, and after such finding, if it consider the variance could not have prejudiced the opposite party, shall give judgment according to the right of the case. *Held*, that where plaintiff sought to recover for injuries while operating a locomotive because of the collapse of a bridge, and alleged that defendant was negligent in the construction of the bridge, but the evidence showed that defendant's failure to inspect the bridge after a rain was the cause of the accident, the court at the conclusion of the evidence could properly permit plaintiff to amend his declaration so as to allege that the stringer of the bridge which broke was insufficient unless properly supported, and that by reason of defendant's failure to make reasonable inspections it was not properly supported at the time of the accident, and caused the injury; there being no demand by defendant for the imposition of terms or for a continuance by reason of such amendment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 603-619; Dec. Dig. § 237.*]

In Error to the Circuit Court of the United States for the Western District of Virginia, at Lynchburg.

Action by Charles Gross against the Long Pole Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The plaintiff below—now designated as defendant in error—was employed by the defendant below as locomotive engineer, and was engaged in running defendant's locomotives from the mills to its timber standing in the woods. Defendant operated a lumber plant and a railroad or tramroad from its plant to the woods where it owned standing timber, and, when the timber was cut, the logs were loaded on cars and hauled over this road by the locomotive to the mills. Plaintiff was hired as engineer for about two years prior to the accident complained of in this action. The railroad in question was five or six miles long, and ran up Lewis' creek, in Russell county, Va., and there were many bridges and trestles in the road over which the locomotive and cars had to run. The country was hilly and mountainous and the creeks were often considerably swollen and the bridges and track were liable to be washed out as a result of the rains. Some few weeks before the accident there had been washouts of some of the bridges, and it was necessary to replace them.

Noah Brown, foreman of defendant's hands, was requested to replace the bridge in question. The bridges were built by building two wooden abutments (like a square pen), and then laying two wooden "stringers" parallel to each other and ——— feet apart from one abutment to the other, then laying cross-ties across the "stringers" (the cross-ties extending over the side of each "stringer" about a foot), and then laying wooden rails across the ties, parallel with and over the "stringer." In the construction of the bridge in question Brown had charge of the work. It appears from the evidence that he put in an old, knotty piece of timber which was taken up out of an old track, and had a "saddle-notch" cut in it about three or four inches deep, as one of the stringers. He was told at the time by witness Hugh Gillespie that the stringer was "no account," and it also appears from the evidence that this stringer would not have supported an unloaded train or empty locomotive. After the bridge was built this "stringer" was propped up to keep it from breaking, and plaintiff ran his locomotive and train over it daily.

On Saturday and Sunday before the accident (which happened on Monday) there was a rain, the first after the bridge was built; but it appears that the rain was not heavy, and that the creek was only "a little bit" flush. On

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Monday morning after this rain plaintiff started out with his train, pushing five cars ahead with train foreman (who was also track foreman) Estep in charge. The cars were 22 feet long, the locomotive 15 feet, making the train 125 feet long, with the locomotive and engineer (plaintiff) in rear. Foreman Estep rode on front end of front car, for the purpose of watching the track and bridges, to see if the water had washed out any props, etc. They ran over all the bridges safely until they got to the one in question, and just as they reached this one Estep concluded that because they had gotten over the others safely he "hardly thought it worth while" to look out for this one; and it appears from the evidence that he had not made any inspection of this bridge in question from about the date the props were put under it up to the date of the accident. About the time the front car reached the bridge, Estep quit his post and went back to the engine to sand the track. The cars went over safely, but when the engine got on the bridge the engineer (plaintiff) heard something begin to "pop," and the next thing he knew his engine went over and inflicted the injuries complained of. The dangerous "stringer" had broken in two in the "saddle-notch" under the weight of the locomotive. The props were washed out and were afterwards seen lying in the creek nearby.

The jury returned a verdict in favor of the plaintiff in the sum of \$3,500, together with interest on the same from September 22, 1909, from which judgment defendant sued out a writ of error.

P. H. C. Cabell and V. L. Sexton (Sexton & Roberts, on the brief), for plaintiff in error.

Wm. H. Werth (Routh & Routh, on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and BOYD and DAYTON, District Judges.

PRITCHARD, Circuit Judge (after stating the facts as above). There are a number of assignments of error. The first relates to the refusal of the court to grant the motion of the defendant below to instruct the jury to return a verdict in its favor. This motion was based upon the following grounds: (a) That no negligence on the part of the defendant as the proximate cause of the injury was shown; (b) the negligence, if any, was that of a fellow servant; (c) the plaintiff assumed the risk. The learned judge who tried the case below in overruling the motion made the following statement:

"The rule of the federal court, as I understand it, as to fellow servants, is that with regard to such employes as we are considering in this case it depends on what the negligent servant was doing; that is to say, that the servant from whose negligence the plaintiff suffers was engaged in performing a nonassignable duty of the master. He is not a fellow servant of the plaintiff. It seems to me that the plaintiff here suffered injury from the negligence of Mr. Estep, who was charged with the duty of making an inspection to discover the result of this recent rise in the stream. Consequently, in the performance of that duty, he was performing a nonassignable duty. He was a vice principal, and not a fellow servant of the plaintiff. It seems to me that there is evidence of negligence; that is to say, evidence tending to show negligence on the part of the defendant in not having a proper inspection of the bridge made after knowing there had been a rise in the stream since Saturday.

"The Court: The motion for a peremptory instruction is overruled.

"Mr. Cabell: Save the point."

It appears from the foregoing that the court was of opinion that the defendant's liability grew out of the failure to inspect the bridge after the rain. However, an inspection of the record discloses the fact

that the original declaration contains an allegation to the effect that the defendant in the construction of its bridge or trestle at the point where the injury was incurred failed to use ordinary care, caution, and diligence in the selection of its stringers for the purpose of connecting one abutment with the other, and that the company placed across said trestle one stringer far too small and weak for the purposes of such construction, and that it was further weakened by rot and decay, and because of such defects was too weak, by far, to support an engine and loaded cars, such as were used over this line. These allegations could have been made more explicit, but we think they are sufficiently clear to inform the defendant of the character and nature of the negligence alleged to enable it to make proper defense to the same. There was evidence offered tending to show a failure on the part of the defendant to properly construct the trestle, that the stringer was weak and defective, and that the supports in the shape in which they were put in were liable to be washed away. There was, we think, sufficient legal evidence to go to the jury on the question as to whether the defendant exercised due care and caution in the construction of the bridge. It appears from the evidence of Superintendent Settle that he was as a matter of fact informed as to the dangerous condition of the road after the rain, and gave Foreman Estep express instructions to inspect on account of such condition. Among other things, in his testimony bearing on this point, Settle said:

"* * * Q. What orders did you give to Mr. Estep, and when did you give them to him, and where? A. These—

"Mr. Worth: Wait. Are you going to show that those orders came to the plaintiff? I object. (Overruled. Point saved.)

"Q. Read the question. (It is read.) A. Saturday night and Sunday was when this rain was, I think it rained, up until about 1 o'clock on Sunday, and I was out looking at the flood, or looking at the situation to see how bad the flood was, near the place where I boarded at Mr. Osborne's. This house was very close to Lewis creek, the main creek below the mill, and I says to Mr. Estep, I says, 'I wonder how serious this flood is.' I says: 'It may not be as bad up on the logging road as it is here, as this place where we were was below the forks.'

"Q. Below what? A. The forks in the creek, where they came in, known as lower branch of the creek, where I was. We had water from both streams. I told him what to do, you understand. Monday morning, and I says to Mr. Estep: 'Now, I want you to be careful, as this flood, I don't know how bad it is, to be careful, and examine these trestles carefully, before you go over them, and I will go with the dry lumber train in the morning to examine these trestles.'

"Q. What position did Mr. Estep hold? A. Mr. Estep was train foreman.

"Q. Train foreman? A. Yes, sir."

Thus it appears that the superintendent had full knowledge of the rain, and that he gave Estep (the foreman) instructions to make proper inspections on account of the same. That it was the duty of the defendant company to maintain a safe place to work—roadbed, etc.—we think is the well-settled law of the land; and this applies to every railway, of whatever description.

Section 4274, 4 Thompson on Negligence, among other things provides:

"The obligation of maintaining a safe track for the protection of the servants employed in the operation of the railway is ascribed to every proprietor

operating a railway of whatever description, and it is quite immaterial that the person or corporation operating the railway is not the owner of it."

Also, Labatt on Master & Servant, §§ 67, 68b, contains the following statement as to the law bearing upon this subject:

"**Railway Tracks; Generally.**—The general rule is that any person who maintains a railway as a part of his plant is bound to exercise ordinary care to the end that it shall be so constructed and maintained as to be reasonably safe as a place to work. For the purpose of this rule it is immaterial whether the employer is as is usually the case a company engaged in transportation as a common carrier, or a company or individual operating a railway as an accessory to some other business—as a coal company, or a lumber manufacturer who owns and conducts a railroad running from his mill to the timber.

"**Bridges.**—Negligence is predicable of the construction of the bridges which are of insufficient strength to withstand the floods in the water course which they span, or are not strong enough to support the rolling stock."

It is insisted that there is a variance between the evidence and the allegations contained in the declaration as to the construction of the bridge. No exception was taken to the evidence relating to this question, and it was permitted to go to the jury unchallenged. The failure of the defendant to object to this evidence at the time of its introduction was equivalent to a waiver, and it was too late, after a verdict had been rendered, to interpose an objection to the same. There may be an exception to this rule in some jurisdictions, but such is the rule in the state of Virginia.

In the case of *Bertha Zinc Co. v. Martin's Ex'rs*, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999, the first syllabus reads as follows:

"An objection that there is a variance between the evidence and the allegations should be made at the trial, so that the opposite party may be given the opportunity to amend, under Code 1887, § 3384 (Code 1904, p. 1792)."

Also, in the case of *Portsmouth St. R. Co. v. Peed's Administrator*, 102 Va. 662, 47 S. E. 850 it was held that, where there is a variance between the evidence and the allegations, the correct practice is to object to the evidence when offered, or move to exclude it; the attention of the court being thereby called to the variance, and an opportunity afforded to meet the emergency under the statute.

It is further contended by defendant that the plaintiff assumed the risks ordinarily incident to his employment, which, among other things, included any defects there may have been in the construction of the bridge or in keeping the same in proper repair. It cannot be reasonably contended that an engineer is required to stop his engine every time he approaches a trestle or bridge for the purpose of inspecting the same. While, by virtue of his contract, the engineer, like other employes, assumes those risks that are open and obvious—and this is also true as to any defects of machinery that are patent—yet it is not true as to defects that are latent and therefore unobservable. The defendant sought to show by the testimony of witness Newenham that the plaintiff had been instructed by the superintendent of the company to examine all trestles along the road before crossing them. The deposition of Newenham was offered in evidence, and among other things the witness made the following statement:

"* * * Gross told me in a conversation I had with him when I went down to investigate it that he was instructed by the superintendent of the company, Mr. Henry Settle, to examine all trestles along the road before crossing them; that he examined all but this one, which was the last one, so he did not examine it; and that the accident was his own fault."

This evidence is rather vague and indefinite, inasmuch as the witness does not undertake to fix the time when the instructions were given to the plaintiff. The construction sought to be placed upon this testimony was that it tended to establish the fact that the plaintiff had been so instructed after the rain had washed away the props in question; that in the light of this evidence the plaintiff assumed the risk incident to passing over the bridge at the time the accident occurred.

After having testified, the plaintiff below was recalled and testified as follows:

"Q. Mr. Gross, please state if you ever had a conversation with Mr. Newenham, and if you told him that you were instructed by the superintendent of the company, Mr. Henry Settle, to examine all the trestles along the road before crossing them, and that you examined all but this one, so you did you examine it and that the accident was your own fault? A. No, sir."

The testimony of Newenham was flatly contradicted by the plaintiff, and the court very properly submitted an instruction by which the jury was left to determine whether the plaintiff made such statement and whether he received such instructions from the superintendent. The instruction of the court on this point is in the following language:

"The court instructs the jury that as to all and each one of the duties set forth in instruction No. 1 the plaintiff had the right, in the absence of knowledge or belief to the contrary, to presume and to rely upon the presumption that they had been performed by defendant or its representative with ordinary care; and it was not incumbent upon plaintiff to discover or anticipate and guard against any dangerous condition in said roadbed, tracks, or bridges, which the exercise of ordinary care on the part of defendant would have prevented, unless such condition was either known to plaintiff prior to his alleged injury, or was so open and obvious that it ought to have been known to any one in his situation at the time, had he used his senses. And the court tells the jury that the burden is upon the defendant to prove to the satisfaction of the jury from all the evidence in the case that the plaintiff did in fact have such knowledge, or that the condition of the bridge in question and the danger arising therefrom (if any) was so open and obvious that it ought to have been known to plaintiff had he used his senses."

If, in approaching the bridge, the engineer saw, or could have seen, or had knowledge of the defective condition of the bridge, then, under such circumstances, the doctrine of assumed risk would apply. Under the foregoing instruction, the question as to whether the plaintiff had knowledge of the dangerous condition of the bridge was submitted to the jury, and the jury, by its verdict, determined that question in favor of the plaintiff. We think this instruction fully covered the law bearing upon this phase of the question, and that the court did not err in refusing to submit the instruction tendered by the defendant upon this point. In this instance Estep, the foreman, rode on the front car for the purpose of keeping a lookout and determining as to whether the roadbed was in a safe condition. This fact was well-known to the engineer, and in the performance of his duty he had a

right to rely upon Estep for the faithful performance of his duties in this respect. Under these circumstances, we are of opinion that the doctrine of the assumption of risk does not apply.

It is also insisted that the injury sustained by the plaintiff was due to the negligence of a fellow servant. The court below in overruling a motion to instruct the jury to return a verdict in favor of the defendant clearly and concisely stated the law as respects this point, and, in view of the court's statement, we do not deem it necessary to further discuss this question. That there was evidence as to the failure of the defendant to properly construct its bridge or trestle at this point sufficient to go to the jury is clearly shown by an inspection of the record, and we think the court very properly overruled the motion.

At the conclusion of the evidence, the plaintiff asked leave to amend his declaration so as to allege that the stringer which broke was insufficient, unless properly supported; that, while it was properly supported for a time, by reason of the defendant's negligent failure to make reasonable inspections, it was not properly supported at the time of the accident which caused the injury to the plaintiff. The court permitted this amendment to be made, and the defendant excepted to the same. It is therefore insisted that at that stage of the proceedings, after all the evidence had been offered and the case submitted to the jury, the court was without power to permit such amendment. This action presents two questions for our consideration: (a) As to whether the court, at this juncture, had the power to permit such amendment to be made; (b) whether under the law of Virginia the amendment in question was a proper one.

Section 3384, Code Va. 1904, reads as follows:

"Sec. 3384. Remedy, when at trial variance appears between evidence and allegations or recitals.—If, at the trial of an action, there appears to be a variance between the evidence and allegations or recitals, the court, if it consider that substantial justice will be promoted and that the opposite party cannot be prejudiced thereby, may allow the pleadings to be amended, on such terms as to the payment of costs or postponement of the trial, or both, as it may deem reasonable. Or, instead of the pleadings being amended, the court may direct the jury to find the facts, and, after such finding, if it consider the variance such as could not have prejudiced the opposite party, shall give judgment according to the right of the case."

In view of the evidence, the amendment in question was in harmony with the theory upon which the case had been proceeded with up to the time it was allowed, and we think that by the allowance of the same substantial justice was obtained, which leaves open the question as to whether the defendant was prejudiced thereby. The defendant under the well-settled rule of procedure was entitled to have the order made upon terms, and, if it had so desired, it could, upon proper motion, have secured a continuance of the case, and we feel sure that the court below would have ordered a mistrial and required the plaintiff to pay the costs of the term, if a motion to that effect had been made. But no such motion was made, the defendant simply contenting itself with excepting to the action of the court, there being no intimation that it was taken by surprise or that it had any

other or additional evidence to offer in opposition to the contention of the plaintiff as then presented by the amended declaration.

In the case of *Langhorne v. Richmond City Ry. Co.*, 91 Va. 364, 22 S. E. 357, the court, in referring to the provisions of section 3384, said:

"Statutes allowing amendments are favored, and, although resting in the sound discretion of the court, the authorities, without exception, it is said, declare that such statutes are remedial, and must be construed literally. Enc. Pl. & Pr. 516, 517. Section 3384 of the Code was clearly intended to provide for such cases as the one under consideration. By allowing the pleadings to be amended so as to put in issue the identity of the Richmond Railway Company and the defendant company, the whole controversy between the parties could have been settled. By refusing it, the court compelled the plaintiff to take a nonsuit, or to submit to a verdict in favor of the defendant, not upon the merits of the case, but because, as it appeared from the evidence then before the jury, one corporation had done the injury complained of, and another corporation had been sued; and that, too, when the plaintiff was insisting that this was not the fact, but that they were one corporation known by both names, and asking the court for leave to amend his declaration, that he might have an opportunity to introduce evidence to show it. There is no suggestion of laches on the part of the plaintiff in not amending, or asking leave to amend, his pleadings earlier. Neither does it appear that the defendant would have been prejudiced thereby, except in being prevented from taking advantage of the variance between the pleading and proof in the cause, which advantage it was one of the express objects of section 3384 of the Code to prevent."

In the case of *Alexandria & F. R. Co. v. Herndon*, 87 Va. 193, 12 S. E. 289, the court said:

"(1) The first assignment is that the court below erred in refusing to remand the case to rules, and in allowing the plaintiff to amend at bar, after sustaining the defendant's demurrer to the plaintiff's declaration. We fail to perceive any cause of reversal in the action of the court in this respect. Had the amendment been of such a nature as to render necessary some change in the defense, and a trial had been forced upon the defendant at the same term at which the amendment was allowed, then there would have been ground of complaint. But the amendment consisted merely in striking out of the declaration certain superfluous and immaterial words, and, moreover, the trial was delayed until the succeeding term. It is not only common, but commendable, practice for trial courts to allow amendments in the pleadings at bar without putting the party to the unnecessary trouble and expense of going back to rules, provided the other party is not put to the disadvantage of being forced into trial on new and difficult issues."

The rule is very clearly stated in 1 Enc. Pl. & Pr., p. 564, note 5:

"(7) Summary statement of the rule.—As long as the plaintiff adheres to the contract or the injury originally declared upon, an alteration of the modes in which the defendant has broken the contract or caused the injury is not an introduction of a new cause of action. The test is whether the proposed amendment is a different matter, another subject of controversy, or the same matter more fully or differently laid to meet the possible scope and varying phases of the testimony."

In the case of *New River Min. Co. v. Painter*, 100 Va. 507, 42 S. E. 300, the court among other things said:

"Counsel have not cited, nor have we in our investigation found, any decision of this court which indicates what amendments of the declaration the court may allow after appearance; but there are many decisions upon the question in other jurisdictions. The rule generally prevailing seems

to be that such amendments will be permitted as have for their object the trial and determination of the subject-matter of the controversy upon which the action was originally based, but amendments will not be allowed which bring into the case a new and substantive cause of action, different from that declared on, and different from that which the plaintiff intended to assert when he instituted his action. If the plaintiff in the amended declaration is attempting to assert rights and to enforce claims arising out of the same transaction, act, agreement, or obligation, however great may be the difference in the form of liability as contained in the amended from that stated in the original declaration, it will not be regarded as for a new cause of action. In such cases the original and amended declarations, and the count or counts in each, are regarded as variations in the form of liability to meet the possible scope and varying phases of the testimony, which is one of the very objects and purposes of adding several counts and of making amendments to a declaration. *Snyder v. Harper*, 24 W. Va. 203, 211; *Smith v. Palmer*, 6 Cush. [Mass.] 513, 519; *Yost v. Eby*, 23 Pa. 327, 331."

Here there was no intimation on the part of counsel for the defendant that the defendant was surprised or that it was not prepared to proceed with the trial with the pleadings as amended, and, as we have said, there was no request for a continuance of the case after this amendment was permitted. Under these circumstances, we are of opinion that the action of the lower court does not involve an abuse of judicial discretion.

There are various other assignments of error, all of which we have carefully considered, but we do not deem it necessary to enter into a discussion of them, inasmuch as the disposition of the points that we have discussed clearly determines the matter at issue in this controversy. Some of these assignments relate to the refusal of the court below to charge certain propositions of law as requested by the defendant, and some of them relate to the charge as given by the court. We think that the judge very properly refused to give the instructions submitted by the defendant, and it should be remembered that in many instances these instructions were substantially given by the court in its charge and the others were not justified in view of the pleadings and evidence; and the charge of the court, taken as a whole, clearly states the law bearing upon the questions involved herein.

We are therefore of the opinion that the rulings of the lower court upon the various questions presented are correct; and, failing to find that the court below committed any error prejudicial to the rights of the defendant, the judgment of that court is affirmed.

DOTSON v. KIRK et al.

(Circuit Court of Appeals, Fourth Circuit. July 12, 1910.)

No. 899.

1. ACTION (§ 23*)—EQUITABLE DEFENSE IN ACTION AT LAW.

Code Va. 1904, § 3299, provides that in an action on a contract defendant may file a plea alleging any such failure in the consideration, fraud in procurement, or any other matter as would entitle him to recover damages at law from plaintiff or to relief in equity in whole

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

or in part against the contract. *Held* that, in an action at law for breach of a timber contract, upon an equitable plea under the statute the court could not rescind the contract for fraud; only a court of equity having such power.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 151; Dec. Dig. § 23.*]

2. CONTRACTS (§ 94*)—FRAUD (§ 11*)—RESCISSION—RIGHT OF ACTION—"MIS-REPRESENTATION."

A "misrepresentation," the falsity of which will afford ground for action for damages or a bill for rescission of a contract, must be as to an existing fact and an affirmative statement of facts in contradistinction to the mere expression of an opinion which is ordinarily not presumed to deceive or misrepresent.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 427; Dec. Dig. § 94.* Fraud, Cent. Dig. § 12; Dec. Dig. § 11.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4537, 4538.]

3. CONTRACTS (§ 93*)—RESCISSION—RIGHT OF ACTION—"FALSE REPRESENTATION."

In a suit to cancel a contract for false representations, the burden is upon complainants to prove that the representations were made as alleged; that they were false and fraudulent; that defendant knew they were untrue; that they were material inducements to make the contract; and that complainants were deceived by them.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 448; Dec. Dig. § 93.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2668-2670; vol. 8, p. 7661.]

4. CONTRACTS (§ 99*)—RESCISSION—FRAUD—EVIDENCE.

Evidence *held* not to show that fraud was practiced on the purchaser of standing timber in the negotiations which led up to the execution of the contract.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 99.*]

5. COURTS (§ 371*)—FEDERAL COURTS—RIGHTS UNDER STATE STATUTES—SET-OFF AND COUNTERCLAIM.

Under Code Va. 1904, § 3304, providing that if plaintiff be the person with whom the contract sued on was originally made, or the personal representative of such person, the jury shall ascertain the amount to which defendant is entitled and apply it as a set-off against plaintiff's demand, and if the amount be more than plaintiff is entitled to, shall ascertain the excess, fix the time from which interest will be computed, and render judgment for plaintiff for such excess with interest, in an action in a federal court by the vendor against the purchaser of standing timber for breach of the contract, if defendants can show that the vendor has failed to perform the contract, they can do so either by way of defense or of counterclaim; set-offs and counterclaims of a legal character being available to defendant in an action at law in the federal courts, if allowed by state practice, even to the extent of enabling defendant to recover judgment against plaintiff.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 371.*]

(Conformity of practice in common-law actions to that of state court, see notes to *O'Connell v. Reed*, 5 C. C. A. 594; *Nederland Life Ins. Co. v. Liall*, 27 C. C. A. 392.)

Appeal from the Circuit Court of the United States for the Western District of Virginia, at Abingdon.

Bill by Charles M. Kirk and others against N. B. Dotson. Decree for complainants, and defendant appealed. Reversed and remanded, with directions.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

George E. Penn (George C. Peery, O. M. Vicars, and James L. White, on the brief), for appellant.

Roland E. Chase (Daniel Trigg, on the brief), for appellees.

Before GOFF and PRITCHARD, Circuit Judges, and CONNOR, District Judge.

CONNOR, District Judge. Complainants, citizens of the states of Ohio and Pennsylvania, filed their bill in the Circuit Court of the United States for the Western District of Virginia, against defendant, a citizen of the said district, alleging: That on the 18th day of April, 1901, they entered into a contract, in writing, with defendant in the following words and figures, to wit:

"This agreement made and entered into this the 18th day of April, 1901, by and between N. B. Dotson, of Wise, Va., party of the first part, and Charles M. Kirk, of Rosemont, Ohio, James McKelvey, of Somerset, Pennsylvania, John C. Jackson, of Youngstown, O., and John C. Leavitt, of Niles, Ohio, parties of the second part, witnesseth:

"That whereas the said parties of the second part have made personal investigation, of the white oak timber in Dickenson county, Virginia, on the waters of Pound river and its tributaries, and McClure river and its tributaries, and Crane's Nest river and its tributaries, as to the quality of said timber, its location, facilities as to cutting and getting same out to railroad, etc., and are satisfied from the said investigation with the same, and are desirous of purchasing all of the white oak trees twenty inches and upwards in diameter, which will measure forty feet from the ground, to or near the top of the trees, where the large limbs branch out, and in which measurement the small limbs are not to be considered:

"Now, therefore, in consideration of two dollars per tree, paid and to be paid as hereinafter stated, the said first party agrees to procure and to sell to said second parties, and said second parties agree to purchase from said first party, fifty thousand white oak trees, twenty inches and upward in diameter, two feet from the ground, with a body of forty feet measuring from the ground, to the top of the trees where the large limbs branch out as aforesaid, or as many thereof as said first party may be able to procure or cause to be conveyed, by deed or deeds with covenants of general warranty, to said second parties, it being understood, however, by and between the parties to this contract, that said number of fifty thousand trees is only an estimate, of the number of trees that the said first party thinks he will be able to procure and deliver to said second party as aforesaid, and if it should be found that when said trees are received and counted by said second parties, that the number of trees that the said first party has procured or caused to be conveyed, by the parties on whose lands said trees stand, or the owners of said trees, by deed or deeds with covenants of general warranty as aforesaid, is less than fifty thousand trees, then said second parties are to be required to take and pay for the actual number of trees, said first party has procured and caused to be delivered to said second parties as aforesaid, and said second parties shall have no claim against said first party, by reason of his failure to procure and cause to be conveyed to said second parties the whole of the said fifty thousand trees. Said first party agrees to furnish men to show up said trees to said second parties, and said parties of the second part agree to furnish men to measure, receive, brand and cut said trees promptly, and the said second parties agree and bind themselves to pay to said first party two dollars per tree for each of said white oak trees, one-third of which shall be payable within four months of this date, and when said trees are delivered and conveyed to said second parties by the respective parties on whose lands said trees stand, or the owner of the said trees, are to pay to said first party the residue of the purchase price for each of said respective lots in one and two years respectively from the date hereof, with interest thereon at the rate of six per cent. per annum until paid, and the lien shall be re-

tained in each of said deeds, to secure the payment of the said deferred payments, for the timber conveyed by each of said deeds respectively, and the said second parties shall have the right at any time to anticipate the said deferred payments, and pay the same in full, including interest thereon accrued, up to the time of such payment, at any time before maturity, and if such deferred payments shall be paid in full, including interest thereon accrued to the date of said payment, within six months from the date hereof, then the said second parties shall have a discount of two per cent. on the amount of said deferred payments so paid, but if the same shall not be paid within six months aforesaid, according to the terms of this agreement, then the said second parties shall have no discount whatever and the said second parties have this day paid said first party the sum of five thousand dollars on the purchase price of said trees, the receipt of which is hereby acknowledged, and which said sum of five thousand dollars is to be applied as a payment, on the one-third cash payment provided for heretofore. Said second parties are to have ten years from this date and a reasonable time thereafter, if necessary, so as not to exceed two years, in which to cut and remove said trees, off said lands, upon which the same stand respectively, and if said second parties shall fail to cut and remove the same within said ten years, or a reasonable time thereafter, not to exceed two years, then the owners of the land, upon which said trees may be standing, at the expiration of said term, shall have the right to deaden such of them as may be standing upon said land which the owners thereof desire to clear for the purpose of cultivation, and said second parties are to have the right to enter upon each of said respective tracts of land, for the purpose of cutting and removing any of said timber, which may be standing upon said tract of land, and may use, free of charge, at any time within eight years from this date, sufficient timber for necessary tramroads, on such tracts of land, so that no valuable merchantable timber shall be used for said tramroads.

"It is further agreed that, in the event said second parties shall need right of way to remove said trees over any tract of land, in said county of Dickenson, to which said first party now has the legal title, said second parties shall have such right of way free of charge.

"And it is further agreed that when said second parties shall have measured and branded said trees or any of them, they shall be conclusively presumed to be satisfied with the diameter and length of same, and be bound by the measurement thereof, although the same may not in fact be either 20 inches in diameter or 40 feet long, but when branded by said second parties or their agents, the same shall be paid for according to the terms of this contract as aforesaid. This contract is acknowledged and executed in duplicate.

"Witness the following signatures and seals on this the day and date first above written"

That, as an inducement to complainants to enter into said contract, defendant, through his agents, represented that he was the owner and had control of a large boundary of white oak timber land situate in Dickenson county, Va., on the waters of Pound river, and its tributaries, McClure river and its tributaries, and Crane's Nest river and its tributaries. That among other tracts pointed out to them by defendant's agents and represented to be the property of defendant, or under his control, and to which he held, or could procure, a good and indefeasible title, were certain valuable tracts of white oak timber, known as the "Mullins" and "Chase" tracts, the "Ramey Flats timber," the "Fulton timber," and other large and valuable tracts. That said agents further represented to complainants that all of said timber was upon tracts of land lying in a body, 8 miles wide and 12 miles long. That defendant would secure to complainants rights of way over said lands, etc. That said tracts were shown to complainants by defendant's agents and represented to be the property, or under the

control of defendant, as the timber which they were to get under said contract. All of which statements and representations were believed and relied upon by complainants. That said statements and representations, except that the timber was growing and standing upon the lands within the territories mentioned and upon the streams mentioned and their tributaries, complainants allege were false, fraudulent, and deceptive. That they relied upon said statements, and believed them to be true, and "being satisfied from their investigation and examination of said timber, as to its quality, its location, and facilities as to cutting and shipping, all of which was based upon said representations and statements so made by said agents of said Dotson, as aforesaid, and all of which statements and representations were afterwards, and prior to, the date of said contract, gone over and discussed with said Dotson, his agents, and attorneys in his presence," so that he was cognizant of all of said statements and representations and he made no statement modifying them and thereby confirmed and approved them. That, pursuant to said contract, and believing that defendant owned or controlled, or that he could procure, said timber for them so as to give them a good and perfect title thereto, and being anxious to receive said timber and have same conveyed to them, they furnished men, as they were under said written contract to do, to measure, receive, brand, and count said trees promptly. That they measured about 11,000 of the 50,000 trees "estimated by said Dotson, as aforesaid, in isolated tracts, scattered here and there, all over the large territory pointed out and represented as the boundary of timber, which they could get from the defendant by virtue of their purchase from him." That these trees were taken up, measured, and received by complainants upon the assurance of defendant, and his agents, that the main tracts and boundaries of valuable timber which they would receive under said contract were fair samples of the entire timber and they were only delayed briefly in permitting them to take up the timber on these tracts and other large and valuable tracts, on account of some irregularity as to title which would be readily cured and straightened out and they would be able to get same, etc. That all of these representations they found to be false. That complainants, relying upon said representations made by defendant and his agents, went to great expense in preparing to take and receive said timber, etc. That defendant instituted an action at law against complainants in the circuit court of Wise county, Va., demanding \$50,000 damages for an alleged breach of contract. That complainants, by appropriate proceedings, caused said action to be removed into the Circuit Court of the United States, and the same has been duly docketed in said court.

Complainants pray that the contract of April 18, 1901, be canceled and rescinded; that an account be taken of the amount paid by them on account of said contract, and the expense incurred by complainants by reason of their attempt to perform the same on their part; that defendant be enjoined from prosecuting his action at law against them during the pendency of this suit; and that upon the final hearing said injunction be made perpetual, and for such other and further relief as they may be entitled to in the premises, etc.

Process being duly issued and served, defendant filed exceptions to the bill and demurred to same, which were overruled, whereupon he filed his answer and cross-bill. He admits the execution of the contract and denies that the same was procured by any false or fraudulent representation by him or any one authorized to act for him. He sets forth, at much length, a history of the negotiations which preceded and led up to the execution of the contract, saying, among other things: That from the beginning of his negotiations with complainants up to and including the moment when they were consummated in the execution of the contract aforesaid, he never undertook or agreed to procure and sell to complainants and never represented either himself, or by his agents, that he could procure and sell to them the trees upon any specified tract, or tracts, of land, except as to the two tracts which he, at that time, owned—one of which was situate upon George's fork of Pound river and the other on the divide between McClure's and Russell's fork. On the contrary, he avers that he only represented that he would procure and sell to complainants, and only undertook to procure and sell them white oak trees in the section indicated, to the number of 50,000, if they could be obtained, of the character and description set forth in said contract. This was clearly understood between the parties, and the contract was drawn in conformity with this understanding. As a matter of fact, this respondent had never made a personal examination of the different tracts of land embraced in the territory except in a general way in riding through the territory on horseback over the country roads, but his information generally was that the finest timber in the territory was upon the "Ramey Flats" and the "Fulton and Phipp Tracts" which he procured and turned over to complainants, and the trees upon which they partially received and measured. He denies that he, or his agents, represented that the trees which he was to purchase under said contract were standing and growing upon lands laying in a body and would include a boundary 8 miles wide and 12 miles long, or would be in a "solid body." He further denies that he represented to complainants, or their agents, that he owned and had title to large tracts and boundaries of land in Dickenson county, over which a right of way would be required to remove said timber to market. "He simply agreed that if such right of way was needed through two tracts owned by him, complainants should have the same free of charge and this was so expressed in the contract." He denies that the trees measured by complainants were isolated tracts scattered over large territory and represented as the timber which complainants would get. While complainants were measuring and receiving trees upon tracts already procured, respondent was engaged in securing other contracts, and "if they had not abandoned the contract he would have carried out the same fully according to its true spirit and intendment." He denies that the title to the tracts secured were imperfect—if there were defects in the titles this fact was unknown to respondent and no objection on this ground was made to him by complainants. "If substantial defects existed in titles to any of the tracts, these could have been passed by, as respondent was in a position to furnish all the trees called for by the contract and according to its terms, the title to which

was good. It is not true that many of the owners of the tracts listed had not contracted the timber and agreed to sell the same. On the contrary, respondent had a written contract for each and every tract listed." He says:

"It may be that there were trees upon the tracts which did not come up to the requirements of the contract. Complainants were not required nor expected to measure and receive them. It is true that they did not have, and it may be true that he could not procure, title to the Mullins and Chase tracts—he avers that he was under no obligation, either by virtue of his contract or of any representation to procure such title for complainants."

He admits that his action at law was instituted before the expiration of the time for the first payment on the timber, but denies that it was instituted while complainants were importuning him to let them have the timber they were to get under their purchase from him; on the contrary, complainants had abandoned the contract and were leaving the state when he instituted his action against them. He denies that he abandoned the contract; on the contrary, he was ready, able, willing, and anxious to comply with the said contract when complainants abandoned the same and left the state. He denies that complainants were ready, willing, and able to take, receive, have measured, and pay for the timber which they were to receive under said contract; on the contrary, he avers they willfully abandoned, without any fault on his part, the contract and its performance. He further says that immediately after the execution of the contract he set about in good faith to carry out the same on his part. To this end he procured not less than 100 timber contracts upon the streams and their tributaries and in the territory mentioned and at considerable expenditure of time and upon which he paid large sums of money. These contracts embraced more than 50,000 trees of the kind and character agreed to be procured and were in hand at the time complainants abandoned the contract.

Defendant alleges: That he had an agreement with responsible parties, who owned and controlled the timber of the required character and in the territory embraced in the contract, that if the contracts already secured did not yield 50,000 trees of the kind and character called for by the contract they would furnish him enough trees of the kind called for to make up the required number and that said parties were able to carry out and would have carried out the said agreement. That he furnished men to show complainants the trees and was ready, willing, and able to convey same to them by deeds with covenants of general warranty in pursuance of said contract and has always been ready, willing, and able to do so. That complainants, in part execution of said contract, made the cash payment of \$5,000 and commenced to measure and receive, and did measure and receive, 17,600 of said trees. That they are indebted to him for said number of trees received by them at \$2 each. That, without any fault on his part, complainants willfully abandoned their contract, refused to measure and receive any more trees thereunder, and have left the state, and that, by so doing, they have caused him to suffer great loss and damages. He prays that the answer be treated as a cross-bill, and that proper process issue thereon against the complainants and that they be required to answer

same; that they be decreed to pay him \$2 each for the 50,000 trees which they contracted to take from him; that they be required to account, etc. Complainants filed a demurrer to the cross-bill, which was sustained.

It seems that, in the action at law by defendant against complainants, service of process was made only upon Chas. M. Kirk, one of the defendants named in the writ; the other defendants being nonresidents. All of them, to wit, said Chas. M. Kirk, and John C. Jackson, J. C. Leavitt, and James McKelvey, joined in the bill filed in this cause, although those who had not been served with process had not entered an appearance in said action. Defendant filed his petition praying that said complainants be required, before proceeding further in this cause, to enter an appearance in said action. The petition was granted and the parties required, within 20 days, to enter their appearance. The complainants having failed to obey said order, defendant herein moved the court for an order attaching them for contempt in that they refused to comply with the order, etc. This was refused upon the grounds set out in the opinion of Judge McDowell. Complainants having filed a replication to the answer, the cause was set down for hearing upon the pleadings and depositions.

On February 11, 1909, a final decree was made: Enjoining defendant from prosecuting his action at law against complainants; canceling the contract executed April 18, 1901; and directing an accounting between the parties. From this decree defendant prayed for an appeal which was duly granted. Defendant assigned a number of errors alleged to have been committed by the court. Several of them are directed to questions of practice and procedure arising during the progress of the cause, and because of the conclusion we reach need not be discussed. Those which are determinative of the controversy involve the questions:

(1) Whether the complainants had, upon the allegations in their bill, a full, adequate, and complete remedy at law. Whether they could have secured complete relief in the action at law brought by defendant against them.

(2) Whether the allegations of fraud in the bill were of such matters and of such character, in view of the written contract of April 18, 1901, as could be made the basis for cancellation.

(3) Whether, upon the evidence, the complainants have established their allegations of fraud.

The opinion of the learned judge was against defendant upon each of these questions.

Without undertaking to enter into any discussion of the defenses open to complainants in the action at law, either under the system of pleading at common law, or as modified by Code Va. 1904, § 3299, we concur with the learned judge below that complainants could not, in that action, have the complete, full, and adequate remedy to which they would be entitled, if the allegations in their bill are true.

Section 3299, Code Va., provides:

"In any action on a contract, the defendant may file a plea alleging any such failure in the consideration of the contract, or fraud in its procurement,

or any such breach of any warranty to him of the title or the soundness of personal property, for the price or value whereof he entered into the contract, or any other matter as would entitle him either to recover damages at law from the plaintiff, or the person under whom the plaintiff claims, or to relief in equity, in whole or in part, against the obligation of the contract; or if the contract be by deed, alleging any such matter arising under the contract, existing before its execution, or any such mistake therein, or in the execution thereof, or any such other matter as would entitle him to such relief in equity; and in either case alleging the amount to which he is entitled by reason of the matters contained in the plea. Every such plea shall be verified by affidavit."

Conceding *pro hac vice* that complainants, under this statute, could defend in the action at law by showing fraud in the procurement of the execution of the contract, it does not follow that the jurisdiction of equity is ousted. If, in truth, there was such fraud in the procurement of the contract as entitled complainant to cancellation, it is clear that a court of law could not grant the relief—that is peculiarly and solely within the power of a court of equity.

We concur with the contention of complainants that:

"Even under the Virginia statute (Code 1904, § 3299), upon an equitable plea, such as there provided for, as a defense to an action at law, the court would have no power to rescind the contract, even though it were found to be fraudulent. Only a court of equity would have such power. Hence a defense at law to the suit instituted by Dotson would have not been adequate and complete."

Mr. Chief Justice Fuller, in *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005, says:

"The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances."

Farwell v. Colonial Trust Co., 147 Fed. 480, 78 C. C. A. 22, was a suit for cancellation for fraud. Sanborn, Circuit Judge, said:

"The defendants challenge the bill on the ground that the complainant has an adequate remedy at law by an action to recover of the trust companies the price he paid for his bonds and stock or the damages which have resulted to him from the false representation he avers. But the adequate remedy at law which will deprive a court of equity of jurisdiction is a remedy as certain, complete, prompt, and efficient to attain the ends of justice, as the remedy in equity." *Rumbarger v. Yokum* (C. C.) 174 Fed. 55.

This, we think, is in accordance with well-settled principles of equity jurisprudence.

We proceed to inquire whether the bill sets forth allegations entitling complainants, or the evidence sustains, the prayer for cancellation. We do not understand that the learned judge admitted parol evidence to contradict, alter, or add to the written contract. The bill, while containing much irrelevant and some redundant matter, is not drawn upon the theory that the contract fails to express the terms of the agreement as settled after negotiation between the parties—it is not drawn with a view to correction. It concedes that the written contract expresses the agreement made between the parties, but avers that complainants were induced to execute it, i. e., concur in its terms and provisions by false and fraudulent representations of material facts. The equitable doctrine concerning cancellation is well defined by the

Court of Appeals of Virginia, in *Campbell v. Building & Loan Association*, 98 Va. 729, 37 S. E. 350:

"A misrepresentation, the falsity of which will afford a ground of action for damages, or a bill for the rescission of a contract, must be as to an existing fact. It must be an affirmative statement of some facts, in contradistinction to a mere expression of an opinion, which is ordinarily not presumed to deceive or mislead."

In *Farrar v. Churchill*, 135 U. S. 609, 615, 10 Sup. Ct. 771, 773 (34 L. Ed. 246), Mr. Chief Justice Fuller says:

"The representation must be in regard to a material fact, must be false, and must be acted upon by the other party in ignorance of its falsity and with a reasonable belief that it was true. It must be the very ground on which the transaction took place, although it is not necessary that it should have been the sole cause, if it were proximate, immediate, and material. If the purchaser investigates for himself and nothing is done to prevent his investigation from being as full as he chooses, he cannot say that he relied on the vendor's representation."

The Chief Justice quotes with approval the language of Lord Langdale in *Clapham v. Shillito*, 7 Beaven, 146:

"If the party to whom the representations were made himself resorted to the proper means of verification before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made to him by the other party; or if the means of investigation and verification be at hand, and the attention of the party receiving the representation be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded."

In *Shappirio v. Goldberg*, 192 U. S. 232, 240, 24 Sup. Ct. 259, 261 (48 L. Ed. 419), Mr. Justice Day says:

"When the means of knowledge are open and at hand, or furnished to the purchaser, or his agent, and no effort is made to prevent the party from using them, and especially when the purchaser undertakes examination for himself, he will not be heard to say that he has been deceived to his injury by the misrepresentations of the vendor."

In *Farnsworth v. Duffner*, 142 U. S. 43, 12 Sup. Ct. 164, 35 L. Ed. 931, Mr. Justice Brewer cites with approval *Luddington v. Renick*, 7 W. Va. 273, wherein it is said:

"A party seeking the rescission of a contract, on the ground of misrepresentations, must establish the same by clear and irrefragable evidence, and if it appears that he has resorted to the proper means of verification, so as to show that he, in fact, relied upon his own inquiries, or if the means of investigations were at hand, and his attention drawn to them, relief will be denied. * * * If the neglect to make reasonable examination would preclude a party from rescinding a contract on the ground of false and fraudulent representations, a fortiori is he precluded when it appears that he did make such examination, and did not rely upon the representations."

Judge Sanborn, in *Farwell v. Colonial Trust Co.*, *supra*, says:

"Actual or legal fraud is an essential element of those misstatements which will induce a court of equity to set aside a contract or a sale. The subject of such misrepresentations must be the existence or nonexistence of facts at the time the statements were made. Neither promises, nor prophecies, nor expressed opinions or beliefs, concerning future events or conditions, will

sustain a rescission of a contract or a sale. The facts concerning which the misrepresentations are made must be material to the contract, or transaction. They must be facts concerning which the victim is ignorant, and of which a person of ordinary sagacity and diligence in his place would have acquired no knowledge. The false statements or representations must be well calculated to deceive and to induce the victim to enter upon the trade, and they must accomplish the result and cause him substantial damages."

These authorities are in harmony with equitable principles and are sustained by a uniform current of decisions of courts of equity.

Eliminating much of the redundant language of the bill, the material averments come substantially to the following: That defendant's agents represented that he owned, or controlled, large bodies of white oak timber on contiguous tracts of land, about 8 miles wide and 12 miles long. That among other tracts so owned or controlled by defendant were the "Mullins," "Chase" and "Ramey Flats" timber, of special value and convenient location. That these tracts were pointed out to complainants, and represented as the timber which they were to get under the contract. That defendant could procure, with good title, a sufficient number of trees, including those named, to make in all 50,000 of the kind and description mentioned and desired, etc., and that these representations were made as an inducement to the execution of the contract—that they were false and fraudulent.

Before discussing the evidence, it will be well to examine the language of the contract. It will be observed that it opens with the declaration:

"That the parties of the second part have made personal investigation of the white oak timber in Dickenson county, Va., on the waters of Pound river and its tributaries and McClure river and its tributaries and Crane's Nest river and its tributaries, as to the quality of said timber, its location, facilities as to cutting and getting the same to railroad, etc., and are satisfied with said investigation, etc."

Complainants, in their bill say that by "personal investigations" they meant investigation based upon representations and statements made by Dotson and his agents. It will be noted that defendant does not, in said contract, sell or convey to complainants a single tree, nor does he represent that he owns or controls a tree, but he "agrees to procure and to sell to said second parties, and said second parties agree to purchase from said first party, 50,000 white oak trees," of the dimensions set out; "it being understood, however, by and between the parties to this contract, that said number of 50,000 trees is only an estimate of the number of trees that the said first party thinks he will be able to procure and deliver to said second party as aforesaid." To preclude any suggestion of liability by reason of his failure to procure the entire number named, it is provided that:

"If it should be found that, when said trees are received and counted by the said second parties, the number of trees that the said first party has procured, or caused to be conveyed by the parties on whose land said trees stand, or the owners of said trees, * * * is less than 50,000, then said second parties are to be required to take and pay for the actual number of trees, said first party has procured and caused to be delivered to said second parties, as aforesaid, and said second parties shall have no claim against said first party, by reason of his failure to procure and cause to be conveyed to said second parties the whole of the said 50,000 trees."

This language is inconsistent with the idea that defendant made any representation as to the actual number of trees which he was to procure and cause to be conveyed and expressly negatives the suggestion that he was selling, or contracting to sell, trees then "owned or controlled" by him. The only obligation which he assumed was to make an honest effort, in good faith, to "procure and cause to be conveyed" to the complainants the number of trees named, of the kind and description set forth "in Dickenson county, on the waters of Pound river and its tributaries, McClure river and its tributaries, and Crane's Nest river and its tributaries." There is no suggestion in the contract that any specified tract of timber land was to be "procured" by defendant. To write into it an agreement to "procure" the "Mullins" and "Chase" tracts, or the "Ramey Flats" timber, or that the trees were to be on "contiguous tracts," or in a body of certain dimensions, would be to add to, vary, and change the contract, as made by the parties, thus violating an elementary rule of evidence binding upon courts of equity in suits for cancellation. If it were alleged, and proven, that these facts were agreed upon, that the parties intended to insert them in the written contract, and that they were omitted by the mistake of the draughtsman, or by the fraud of defendant, an equity would be found for a decree to correct the instrument and make it speak the truth. There is no suggestion, either in the bill or the evidence, that the written contract was not drawn and executed in the language agreed upon by the parties, or did not express their agreement. The evidence shows that its terms were fully discussed and concessions made to complainants. It is said by complainants that they were induced to enter into the contract as written, because defendant's agents showed them certain tracts of land upon which white oak timber was growing and standing and told them that defendant "owned or controlled" these tracts, and that they would "get" this timber, etc.

Assuming, for the purpose of this discussion, that the allegations were of the character entitling complainants to cancellation, we proceed to examine the evidence and ascertain whether they are sustained. It seems that, prior to executing the contract, complainant Chas. M. Kirk made a trip over the land upon which the timber stood, in regard to which they were negotiating, with Col. Thompkins, defendant's agent; defendant furnishing a guide. He says that Col. Thompkins and Mr. Dean, the guide, showed him certain timber which he understood to be "the Chase and Mullins tracts and the Ramey Flats timber and another piece that we afterwards branded—these four tracts were the only ones which were shown on this trip." He says that the four pieces of timber, above mentioned, were shown him with the representation that the entire body of timber to be furnished would be as good in quality, and as well located as to the lay of the land as this, and that it would lay in a body about 8 by 12 miles, and that the nearest point of the timber to a proposed tunnel and railroad extension would not be more than $2\frac{1}{2}$ miles, and the extreme point not more than 15 miles from said tunnel. He says that these statements were relied upon by him and constituted his only "source of in-

formation in regard to the location, boundary, and nearness to an extension of the railroad." He further says that they were given fully to understand before buying, and during the examination, that Mr. Dotson owned all of the timber that would be furnished—a large part of it in fee and the balance in timber right only. These representations, he says, were made in February, 1901. The contract was executed April 18, 1901. Mr. Dean was examined as a witness for defendant and gives a very clear statement in regard to the timber which he showed Mr. Kirk on the first trip—the route taken, etc. He says that he made no such representations as testified to by Mr. Kirk, saying:

"I did not know what timber they would get—at that time; I did not know where the Mullins timber was, or the Chase timber. I did not know it from any other timber."

Asked if he represented that complainants would get the timber in a "solid body," he answered:

"No, sir; I never heard such a thing mentioned."

Col. Thompson was not examined.

On the second trip, Louis Walker, a timber dealer from Ohio, was sent by complainants. He went with Col. Thompson to see defendant, who furnished him a horse and Mr. Dean as a guide. Dean was compelled to leave after the first day, by reason of the illness of his father, and Mr. McFalls accompanied them. Mr. Walker testifies: That he was shown a large body of timber, giving a detailed account of the trip and the boundaries over which he was carried. He says that Thompson and McFalls stated that the timber lay in a body 12 by 8 miles. That Thompson said that Dotson owned all of the timber; that he did not own the land, but bought the timber and had a right to sell it and take it away; that the right of way went with it. "All this body of timber that he showed me was controlled by Mr. Dotson. That was the understanding and inference I got from what he said." He says that Mr. McFalls called one tract the "Fulton Tract," others the "Ramey Flats," "Chase," etc., and these were tracts which complainants were to get. He further says that, when they saw Mr. Dotson, Col. Thompson said:

"I have shown Mr. Walker this timber. I have given him the terms upon which you propose to sell this timber to these parties, and I will now repeat what I told Mr. Walker."

He went over the proposition, as he understood it, and asked Mr. Dotson to correct him, if he made any mistake or misstatement, and after he had made the statement Mr. Dotson said:

"That is just what I propose to do exactly."

Dotson said:

"He controlled or could sell the timber."

The different tracts were mentioned, and it was said that they were fair samples, etc. This witness says: That he was sent by complainants to examine the "location and whether it was a class of timber that would be desirable, etc." That the right of way was "one of the main

things" he desired to find out about. That Dotson said that "in the deed he was going to make us—a deed for the timber—and in that deed he would guarantee us a right of way to all."

A third trip of investigation was made by complainants John C. Leavitt, Chas. M. Kirk, John C. Jackson, and James McKelvey, on April 3, 1901. Defendant sent with them, as a guide, his brother-in-law, W. F. Clay, who took them to the home of McFalls; that he showed them the timber. They were out on the trip several days. Jackson says that they were shown the several tracts, especially in controversy, and told them what they would get, "that the timber was to be a solid block," and that Dotson "owned and controlled these certain tracts." Leavitt says that they were shown the Ramey flats, the Mullins, and particularly the Chase tracts. "We measured up timber in at least two of these tracts. Got off our horses and went into the timber and looked certain portions of each tract over carefully. Took a tapeline and measured the trees, and I know that there were some mammoth trees in several of the tracts, particularly the Chase tract." These tracts were pointed out as either owned or controlled by Dotson and "would represent the greater part of the timber which would come under the contract"—"as I understand it." He says that the contract was written on Monday following Saturday upon which they returned from the "tour of inspection." He says, "We were very well pleased with the timber and ready to enter into the contract"; that "they had traveled around the timber 50 or 60 miles."

Mr. McFalls was introduced for defendant and gave an account of the several trips upon which he accompanied the parties inspecting the timber. He denied that he told them that Dotson owned the timber, saying, "If he owned it, I don't know it." They asked him who owned the timber, and he told them as "nigh" as he could; that he told Mr. Kirk that "Old man Mullins owned the Mullins timber," and that "the Chases owned the Chase timber." "I supposed" that Dotson owned or claimed that he had a contract on the Fulton tract. When asked whether he told them that the entire body of timber would be as good as the Mullins, Chase, Ramey flats, and Fulton tracts, and that the timber would lay in a body 8 by 12 miles and its location with reference to the railroad, he answered:

"I never did name no such thing as that and never thought of such a thing. It was never talked of by me nor them—neither. I never heard Col. Thompson make any such representation. I was not round making any such statement—I was just to show up the timber of the country, an average of the country. They asked me this about the Chase timber, if it could be bought, and I told them that he had a certain price on it. I will tell you just how it was; that he asked a certain price for it, and Mr. Dotson told me if he would take that price, and I think that was \$20."

He denies telling Walker that Dotson owned the timber. Dotson was examined in his own behalf and denied that he ever represented or authorized any one to represent that he owned the timber or agreed that any specified tracts were to be procured. His testimony is full and explicit. The contract was drawn some two months after the first tour of inspection, and two days after the last. Hence it appears that the complainants had ample time and opportunity to inspect the

timber, and that the last inspection was made immediately prior to the consummation of the trade. In addition to the positive denial by Dean, McFalls, and Clay, of complainants' testimony, in regard to the alleged representations that Dotson owned the Chase, Mullins, or Ramey flats, the language of the contract expressly excludes any such contention. It is quite impossible to reconcile this language with the testimony of complainants. Again, they testify that they relied upon these alleged representations; whereas, in the contract, they expressly declare that they have made "personal investigation," as to the quality, location, and facilities for getting it out to the railroad, "and are satisfied from said investigation." This language solemnly inserted in the contract contradicts the contention now made.

It will be further noted that any suggestion that Dotson assumed any obligation to do more than make an honest effort, in good faith, to "procure and have conveyed" to complainants the number of trees called for, is met by the express provision that if he should not succeed in getting the entire quantity he should not be liable to complainants; but, on the contrary, they shall receive and pay for such trees as he does procure and have conveyed to them. The complainants take upon themselves the burden of proving that the representations were made, as alleged; that they were false and fraudulent—that is, that defendant knew they were untrue—that they were material inducements to making the contracts; and that they were deceived by them.

Upon a careful examination of the testimony, only excerpts from which it is possible to give, we are confronted with the inquiry whether they have successfully carried this burden and established their case. The rule by which courts of equity are guided in dealing with cases of this character is well settled. In *Atlantic Delaine Co. v. James*, 94 U. S. 207, 24 L. Ed. 112, it is said:

"Canceling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations unless their falsity is certainly proved and unless the complainants have been deceived and injured by them."

Chancellor Kent says that an instrument should not be canceled for alleged fraud unless shown "to the entire satisfaction of the court." *Lyman v. United Ins. Co.*, 2 Johns. Ch. (N. Y.) 632. Mr. Justice Brewer quotes with approval the following language of Mr. Justice Miller:

"We take the general doctrine to be that when, in a court of equity, it is proposed to set aside, to annul, or correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt."

In *Gumaer v. Col. Oil Co.*, 152 U. S. 88, 14 Sup. Ct. 480, 38 L. Ed. 365, the bill was dismissed because the court "could not reconcile the conflicting testimony of the witnesses." Applying this well-established standard based upon experience and sound policy, we are unable to find that the complainants have shown that they were induced to execute the contract of April 18, 1901, by the false and fraudulent

representations of defendant or his agents. While this conclusion works a dismissal of the bill, its correctness is sustained by the conduct of the parties, after the contract was executed. It appears that all parties entered at once upon the performance of the obligations assumed by them. A large number, some 17,600 trees, were marked, branded, and received by complainants. When complaint was made that defendant was not procuring the trees which complainants claimed they were to get, Dotson said he was getting the timber—he did get the Ramey flats, the Fulton, and several other tracts. Mr. Kirk says:

“The only things we felt we were misled in was that the right of way for the removal of the timber would have been vastly simpler for us to have had Mr. Dotson’s own land that the timber stood on, the land adjoining it, over which it would have had to be moved. We had the impression that that would have been a very small matter, the question of the right of way, as we understood that he owned nearly all the land—the territory over which this territory extended.”

Dotson says that, if complainants had not abandoned the contract, he would have secured the full number of trees named in it; that he was, at the time, engaged in doing so.

There was considerable evidence tending to show that Dotson was buying the timber, and that he was paying much less for it than the price for which he had sold it to complainants. That they complained of this, and that it was on this account that they abandoned the contract and left the state. This testimony is material only as tending to explain the conduct of the parties after the execution of the contract.

Without further extending the discussion, we are of the opinion that the evidence fails to show that any fraud was practiced on complainants, in the negotiation which led up to the execution of the contract. If in the action at law they can show that defendant has not, in good faith, endeavored to procure the timber, or that the title to any of that conveyed to them is defective, or that he has, in any other respect, failed to perform and discharge the obligation imposed upon him by the contract, it is open to them to do so, either by way of defense or by way of counterclaim, under the provisions of section 3304 of the Code of Virginia, which provides that:

“If the plaintiff be a person with whom the contract sued on was originally made, or the personal representative of such person, on the trial of the case, the jury shall ascertain the amount to which the defendant is entitled and apply it as a set off against the plaintiff’s demand, and if the said amount be more than the plaintiff is entitled to, shall ascertain the excess, and fix the time from which interest is to be computed on the same, or any part thereof. Judgment, in such case, shall be for the defendant against the plaintiff for said excess, with such interest from the said time till payment.”

We concur in the following language found in defendant’s brief:

“Offsets and counterclaims of a legal character may be availed of by the defendant in an action at law in the federal courts, if allowed by state practice, and even to the extent of enabling the defendant to recover judgment against the plaintiff in the action.” *Dabney*, Fed. Jur. § 117, p. 164; *Partidge v. Insurance Co.*, 15 Wall. 573, 580, 21 L. Ed. 229.

See, also, *Bostwick v. Covell* (C. C.) 24 Fed. 402; *Withers v. Greene*, 9 How. 213, 231, 13 L. Ed. 109.

In *Newport News, etc., R. Co. v. Bickford*, 105 Va. 182, 52 S. E. 1011, a recent case, it was held as follows:

"Section 3299 of the Code contemplates the settlement of all differences that are connected with the subject-matter of the plaintiff's claim. The fact that the defendant's claim is in tort or for unliquidated damages is immaterial. If it is based upon matters directly connected with, and injuries growing out of, the contract sued on by the plaintiff, it can be asserted as a set-off under section 3299. The object of the section is to prevent one cause of action from being divided into two, and to give precisely the same relief on a plea filed thereunder as could be obtained in an independent action brought for the same cause."

In this way the controverted questions of fact may be tried by a jury, and the rights of all parties ascertained and enforced. If it be found that defendant has failed to procure trees in accordance with the terms of the contract to the value of \$5,000, the cash payment, or that complainants have sustained other damages, by reason of a breach of the contract on the part of defendant, they will recover such amount as a jury may find to be due. The cause will be remanded to the Circuit Court for the Western District of Virginia, with direction to dismiss the bill.

Reversed.

PRETTYMAN et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. July 13, 1910.)

No. 2,004.

1. BANKS AND BANKING (§ 256*)—MISMANAGEMENT—OFFICERS—PUNISHMENT.

Gross maladministration and inexcusable breach of duty on the part of the officers of a national bank in its management, however disastrous to its stockholders, are not punishable unless in violation of Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497).

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 958-964, 967; Dec. Dig. § 256.*]

2. INDICTMENT AND INFORMATION (§ 125*)—DUPLICITY—NATIONAL BANKS—OFFICERS—JOINING PRINCIPAL AND ACCESSORY—MISAPPLICATION OF FUNDS.

Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), provides that every president, director, cashier, teller, clerk, or agent of any national banking association who willfully misapplies any of its funds with intent to injure or defraud the association, and every person who with like intent aids or abets any officer, clerk, or agent in any violation of the section shall be deemed guilty of a misdemeanor. *Held*, that under such section it is proper to join in a single count of the indictment a charge of willful misapplication of the bank's funds by its officers and a charge that the other defendants aided and abetted them therein, and that such joinder did not render the indictment demurrable for duplicity.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.*]

3. CRIMINAL LAW (§ 371*)—EVIDENCE—OTHER OFFENSES.

The rule that acts not charged in an indictment cannot be proved is subject to the exception that, where the intent with which an act charged to be criminal has been done is important, proof of similar acts of accused is admissible to show intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. CRIMINAL LAW (§ 371*)—EVIDENCE—OTHER OFFENSES—INTENT.

Similar acts to that charged in the indictment can be proved to show intent only when they are acts of accused sufficiently near, in point of time, to the act charged as to fairly throw some light on the question of intent, and when such similar acts are so related in kind to the one charged as to illustrate the question of intent, and are of the same general nature or closely related to the transactions out of which the alleged criminal act arose.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.*]

5. CONSPIRACY (§ 45*)—EVIDENCE.

Where an indictment against officers of a national bank and certain others, alleged to have aided and abetted them in the misapplication of the bank's funds, charged conspiracy and intent to willfully misapply the bank's funds in several ways, and, among them, of procuring and causing it to make large loans to a hosiery company by paper indorsed by a woolen company, which, it was claimed, was then largely indebted to the bank, proof that funds of the bank were loaned on paper of the hosiery company which was indorsed by the woolen company was admissible, but it was not proper to admit evidence of a mortgage given by the woolen company to the bank, nor as to notes which the woolen company made to the bank to secure its individual obligations, and not as indorser of the hosiery company.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 45.*]

6. CRIMINAL LAW (§ 695*)—TRIAL—RECEPTION OF EVIDENCE—OBJECTIONS.

Objections to evidence failing to state the precise grounds on which they are made are unavailable for any purpose.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1633-1638; Dec. Dig. § 695.*]

7. CONSPIRACY (§ 45*)—NATIONAL BANKS—OFFENSES—MISAPPROPRIATION OF FUNDS.

In a prosecution against officers of a national bank and certain alleged aiders and abettors for the willful misappropriation of the bank's funds, a question to one of the officers, if he had any arrangement with the vice president of the bank or any agreement with him by which the bank was to be defrauded by willfully abstracting its funds and appropriating them to illegitimate purposes, should have been allowed.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 45.*]

8. CONSPIRACY (§ 45*)—NATIONAL BANKS—OFFICERS—MISAPPROPRIATION OF FUNDS.

Where, in a prosecution against officers of a national bank and alleged aiders and abettors for misapplying the bank's funds, it was claimed that such application was made partly through overdrafts by defendant K. for the benefit of a hosiery company, and that defendant K. had conspired with certain of the officers of the bank to defraud it of its funds, evidence that many other customers of the bank had made overdrafts on it, the details of which were exhibited on certain pages of the bank's individual ledger offered in evidence, was admissible as bearing on defendants' criminal intent.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 45.*]

9. BANKS AND BANKING (§ 257*)—NATIONAL BANKS—MISAPPROPRIATION OF FUNDS.

Where, in a prosecution of the vice president of a bank for alleged misappropriation of the bank's funds in the payment of overdrafts by the bank's cashier, there was no evidence that the checks representing the overdrafts were paid with the knowledge or under the directions of the vice president, the offense as to him was not proved, under the rule that to constitute a willful misappropriation of a national bank's funds

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

there must in fact be an unlawful application by the person charged, with intent to injure and defraud the bank.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 257.*]

10. BANKS AND BANKING (§ 257*)—NATIONAL BANKS—MISAPPROPRIATION OF FUNDS—CONVEYANCE—QUESTION FOR JURY.

In a prosecution of defendant K. for aiding and abetting the officers of a national bank in the misappropriation of the bank's funds by means of checks and drafts of a hosiery company, in which such defendants were interested, whether such appropriation was intended to injure and defraud the bank *held* for the jury.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 257.*]

11. BANKS AND BANKING (§ 257*)—MISAPPLICATION OF FUNDS—MORTGAGES.

In a prosecution of national bank officers and alleged aiders and abettors for misapplying the bank's funds, evidence of the taking of a mortgage to secure an indebtedness represented by overdrafts and the making of an additional loan secured by deposit of other collateral, the effect of which was to give the bank better security than before, was insufficient to sustain a conviction.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 257.*]

12. CONSPIRACY (§ 43*)—NATIONAL BANKS—MISAPPROPRIATION OF FUNDS—CONSPIRACY—INDICTMENT.

Where a count in an indictment against a bank's officers and alleged aiders and abettors charged conspiracy to violate Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), prohibiting the willful misapplication of the funds of a national bank, and that in order to effect the object of the conspiracy defendant K., one of the parties thereto, drew and accepted a draft, set out, presented it to the bank, and obtained credit for the amount thereof for a hosiery company in which K. was interested, and which was the drawer of the draft, the indictment sufficiently charged that an act was done by one of the parties of the alleged conspiracy to effect the object thereof and sufficiently identified and specified such act to withstand a demurrer.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79-99; Dec. Dig. § 43.*]

13. CRIMINAL LAW (§§ 300, 328*)—PLEA OF NOT GUILTY—BURDEN OF PROOF.

In a criminal prosecution, pleas of not guilty put in issue every allegation in the counts of an indictment to which they are addressed and place on the government the burden of proving every essential element of the offenses charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 684-686, 730; Dec. Dig. §§ 300, 328.*]

14. CONSPIRACY (§ 44½)—NATIONAL BANKS—OFFENSES—MISAPPLICATION OF FUNDS.

Where an indictment for conspiracy to willfully misapply the funds of a national bank charged that the conspiracy had been formed between certain officers of the bank and defendant K. to willfully misapply the funds of the bank to the use of a hosiery company, and that such conspiracy was accomplished by an act of defendant K. in drawing and accepting a draft in behalf of the hosiery company, and in depositing the draft in the bank, and obtaining credit therefor in the hosiery company's account, to effect the object of the conspiracy, the burden was on the government to prove that the conspiracy as alleged was entered into, that defendant K. was a party to it, and that the acts referred to were done by him to effect the object of the conspiracy in order to sustain a conviction.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 44½.*]

15. CONSPIRACY (§ 47*)—MISAPPLICATION OF FUNDS.

Since, under Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), making it an offense to misapply the funds of a national bank, that offense can only be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

committed by an officer or agent of the bank, under a count of an indictment for conspiracy to misapply funds of the national bank, it is sufficient to show an agreement to commit that offense made between either the cashier or the vice president of the bank and the defendants for whose benefit the money is alleged to have been withdrawn.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 105-107; Dec. Dig. § 47.*]

16. BANKS AND BANKING (§ 257*)—NATIONAL BANK—OFFENSES—MISAPPLICATION OF FUNDS—CONSPIRACY.

In a prosecution of certain officers of a national bank and defendant K. for conspiracy to misapply the bank's funds, evidence *held* to sustain conviction.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 257.*]
Evans, District Judge, dissenting in part.

In Error to the District Court of the United States for the Southern District of Ohio.

James S. Prettyman and others were convicted of violating an action of banking act, and they bring error. Reversed, with directions.

T. E. Powell, for plaintiff in error Prettyman.

A. T. Seymour, for plaintiffs in error Kapners.

T. H. Darby, for the United States.

Before WARRINGTON and KNAPPEN, Circuit Judges, and EVANS, District Judge.

EVANS, District Judge. In October, 1898, the First National Bank of Dresden, Ohio, commenced business as a national bank with a capital of \$50,000. James S. Prettyman, one of its directors, became its vice president, and Cephas S. Littich was appointed its cashier. They were continued in office until the latter part of 1907. The president of the bank, Prettyman, its vice president, and Littich, its cashier, were appointed an exchange or discount committee; but the committee appears never to have held a meeting after its organization. The Muskingum Valley Woolen Manufacturing Company, which will hereafter be called the "woolen company," was a manufacturing corporation in the vicinity of Dresden, of which Prettyman was president, and in which Jacob Kapner was a stockholder. Another manufacturing company in the same locality was the Kapner Bros. & Duga Hosiery Company, which hereinafter will be called the "hosiery company." In this concern Prettyman had no interest. Its affairs were managed by Jacob Kapner and Abe Kapner. Both of these corporations continued business as going concerns until after August, 1907. In the course of a few years prior to August, 1907, the woolen company became indebted to the bank to the extent, approximately, of \$60,000, which it was unable to pay, and during about the same period the hosiery company became indebted to the bank in the sum of \$77,566, which it could not pay, and the result was the collapse of the bank, for which a receiver was appointed by the Comptroller of the Currency in the latter part of 1907. Much of the indebtedness of each of the corporations to the bank was the result of payments by Littich, the cashier, of numerous checks and drafts drawn

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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by the respective companies when there were no funds to meet them. Indeed, the readiness of Littich, the cashier, to pay out of the bank's funds the drafts and checks drawn respectively by these companies was hardly less than that of the companies to draw upon those funds. The liberality of the cashier in the use of the funds intrusted to his care was doubtless an encouragement to the two companies to draw ad libitum, and they seem not to have been at all backward about doing so. The conduct of Littich, the cashier, in recklessly paying overdrafts, and that of Prettyman, the vice president, in insisting upon and accepting excessive accommodations for the woolen company, of which he was then the chief executive officer, were most reprehensible and altogether lacking in faithfulness to the trust reposed in them by the stockholders of the bank and merits the severest condemnation. And this is so whether or not all of that conduct shall turn out to include all of the elements of criminality prescribed by the statute under which they were indicted. But gross maladministration and inexcusable breach of duty on the part of its officers in the management of a national bank, however disastrous such conduct may be to its stockholders, are not punishable unless they come within the provisions of section 5209 of the Revised Statutes (U. S. Comp. St. 1901, p. 3497). The Supreme Court, in *United States v. Brewer*, 139 U. S., at page 288, 11 Sup. Ct. 541 (35 L. Ed. 190), though alluding to another enactment, announced the applicable principle when it said that:

"Before a man can be punished his case must be plainly and unmistakably within the statute."

The result of the transactions which have been outlined was the indictment, in 1908, of Prettyman, the vice president, Littich, the cashier, Jacob Kapner, and Abe Kapner. The indictment contains 14 counts. The first charges Cephas S. Littich, the cashier, and James S. Prettyman, the vice president and a director of the bank, with having willfully misapplied \$2,137.85 of the funds of the bank for the benefit of a corporation known as the Kapner Bros. & Duga Hosiery Company with intent to injure and defraud the bank by paying certain checks drawn by the hosiery company, to wit, one of \$2,000, payable to the drawer, and one for \$127.85, payable to the Dresden Machinery Company, and which checks were drawn when the hosiery company was insolvent, when it had overdrawn its account with the bank, and when it had not sufficient money to its credit to meet the drafts, but which drafts the cashier nevertheless paid. In the same count the two Kapners are charged with having, with intent to injure and defraud the bank, aided and abetted Littich and Prettyman in the alleged willful misapplication of the money of the bank.

Each count in the indictment, from the second to the eleventh, inclusive, also charges the same things with respect to other described checks and drafts, each of which was drawn by the hosiery company on the bank for various sums and in favor of various persons.

These 11 counts will be referred to as the "willful misapplication counts."

The twelfth count is not now in question, as it was withdrawn from the consideration of the jury.

The thirteenth count, in effect, charges that Littich and Prettyman, with intent to injure and defraud the bank, willfully misapplied certain funds and credits of the bank for the benefit of the hosiery company by taking up and surrendering various checks, drafts, and notes due from the latter, upon some of which others were bound as sureties, and in lieu thereof taking the notes of the hosiery company alone for the amount due, and, in connection with other creditors of the hosiery company, taking a mortgage upon the entire property of that concern, which property was wholly insufficient to pay the mortgage debts. The count further charges the Kapners with aiding and abetting Littich and Prettyman in this alleged misapplication of the bank's funds and credits. This count will be referred to as the mortgage count.

The fourteenth count will be fully explained further along. For the present we need only remark that it charges that the defendants entered into a conspiracy to violate section 5209 of the Revised Statutes of the United States by willfully misapplying the money, funds, and credits of the First National Bank of Dresden with intent to injure and defraud the same. This count will be referred to as the conspiracy count.

The government chose to make a witness of Littich, and he was not tried. Prettyman, Jacob Kapner, and Abe Kapner having made various motions, which were overruled, entered pleas of not guilty, but were convicted and sentenced to terms in the penitentiary. They have brought the case here, and have assigned error upon many rulings of the court below, only some of which need be noticed.

1. The defendants demurred to the willful misapplication counts and to the mortgage count, and also moved the court to quash them upon the ground that there were joined in each of those counts charges of the commission of two separate and distinct offenses; that is to say, that one offense is charged to have been committed by Littich and Prettyman alone, namely, that of willfully misapplying the bank's funds with intent to injure and defraud it, and that another offense is also therein charged to have been committed by Jacob Kapner and Abe Kapner alone, namely, that of aiding and abetting Littich and Prettyman in their commission of the offense charged against them. The court overruled both the demurrer and the motion to quash, and it is claimed that these rulings were erroneous.

Section 5209 of the Revised Statutes, so far as applicable to this case, is as follows:

"Every president, director, cashier, teller, clerk or agent of any (national banking) association who willfully misapplies any of the moneys, funds or credits of the association * * * with intent * * * to injure or defraud the association, * * * and every person who with like intent aids or abets any officer, clerk or agent in any violation of this section shall be deemed guilty of a misdemeanor and shall be imprisoned not less than five years nor more than ten."

Under these provisions, in the opinion of a majority of the court, it was admissible and proper to join in a single count of the indictment a charge of willful misapplication of the bank's money or funds by its officers and a charge that the other defendants aided and abet-

ted them therein, and therefore that it was not erroneous to overrule either the motion to quash or the demurrer. The writer takes the opposite view and thinks that the section quoted created among others those two separate and distinct offenses, the first having relation alone to officers or agents of the bank and the other to persons not such officers or agents, that each separate offense should be charged in a separate count, and that each of the counts referred to was open to the objection of duplicity. Consequently he is of opinion that it was alike error to overrule the motion to quash and the demurrer.

2. The court below, over the objections of the defendants, permitted the introduction of testimony as to many acts other than those alleged in the indictment in order to prove the intent of the accused in doing the things which are charged to be criminal. The thoroughly established general rule is that acts not charged in an indictment cannot be proved, among other reasons, because no testimony is pertinent unless it relate to the matters charged in the indictment and as to which an issue is formed by the plea of not guilty, and because the accused, having no notice that testimony as to any other act would be offered, could not be prepared to meet it. But to this general rule there is at least one important exception, and where the intent with which an act charged to be criminal has been done becomes important, as it necessarily is in this case, then, within certain limits, proof of similar acts of the accused is admissible in order to show the intent with which the act charged in the indictment was done. We think, however, that such similar acts can be proved only when they were done sufficiently near, in point of time, to the act charged as fairly to throw some light upon the question of intent; when the similar act is so related in kind to the one charged as to illustrate the question of intent; when the similar acts are in fact acts of the same general nature or closely related to the transactions out of which the alleged criminal acts arose; and when, in fact, the similar acts are acts of the person accused against whom that particular proof is directed. *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193; *Penn. Mut. Life Ins. Co. v. Mechanics', etc., Bank*, 72 Fed. 422, 19 C. C. A. 286, 38 L. R. A. 33, 70; 3 *Greenleaf on Evidence*, §§ 15, 16; 1 *Jones on Evidence*, § 142; 1 *Wigmore on Evidence*, § 302; *Moore v. United States*, 150 U. S. 57, 14 Sup. Ct. 26, 37 L. Ed. 996; *Wood v. United States*, 16 Pet. 360, 10 L. Ed. 987.

We shall not undertake to decide, especially as such questions are somewhat within the discretion of the trial court, which of the many supposed similar acts proved at the trial come within the general propositions just stated, but shall confine what we shall say in this connection to those parts of the testimony which relate to what was done by the woolen company, such as the making by it of certain notes of its own and a mortgage to the bank and to the drawing by it of certain drafts upon the bank in favor of the hosiery company or other persons. Nothing is charged in the willful misapplication counts nor in the mortgage count as to any of those matters; but testimony in respect to them was admitted upon each of those counts, though vaguely objected to by one of the defendants. In view of future action in

the case it will not be improper to say that it appears to us that no one of those acts of the woolen company was, in any proper sense, an act of either of the defendants, nor such as were similar to those acts of the defendants alleged in the counts just mentioned, nor was the mortgage or the notes or drafts by the woolen company in any sense the act either of Jacob Kapner or Abe Kapner.

The conspiracy count charges that it was intended by the defendants to willfully misapply the moneys, funds, and credits of the bank in several ways, and among them by procuring and causing the bank to make large loans to the hosiery company upon paper indorsed by the woolen company which, it is alleged, was then otherwise largely indebted to the bank. We think the paper of the hosiery company, if any, which was indorsed by the woolen company, might properly be admissible as evidence in support of the conspiracy count, but that it was not proper under this count to admit as testimony the mortgage which the woolen company made to the bank nor the notes which that company made to the bank for its own individual obligations and not as indorser for the hosiery company.

Except to the extent indicated this testimony was not competent upon any of the counts. But it does not follow from this that we should reverse the judgment for this error. In *Noonan v. Caledonia Mining Co.*, 121 U. S. 400, 7 Sup. Ct. 915 (30 L. Ed. 1061), it was said:

"The rule is universal that, where an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal, unless it be of such a character that it could not have been obviated at the trial. The authorities on this point are all one way. Objections to the admission of evidence must be of such a specific character as to indicate distinctly the grounds upon which the party relies, so as to give the other side full opportunity to obviate them at the time, if under any circumstances that can be done. *United States v. McMasters*, 4 Wall. 680 [18 L. Ed. 311]; *Burton v. Driggs*, 20 Wall. 125 [22 L. Ed. 299]; *Wood v. Weimar*, 104 U. S. 786, 795 [26 L. Ed. 779]."

In *District of Columbia v. Woodbury*, 136 U. S. 462, 10 Sup. Ct. 994 (34 L. Ed. 472), the court expressed itself as follows:

"We will add that the objections made by the district to the evidence in relation to the plaintiff's contributions to medical journals, as well as to the entry upon the books of the express company, lose much of their force because they did not indicate with distinctness the precise grounds upon which they were intended to rest. Such general objections were well calculated to embarrass the court, and put it at disadvantage in its conduct of the trial. It was entitled to know the grounds of the objection, so that the jury could be put in possession of the real case to be tried. In *Camden v. Doremus*, 3 How. 515, 530 [11 L. Ed. 705], this court declined to consider objections made to the admission of evidence which did not state the grounds upon which they were made, and did not obviously cover the competency of such evidence nor point to some definite and specific defect in its character. 'We must,' the court said, 'consider objections of this character as vague and nugatory, and, if entitled to weight anywhere, certainly as without weight before an appellate court.' To the same effect are *Burton v. Driggs*, 20 Wall. 125, 133 [22 L. Ed. 299]; *Patrick v. Graham*, 132 U. S. 627, 629 [10 Sup. Ct. 194, 33 L. Ed. 460]."

The rule thus stated has been enforced in many other cases by the Supreme Court and by the various Circuit Courts of Appeal. It was enforced by this court in *Merchants' Ins. Co. v. Buckner*, 110 Fed.

346, 49 C. C. A. 80, and in other cases. And so it was by the Circuit Court of Appeals of the Seventh Circuit in *Shandrew v. Chicago, etc., Ry. Co.*, 142 Fed. 322, 73 C. C. A. 430, and in *American Car Co. v. Brinkman*, 146 Fed. 712, 77 C. C. A. 138.

Tested by these rules, the objections to the testimony to which we have alluded were too vague to enable us to act upon them.

3. In the course of the cross-examination of Littich, the counsel of Prettyman asked him if he claimed that he had any arrangement with Prettyman or any agreement with him by which the bank was to be defrauded by willfully abstracting its funds and diverting them to illegitimate purposes. The court sustained an objection to the question, and Prettyman excepted. The word "abstracting," though not representing any charge actually made in the indictment, is so used in connection with other language in the question as to make very important the proposition whether any agreement existed for diverting the funds of the bank to illegitimate purposes, and this is especially so in view of the prominence of Littich in all the transactions and of the fact that there could be no conviction without showing that he was a guilty participant therein. If the word "misapplying" had been used, it would, of course, have been more accurate. Nevertheless, we think the question was a proper one. It clearly admits of an answer relevant to the issues raised by the plea of not guilty and favorable to the party asking it, and we think it was error to exclude it. *Buckstaff v. Russell*, 151 U. S. 637, 14 Sup. Ct. 448, 38 L. Ed. 292.

4. The defendants Jacob and Abe Kapner offered to prove that many other customers of the bank had made overdrafts upon it, the details of which were exhibited on certain pages of the individual ledger of the bank which were offered in evidence. The court sustained the objections of the government to the introduction of this testimony, and the two defendants excepted to the ruling. We think it was error to exclude this testimony, as it had a manifest tendency to show the custom of the bank at the time the hosiery company was making overdrafts upon it. The testimony would throw some light upon the motive of the Kapners, and was for that reason competent not only upon the willful misapplication counts, but also upon the conspiracy count. If it were the habit of the bank to permit overdrafts by its customers, it may be less probable that the overdrafts of the hosiery company were made with criminal intent.

5. At the close of the testimony the defendant Prettyman moved the court to direct the jury to return a verdict that he was not guilty as charged in either count of the indictment. The motion was overruled. We shall first deal with the motion as it respects the charges made in the willful misapplication counts. In each of those counts, as we have seen, it is charged that the alleged willful misapplication of the money of the bank was made by Littich and Prettyman by the payment out of the funds of the bank of certain checks drawn upon it by the hosiery company when the latter had no money in the bank to its credit and when its account had already been overdrawn. The testimony clearly showed that Littich paid out the money but failed to show that Prettyman was in any wise connected with either of the

checks so paid, or that he paid or directed the payment of either of them, or that he participated in either of the transactions. It equally fails to show that the application of any part of the money paid upon the checks was made by Prettyman himself or by his consent, direction, or knowledge. Having regard to the essential elements of the offense charged against Prettyman, it is entirely clear that, if there were any willful misapplication of any part of the money which went to the payment of any of the checks, it was not the act of Prettyman. To constitute the offense of willful misapplication of the funds of a national bank, there must in fact be an application of those funds by the person charged, the application must be an unlawful one and must have been made by the accused with the intent to injure and defraud the bank. The testimony being such as we have indicated, a verdict in Prettyman's favor should have been directed by the court upon the first 11 counts.

6. The defendants Jacob and Abe Kapner also moved the court to direct their acquittal on the willful misapplication counts; but the court overruled the motion. The testimony showed that all the checks described in those counts were drawn by the hosiery company acting through one or the other of the Kapners who were its officers, and that some if not all of the checks were drawn when the account of the company had been overdrawn and when the company was in fact unable, though yet a going concern, to pay its debts. The checks were nevertheless paid by Littich, the cashier, out of the bank's funds. There was testimony tending to show that some, at least, of the checks were paid in the hope of keeping the hosiery company on its feet so that it might ultimately be able to pay its indebtedness to the bank. We have held that the testimony did not warrant the conviction of Prettyman; but it does not follow that it was error to overrule the motion of the Kapners. If we eliminate Prettyman and consider these counts as though only Littich and the Kapners were concerned, we find under the authorities that the essential elements of the charges made in them are: (1) That there were willful misapplications in favor of the hosiery company of the funds of the bank by Littich, its cashier; (2) that such misapplications by him of the bank's funds were for purposes that were unlawful; (3) that the respective misapplications were made by Littich with the intent on his part to injure and defraud the bank; and (4) that the Kapners with intent to injure and defraud the bank aided and abetted Littich in all the alleged willful misapplications. *United States v. Britton*, 107 U. S. 669, 2 Sup. Ct. 512, 27 L. Ed. 520; *United States v. Northway*, 120 U. S. 332, 7 Sup. Ct. 580, 30 L. Ed. 664; *Batchelor v. United States*, 156 U. S. 429, 15 Sup. Ct. 446, 39 L. Ed. 478; *Rieger v. United States*, 107 Fed. 926, 47 C. C. A. 61.

While, as was held by this court in *Flickinger v. United States*, 150 Fed. 1, 79 C. C. A. 515, the payment of overdrafts by an officer of a national bank, under circumstances such as appeared there, is an offense under section 5209, a different result must follow, if, when the overdrafts are paid, there was lacking the element of willful misapplication to an unlawful purpose of the money of the bank or the in-

tent upon the part of the bank's officer to injure and defraud it by such payments.

If we assume, as we think we must, without otherwise expressing an opinion upon it, that the testimony in some degree tended on one hand to prove the existence of each of the elements of the offenses charged, and on the other that it tended to show that payment of the checks was induced by other motives than to injure and defraud the bank, then, although the burden rested on the government to prove beyond a reasonable doubt the intent to injure and defraud the bank, there was a question for the jury to determine, and it was not error to overrule the motion of the Kapners.

7. Each of the defendants moved the court to direct a verdict of not guilty as charged in the thirteenth or mortgage count. The testimony plainly showed that by July, 1907, the hosiery company owed the bank over \$77,500; that after many consultations between it and the bank, and after efforts to raise the money to pay or to reduce the indebtedness had failed, a mortgage upon all its property was given by the hosiery company to E. P. O'Neal, as trustee, to secure that and certain other indebtedness for which new notes were given; that the bank agreed to the making of the mortgage; that it accepted it after it was made; that it was executed by the hosiery company upon the advice of O'Neal, who was the bank's attorney, to whom as trustee the mortgage was made; and that the individual sureties or indorsers upon some of the old paper which was then surrendered by the bank were practically insolvent at the time. Briefly stated, the count charges the alleged willful misapplication as follows: (1) That on August 21, 1907, while the hosiery company was indebted to the bank in the sum of \$77,566.56 upon various notes which are described it, with the assistance and influence of Littich and Prettyman, procured an additional loan of \$5,500. (2) That on that day certain drafts of the hosiery company on Rieger, Kapner & Altmark, each of which had been credited by the bank to the hosiery company and payment of which had been refused by the drawees and had been protested and returned to the bank and were in its hands in the aggregate amount of \$5,950, remained unpaid. (3) That on that date a certain check of the hosiery company on the Old Citizens' National Bank of Zanesville, Ohio, for \$3,000, and for which the First National of Dresden had on August 16th given credit to the hosiery company, was unpaid and protested and had been returned to the latter bank, and that another check of the hosiery company upon the bank for \$2,600 had been presented by the hosiery company and had on August 21st been paid by the bank through the influence of Littich and Prettyman. It is alleged that on the date of these transactions the mortgage was executed and delivered, and that all of the notes of the hosiery company were surrendered without consideration, and that the drafts and checks were paid when the hosiery company had nothing to its credit and was insolvent. Upon these matters we think it will suffice to say that the indebtedness of the hosiery company to the bank covered by the mortgage was better secured by it than it had been before, that the prior overdrafts were covered by the mortgage, and that the new overdrafts

were less than those previously existing. (4) That the additional loan was secured by a deposit of other collateral. We think the allegations of this count were not sustained by substantial testimony, and that it was error to overrule the several motions of the defendants to direct a verdict of not guilty upon the thirteenth count.

8. We come now to questions somewhat more difficult which arise upon the fourteenth or conspiracy count. Section 5440 of the Revised Statutes (U. S. Comp. St. 1901, p. 3676), upon which it is based, reads thus :

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years or to both fine and imprisonment in the discretion of the court."

The count charges that the defendants conspired to violate section 5209 of the Revised Statutes of the United States by willfully misapplying the money, funds, and credits of the First National Bank of Dresden, Ohio, with intent to injure and defraud it by converting the said money, funds, and credits to the use of the Kapner Bros. & Duga Hosiery Company and other persons unknown.

The count also alleges in detail the means by which the defendants were to carry into effect their alleged conspiracy. It is charged that Prettyman was vice president of the bank and president of the woolen company; that Jacob Kapner was president of the hosiery company, and a large holder of the stock in the woolen company; that he was principal owner in the partnership of Rieger, Kapner & Altmark, of New York, which was the selling agent of the hosiery company; and that Abe Kapner was the secretary and active manager of the hosiery company and was also connected in some unknown way, with the partnership of Rieger, Kapner & Altmark. It is alleged that the defendants intended to willfully misapply the moneys, funds, and credits of the bank to the use of the hosiery company with intent to injure and defraud it: (a) By procuring and causing large overdrafts upon the hosiery company's account, when it had no funds to its credit, and was not entitled to draw upon the bank to which it was then indebted in the sum of \$108,000 or more, and was unable to pay its debts; (b) by procuring and causing the bank to make large loans to the hosiery company either upon its own paper or upon paper indorsed by other persons, viz., the woolen company, which last company was then indebted to the bank in a sum exceeding its total assets, and also upon the paper of Kapner Bros. & Rieger, Kapner & Altmark, and afterwards to release said makers and indorsers without consideration; and (c) by causing and permitting the hosiery company to deposit with the bank and to receive credit on its books for the sum of certain drafts upon Rieger, Kapner & Altmark under the pretense that said drafts were drawn upon actual value secured thereby and were in fact commercial paper, whereas in truth and in fact said drafts were not drawn against values of any kind, but were purely fictitious and were drawn for the purpose of getting credit with the bank to which the hosiery company

was not entitled and thereby to injure the association. It is averred that by these means and devices the defendants intended to cause a great loss in money and securities to the bank, and to withdraw from it all the funds and moneys that could by those means be obtained and to appropriate the same to the use of the hosiery company which was then insolvent and indebted to the bank in said sum of \$108,000, but that its total assets were of the value of less than \$50,000.

After stating the general charge and specifications as we have given them, it is averred:

"That in order to execute, carry out and effect the object of said conspiracy, said Abe Kapner, on, to wit, the eleventh day of May, in the year of our Lord one thousand nine hundred and seven, at the county of Muskingum, in the state of Ohio, in the Circuit and Eastern Division of the district aforesaid, and within the jurisdiction of this court, did draw a certain draft upon Rieger, Kapner & Altmark, in the words and figures following, to wit:

"Dresden, O., May 11, 1907.

\$5,000.00

"At sixty days sight, pay to the order of ourselves, five thousand dollars.

"The Kapner Bros. & Duga Hosiery Company.

"Abe Kapner.

"To Rieger, Kapner & Altmark, 43 Leonard Street, New York."

"And did present said draft to the said Banking Association and obtain credit for the same on the said 11th day of May, 1907; and the said Abe Kapner, on the said 11th day of May, 1907, did write upon the face of said draft the following acceptance, to wit: 'Accepted, Rieger, Kapner & Altmark, Abe Kapner, payable, First National Bank, Dresden, Ohio.' And on the same day and at the same time did indorse said draft: 'The Kapner Bros. & Duga Hosiery company, Abe Kapner.'"

9. The defendants demurred to this count upon the ground that it is not averred therein that there was any infirmity connected with the draft, nor that the credit obtained thereon was used, nor that the draft was not paid when it matured, nor that the bank lost anything by reason of giving credit thereon. The allegations in respect to this phase of the offense charged possibly are meager, and we are not unmindful in this connection of the general rule of criminal pleading which requires that all the essential elements of an offense shall be explicitly set forth so that the accused may be informed of what is to be proved against him, and thus be given an opportunity to meet it; but the count does in substance allege that in order to effect the object of the conspiracy Abe Kapner, one of the parties to it, drew and accepted the draft, presented it to the bank, and obtained credit for the amount for the hosiery company. We think this sufficiently charges that an act was done by one of the parties to the alleged conspiracy to effect the object thereof and sufficiently identifies and specifies what that act was. Greater particularity in this respect does not seem to be necessary under section 5440. There was no error in overruling the demurrer.

10. The defendants moved the court to direct their acquittal on this count, the motion was overruled, and error is assigned upon this ruling.

The pleas of not guilty put in issue every allegation in the count, and put upon the government in the amplest way the burden of proving every essential element of the offense charged. Speaking generally, those elements were: (1) Whether there was a conspiracy between the defendants, Littich, Prettyman, Jacob Kapner, and Abe Kapner, to willfully misapply the moneys, funds, and credits of the bank to the

use of the hosiery company with intent to injure and defraud the bank in the ways and by the means set forth in the count; and (2) whether the acts of Abe Kapner in drawing and accepting, in behalf of the hosiery company, the draft dated May 11, 1907, and in depositing it in the bank and obtaining credit therefor in the company's account were acts done by him to effect the objects of the conspiracy. The issues formed by the plea of not guilty made it indispensable for the government to establish beyond a reasonable doubt three propositions, viz.: (1) That the conspiracy as alleged was entered into; (2) that Abe Kapner was a party to it; and (3) that the acts referred to were done by him to effect the objects of the conspiracy. A failure of proof in respect to either of these propositions would necessarily be fatal to the prosecution.

In *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419, a conspiracy was defined to be a combination between two or more persons by concerted action to accomplish a criminal or unlawful purpose, and in *United States v. Hirsch*, 100 U. S. 33, 25 L. Ed. 539, it was held that the gravamen of an offense under section 5440 of the Revised Statutes was the conspiracy which was described as being "the combination of minds in an unlawful purpose." Of course the combination to accomplish a criminal design by concerted action need not be agreed upon in express language. A tacit understanding between parties may be quite sufficient and may be shown by proof of circumstances which fairly tend to indicate its existence; but in this case, as in all others where a conspiracy is charged, it is indispensable that in some way the existence of the alleged combination or agreement should be established by the testimony beyond a reasonable doubt. In *Union Pacific Coal Co. v. United States*, 173 Fed., at page 740, 97 C. C. A., at page 581, the Circuit Court of Appeals of the Eighth Circuit, speaking through Judge Sanborn, said:

"There was a legal presumption that each of the defendants was innocent until he was proved to be guilty beyond a reasonable doubt. The burden was upon the government to make this proof, and evidence of facts that are as consistent with innocence as with guilt is not sufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused."

Under section 5209 of the Revised Statutes the offense of willfully misapplying the money or funds of a national bank with intent to injure and defraud it can only be committed by an officer or agent of the bank, and we think, under the count now being considered, that it would have been sufficient to show an agreement to commit that offense made either between Littich, the cashier, and the Kapners, or either of them, or one made between the latter and Prettyman, the vice president of the bank, or one made between all of the defendants. The record before us is very voluminous, but has been repeatedly examined with great care. It would extend this opinion beyond reasonable limits to go into its details or to discuss minutely its separate features. Under these circumstances, we are content to say that a majority of the court are not prepared to hold as matter of law that there was no substantial testimony tending to support the charge of conspiracy, nor, as

matter of law, that there was no substantial testimony tending to show that the making of the \$5,000 draft in question was an overt act in furtherance of the alleged conspiracy. The writer, however, has reached the conclusion: (1) That there is no substantial testimony to sustain the allegations of the count as to the conspiracy; and (2) that there is no substantial testimony to show that the alleged overt act was done to effect the object of any conspiracy. The averment is that the \$5,000 draft was drawn to effect the objects of the conspiracy, but he thinks the uncontradicted testimony shows that the purpose of making that draft was to pay or renew a pre-existing indebtedness of long standing. He thinks there was no substantial testimony to show the contrary, and that this purpose being positively proved by the oaths of Littich and Abe Kapner, the two active participants in the transaction, excludes any other hypothesis in the absence of a showing by adequate testimony, positive or circumstantial, that the purpose of the act was otherwise. He thinks that the alleged intent should be proved by evidence of facts which are more consistent with guilt than with innocence before there could be a conviction.

The opinion of the majority of the court on the motion being as stated, it appears that it was not erroneous to overrule the motions to direct an acquittal on the fourteenth count.

We have not deemed it necessary to notice the other numerous errors assigned.

For the reasons indicated, the judgments will be reversed, with directions to award a new trial and for further proceedings according to law.

WESTERN UNION TELEGRAPH CO. v. HOWE et al.

(Circuit Court of Appeals, Eighth Circuit. April 27, 1910.)

No. 3,109.

1. TAXATION (§ 498*)—ASSESSMENT—REVIEW BY COURTS—TIME OF TAKING PROCEEDINGS.

Under Kan. Act March 6, 1907 (Laws 1907, c. 408), creating a state tax commission and requiring it to keep full minutes of its proceedings and Laws Kan. 1908, c. 81, which provides that the commission shall meet on the second Monday in April of each year for the purpose of assessing the property of telegraph companies and shall sit as a board of equalization on the second Wednesday in July of each year at which sitting it has power to correct any assessment made in such manner as will in its judgment make the valuation just, a court of equity is without power to entertain a suit to enjoin the commission from certifying an assessment of the property of a telegraph company, made in April, prior to its meeting as a board of equalization in July, at which meeting the telegraph company has the right to invoke its further action to correct the assessment if deemed excessive, the record of the commission being sufficient notice of its action.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 498.*]

2. TAXATION (§ 309*)—"ASSESSMENT."

The word "assessment" as used in the Kansas Constitution means valuation of property by the proper officers for the purposes of taxation; in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

other words, it is the official listing of property for the purpose of constituting a basis upon which taxes are to be levied.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 509, 510; Dec. Dig. § 309.*

For other definitions, see Words and Phrases, vol. 1, pp. 549-555; vol. 8, pp. 7583, 7584.]

Appeal from the Circuit Court of the United States for the District of Kansas.

Suit in equity by the Western Union Telegraph Company against Samuel T. Howe, S. C. Crummer, and W. S. Glass as members of the State Tax Commission, and J. M. Nation, auditor of the state of Kansas. Decree for defendants, and complainant appeals. Affirmed.

The following is the opinion of Pollock, District Judge, in the Circuit Court:

Complainant, the Western Union Telegraph Company, brought this suit originally against Samuel T. Howe, S. C. Crummer, and W. S. Glass, members of the State Tax Commission of this state, Clarence Smith, secretary of said commission, and J. M. Nation, Auditor of the state, to enjoin what is averred to be an illegal tax and assessment on its property for the year 1908.

The suit was originally instituted July 3, 1908. A restraining order was issued at the date of the commencement of the suit. By what is styled an amended and supplemental bill filed herein December 31, 1908, complainant brings in the county treasurers of the several counties of the state and makes them parties to the bill. The tax commissioners were appointed, qualified, and assumed to act in the matter complained of in the bill in pursuance of chapter 408, Laws 1907, of the state, as amended by the legislative assembly in the year 1908. The specific wrongs complained of by complainant in its bill are these: That the Tax Commission of the state caused complainant to return on blanks furnished for that purpose by it a statement and valuation of all its taxable property in the state for the year 1908 under the oath of its appropriate officer. In this statement the valuation fixed by the complainant on its property was the sum of \$838,100.30. Thereafter, and on the 20th day of May, 1908, the State Tax Commission, as shown by the records of said commission, required by law to be kept, made an order assessing the property of complainant in the state at the sum of \$3,159,322, and apportioned the same among the several taxing districts of the state as shown by said order, which reads as follows: "Now, on this 20th day of May, the Tax Commission being in session as a board of appraisers, pursuant to chapter 81, Laws of 1908, does hereby assess the property of the Western Union Telegraph Company, in the state of Kansas, in the sum of \$3,159,322.00. For the purpose of distributing said amount among the taxing districts of the state through which the lines of said company run, there is assigned a value of \$226.26 to each mile of pole line, including cross arms and one wire; and further the sum of \$27.71 for each mile of additional wire on any mile of pole line, and the secretary of the commission is hereby instructed to prepare certificates to be signed by the State Auditor certifying to the county clerks of the several counties the value so assigned in order that the same may be placed upon the tax rolls of the respective counties."

It is the contention of the complainant, as averred in its bill, that the amount returned by it was the true and just market value of all its taxable property within the state subject to taxation for the year 1908: that the Tax Commission without instituting any inquiry into the actual value of complainant's property to determine the correctness or falsity of the return made by it, or the true and actual cash market value of its property, but, on the contrary, arbitrarily, and with a set purpose and without inquiry, therefore fraudulently, increased said assessment to the amount stated, as appears in the record of the commission. It is further contended by complainant as section 16, c. 408, Laws 1907, makes provision for the return of all persons, com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

panies, and corporations under oath of the property of such persons, company, or corporation, for the purpose of taxation, and as certain interrogatories may therein be submitted to be answered under oath, as was done in this case, and as said section further provides the making of any known false answer to any such interrogatories submitted shall be deemed perjury, and as the section further provides any person, company, or corporation which refuses to answer any such interrogatories submitted shall be guilty of misdemeanor and punished, that the Tax Commission could not arbitrarily disregard any such return of property so made for the purpose of taxation. Wherefore an injunction is prayed against the assessment made by the commission as void.

At the time of filing and presenting the original bill, although complainant thereby confessed its liability to taxation on property owned by it in the state of the value of \$838,100.30, it neither tendered nor offered to pay its just proportion of taxes in the state based on such amount as a condition to the order prayed. By the amended and supplemental bill filed complainant tenders and pays into court the sum of \$10,000, which it avers to be more than its just proportion of the taxes due the state on the actual cash market value of its property, and asks the injunction prayed by it in its original bill. To this amended bill, defendants, the Tax Commission, its secretary, and the Auditor of State, have demurred. This demurrer has been presented in oral argument and on briefs of solicitors. While the question of the jurisdiction of this court is presented by complainant in support of its bill, the demurrer does not raise this question. I am satisfied, both under the statute law of the state and the general jurisdiction and power of the court, this court has jurisdiction to inquire into the questions presented by the bill. The ground of the demurrer is want of equity.

One of the objects and purposes of the Legislature as expressed in section 12, c. 408, Laws 1907, was that all assessments of property, real, personal, and mixed, should be made relatively just and uniform and at its true and full cash market value. Theretofore the taxable property of this state had been assessed in most instances from one-sixth to one-third of its actual market value. By the act in question the Tax Commission was created for the purpose of making the actual assessment of certain classes of property in this state and for the purpose of supervising the assessment of other classes of property made by local assessors. This commission is, also, by the terms of the act, made a State Board of Equalization; section 17 of the act providing as follows: "The Tax Commission as hereby created shall constitute a State Board of Equalization, and shall equalize the valuation and assessment of property throughout the state; and shall have power to equalize the assessment of all property in this state between persons, firms or corporations of the same assessment district, between cities and townships of the same county and between the different counties of the state and the property assessed by the said Tax Commission in the first instance. And any person feeling aggrieved by the action of the county board of equalization may, within thirty days after the decision of said board, appeal to the State Board of Equalization for a determination of such grievances."

By the terms of section 1, c. 79, Laws 1908 of the state, which took effect January 29, 1908, the foregoing section was amended as follows: "That section 17 of chapter 408 of the Session Laws of 1907 be and the same is hereby amended to read as follows: Sec. 17. The Tax Commission as hereby created shall constitute a State Board of Equalization, and shall equalize the valuation and assessment of property throughout the state; and shall have power to equalize the assessment of all property in this state between persons, firms or corporations of the same assessment district, between cities and townships of the same county, and between the different counties of the state, and the property assessed by the said Tax Commission in the first instance. And any person feeling aggrieved by the action of the county board of equalization may, within thirty days after the decision of said board, appeal to the State Board of Equalization for a termination of such grievance. It shall be the duty of the Tax Commission to meet in its office on the second Wednesday in July in the year A. D. 1908, and of each year thereafter, to perform the work of equalization as hereinbefore provided. Said Tax Commission shall apportion the amount of tax for state purposes as required by law to be raised in the state among the several counties therein, in proportion to the valuation

of the taxable property therein for the year as equalized by said Tax Commission. Whenever the valuation of any taxing district, whether it be a county, township, city, school district or otherwise, is changed by the State Board of Equalization, the officers of such taxing district who have authority to levy taxes are required to use the valuation so fixed by the state board as a basis for making their levies for all purposes."

As shown by the record of the proceedings of the Tax Commission above quoted in making the assessment complained of in this case, the commission assumed to act under the provisions of chapter 81, Laws 1908, which, in so far as material to this inquiry, concerns only section 2 of that act, which reads as follows: "That section 4 of chapter 502 of the Session Laws of 1905 be and the same is hereby amended to read as follows: 7523. Meeting. 15d. Said Tax Commission shall meet at its office annually, on the second Monday in April, for the purpose of assessing the property of telegraph, telephone and pipe-line companies in Kansas, except as hereinafter provided. The Tax Commission shall proceed to ascertain and assess the value of the property of said telegraph, telephone and pipe-line companies in Kansas, and in determining the value of the property of said companies in this state, to be taxed within the state and assessed as herein provided, said board shall be guided by the value of other personal property within the state."

However, it is contended by complainant, as chapter 408, Laws of 1907, had repealed chapter 502, Laws 1905, therefore, as section 2, c. 81, Laws 1908, above quoted, was an attempt by the Legislature to amend section 4, c. 502, Laws 1905, theretofore repealed, said section 2, c. 81, Laws 1908, is wholly inoperative and void, and confers no power upon the Tax Commission whatever, but that the sole and only power possessed by the commission to assess the property of complainant for the year 1908 must be found in chapter 408, Laws 1907, and acts amendatory thereof. And it is further contended that act does not authorize the board to disregard the return made by the complainant of its property and to increase the amount of taxable property as shown in said return, as was done in this case, without notice to complainant; and, further, if said act does attempt to so authorize the commission, it is unconstitutional and void.

Paragraph 15, § 12, c. 408, Laws 1907, confers power on the Tax Commission, as follows: "Fifteenth. To make appraisement and assessment of all railroads and the property of railroad corporations, excepting such real estate as is not used in the daily operation of its railroad, of all telegraph lines and property, of all telephone lines and property, the property of all express companies, sleeping car companies, and private car lines, doing business within the state of Kansas, of gas pipe lines and property, of all oil pipe-lines and property, of all street railroads, electric lines and property, and all express company property, within and without corporate limits of cities, doing business in the state." It is contended by solicitors for defendants this section confers ample power on the commission to levy the assessment against the property of complainant in this case, and in making the assessment the commission might, as it did, without notice to complainant, depart from the value returned by complainant under the provisions of the act. And, as the act requires an official record of the acts of the commission to be kept, complainant was required to take notice of the contents of such record, to know the assessment against it had been increased from the amount returned by it; and, in case it felt aggrieved by the assessment made by the commissioner, it was its duty under the provisions of chapter 79, Laws 1907, above quoted, to apply to the State Board of Equalization at its meeting fixed by the terms of that act, the second Wednesday of July, 1908, for relief; and as this suit was instituted by complainant on the 3d day of July, 1908, before the date fixed by law for the convening of the State Board of Equalization, at which it might have presented its grievance, its evidence in support thereof, and received redress for wrongs suffered by it, if any, it had not exhausted its remedy at law when this suit was instituted, and, having thus neglected its duty and failed to avail itself of its legal remedy, it cannot be afforded by this court the relief prayed.

Again, it is contended by defendants the relief prayed by complainant in this suit should not be granted it because it did not prior to or at the date of

the institution of this suit tender the amount necessary to pay the taxes admitted to be legal and valid. And, again, it is contended complainant has its remedy at law to pay the tax assessed against it by the commission under protest and recover the excess, if any, by action at law.

There can be no substantial doubt, to my mind, but that chapter 502, Laws 1905, was repealed by the Legislature in its enactment of chapter 408, Laws 1907, as that act provides a general, comprehensive, and complete scheme of taxation for the state, which is in conflict with the provisions of the act of 1905 and therefore supersedes that act. Therefore the amendatory act of 1908, as found in section 2, c. 81, was probably ineffective to revive section 4, c. 502, Laws 1905. Hence that act, being the one recited in the record of the commission, was ineffective to confer the power attempted to be exercised by the commission. However, if the commission possessed full and ample power under the law to make assessment of the property of complainant derived from any source, it might lawfully exercise such power, and the fact that it recited in its record a wrong source of power exercised would neither impair nor nullify its act in so doing. By paragraph 15, § 12, Laws 1907, above quoted, the commission is given plenary power to assess the property of all telegraph companies. While, under the provisions of that act, it may call upon any or all persons, companies, or corporations to make return of their property, and to answer such interrogatories as may be proposed by the commission, yet I am not of the opinion such return when made is in any just sense conclusive on the commission, but, on the contrary, it is advisory only. The duty imposed on the commission by the terms of the act is "to make appraisal and assessment of * * * all telegraph lines and property (section 15) at its true and full cash market value. (Section 12.)" As to the extent of any such property or as to its physical condition, its value, and all other questions relating thereto, it has the power to apprise itself through interrogatories submitted to the company or person whose property is assessed, or from any other source or sources it may elect, in such way and manner as it may see fit. As to the time at which the act of assessment will be made, it is required to give no notice. As to the method employed by it in arriving at the value of the property assessed, it is not compelled to state. It is required to make a public record of the act of assessment and to meet on a day certain to equalize assessments made by it and other assessors.

As complainant did not pursue the remedy afforded it by law to have correction of errors committed against it, if any, by the state board of equalization, at its meeting on the second Wednesday of July, 1908, and as the commission seems to have acted in pursuance of lawful authority and in an appropriate manner, and as resort was had to this court before the expiration of the time at which complainant might have applied to the state board of equalization for the correction of errors against it, and have been there heard, I am of the opinion the demurrer interposed for want of equity must be sustained under authority of the adjudicated cases.

In *Stanley v. Supervisors of Albany*, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000, which was an action to recover taxes paid, Mr. Justice Field, delivering the opinion of the court, said: "In nearly all the states, probably in all of them, provision is made by law for the correction of errors and irregularities of assessors in the assessment of property for the purposes of taxation. This is generally through boards of revision or equalization, as they are often termed, with sometimes a right of appeal from their decision to the courts of law. They are established to carry into effect the general rule of equality and uniformity of taxation required by constitutional or statutory provisions. Absolute equality and uniformity are seldom, if ever, attainable. The diversity of human judgments, and the uncertainty attending all human evidence, preclude the possibility of this attainment. Intelligent men differ as to the value of even the most common objects before them—of animals, houses, and lands in constant use. The most that can be expected from wise legislation is an approximation to this desirable end; and the requirement of equality and uniformity found in the Constitutions of some states is complied with when designed and manifest departures from the rule are avoided. To these boards of revision, by whatever name they may be called, the citizen must apply for relief against excessive and irregular taxation, where the assessing officers

had jurisdiction to assess the property. Their action is judicial in its character. They pass judgment on the value of the property upon personal examination and evidence respecting it. Their action being judicial, their judgments in cases within their jurisdiction are not open to collateral attack. If not corrected by some of the modes pointed out by statute, they are conclusive, whatever errors may have been committed in the assessment. As said in one of the cases cited, the money collected on such assessment cannot be recovered back in an action at law, any more than money collected on an erroneous judgment of a court of competent jurisdiction before it is reversed."

In *Chicago, B. & Q. Ry. Co. v. Babcock*, 204 U. S. 585, 27 Sup. Ct. 326, 51 L. Ed. 636, Mr. Justice Holmes, delivering the opinion of the court, said: "Again, this board necessarily kept and evidently was expected by the statutes to keep a record. That was the best evidence, at least, of its decisions and acts. If the roads had wished an express ruling by the board upon the deductions which they demanded, they could have asked for it and could have asked to have the action of the board or its refusal to act noted in the record. It would be time enough to offer other evidence, when such a request had been made and refused. See *Fargo v. Hart*, 193 U. S. 490, 498 [24 Sup. Ct. 498, 48 L. Ed. 761]; *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus*, 133 Ind. 513, 542 [33 N. E. 421, 18 L. R. A. 729]; *Havemeyer v. Board of Review*, 202 Ill. 446 [66 N. E. 1044]."

In *Adams Express Co. v. Ohio*, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683, Mr. Justice Fuller, delivering the opinion of the court, said: "We have said nothing in relation to the contentions that these valuations were excessive. The method of appraisal prescribed by the law was pursued and there were no specific charges of fraud. The general rule is well settled that, 'whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and, if such determination comes into inquiry before the courts, it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined.' *Pittsburgh, Cincinnati, etc., Ry. v. Backus*, 154 U. S. 421 [14 Sup. Ct. 1114, 38 L. Ed. 1031]; *Western Union Tel. Co. v. Taggart*, 163 U. S. 1 [16 Sup. Ct. 1054, 41 L. Ed. 49]."

In the case at bar there are no specific allegations of fraud made against the board. The charge is made on deduction and inference only, and is averred as follows: "And your orator avers that the total amount as shown by said sworn statement filed with the said Tax Commission by your orator was \$838,100.30, which represented and was the carefully ascertained and full value in money of all the property of the company of your orator in the state of Kansas; that without instituting any investigation to determine the truth or falsity of such statement, and without looking at the property and determining its value, and arbitrarily, and of set purpose and therefore fraudulently, the said members of the Tax Commission, to wit, Samuel T. Howe, S. C. Crummer, and W. S. Glass, took the said statement and increased the various items thereof until the same aggregated \$3,159,322 which they declared to be the assessment for the year 1908 of the property of said company, and placed it as such statement upon their records as hereinbefore set out." This is not sufficient. Mr. Justice Holmes, delivering the opinion of the court in *Chicago, B. & Q. Ry. Co. v. Babcock*, 204 U. S. 585, 27 Sup. Ct. 326, 51 L. Ed. 636, said: "The dominant purport of the bills is to charge political duress, so to speak, and a consequent scheme of fraud, illustrated by the specific wrongs alleged, and in that way to make out that the taxes were void. As the cases come from the Circuit Court, other questions besides that under the Constitution are open, and therefore it is proper to state at the outset that the foundation for the bills has failed. The suggestion of political duress is adhered to in one of the printed briefs, but is disposed of by the finding of the trial judge, which there is no reason to disturb. The charge of fraud, even if adequately alleged (*Missouri v. Dockery*, 191 U. S. 165, 170 [24 Sup. Ct. 53, 48 L. Ed. 133]), was very slightly pressed at the argument and totally fails on the facts. Such charges are easily made, and, it is to be feared, often are made without appreciation of the responsibility incurred in making them. Before the decree could be reversed, it would be necessary to consider seriously whether the constitutional question on which the appeals are based was not

so pleaded as part of the alleged fraudulent scheme that it ought not to be considered unless that scheme was made out. *Eyre v. Potter*, 15 How. 42, 56 [14 L. Ed. 592]; *French v. Shoemaker*, 14 Wall, 314, 355 [20 L. Ed. 852]; *Hickson v. Lombard*, L. R. 1 H. L. 324."

It is, however, contended the Tax Commission, sitting as a State Board of Equalization, was without power to reduce the assessment theretofore made by it. The act provides: "The Tax Commission as hereby created shall constitute a State Board of Equalization and shall equalize the valuation and assessment of property throughout the state; and shall have power to equalize the assessment of all property in this state between persons, firms or corporations of the same assessment district, between cities and townships of the same county, and between the different counties of the state and the property assessed by the said Tax Commission in the first instance." In making the assessment in the first instance the commission acted in the exercise of a judicial power. The same power is required to be exercised by it in equalizing assessments throughout the state. It undoubtedly possessed the power as a State Board of Equalization to make the assessment against complainant in its judgment equal to that assessed against other property in the state, whether by so doing it should raise or lower the assessment theretofore made by it. To this board, in this capacity, under the law, complainant might have resorted. It did not do so, but instituted this suit prior to the date on which the board could convene under the law. And it was asserted in argument the mere physical value of the property was returned by complainant, and not the actual value of the property considered as forming an integral part of the property of a large going business concern, operating throughout the country. That for this reason the value was increased by the commission, as it would have a right to do. *Central Pacific R. R. Co. v. California*, 162 U. S. 91, 16 Sup. Ct. 766, 40 L. Ed. 903; *People v. Central Pacific R. R. Co.*, 105 Cal. 576, 38 Pac. 905; *Chicago, B. & Q. Ry. Co. v. Babcock*, *supra*.

Again, it was contended in argument the assessment made merely equalized the valuation placed on the property of complainant with the valuation placed on other property throughout the state, all of which had been increased from three to six times what it had been theretofore assessed at, and to its actual cash market value; that, under the assessment made by the commission and under the present system of assessment for taxation, the taxes levied against complainant on the assessment made do not equal one-half theretofore paid by complainant in the state.

In view of the entire record, I am of the opinion the statute law of the state, under which the assessment was made, is constitutional and valid; that the commission acted in the exercise of lawful authority in making the assessment against complainant's property; that no sufficient acts of fraud are charged by complainant to warrant the granting of the relief prayed in this case; that by the bill presented, and the amended and supplemental bill, complainant has not shown itself entitled to an order perpetually enjoining the assessment made against it. Therefore the demurrer interposed must be sustained.

It is further directed the restraining order heretofore granted in this case be set aside and held for naught unless complainant, being so advised, shall further amend its bill of complaint within fifteen days from this date.

Charles Blood Smith (George H. Fearons, Brown & Wells, Francis N. Whitney, and Samuel Barnum, on the brief), for appellant.

W. S. Glass (F. S. Jackson, Atty. Gen., on the brief), for appellees.

Before SANBORN, Circuit Judge, and RINER and WM. H. MUNGER, District Judges.

RINER, District Judge. This was a bill in equity brought by the appellant, hereafter called the Telegraph Company, in the Circuit Court of the United States for the District of Kansas, against Samuel T. Howe, S. C. Crummer, and W. S. Glass, members of the State Tax

Commission, hereafter, called the Tax Commission, and J. M. Nation, Auditor of the state of Kansas, by which it was sought to enjoin the Tax Commission from equalizing, and the Auditor from certifying, to the various taxing districts in Kansas an assessment made by the Tax Commission upon the Telegraph Company's property which it alleged in the bill was grossly excessive and made with the fraudulent intent of discriminating in the matter of assessment against the Telegraph Company and certain other corporations. Defendants demurred to the bill. Before the demurrer was disposed of, the Telegraph Company, by leave of the court, filed an amended and supplemental bill. A demurrer was filed to the amended and supplemental bill, and, after argument, sustained by the Circuit Court and the bill dismissed.

After setting out the necessary jurisdictional allegations, it was further alleged in the amended bill that the Telegraph Company had filed an acceptance with the Postmaster General of the United States as required by an act of Congress (Act July 24, 1866, c. 230, 14 Stat. 221), entitled: "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes"; that the lines of telegraph communication constructed by the Telegraph Company in the state of Kansas were an essential part of the interstate telegraphic communication of the United States. It was further alleged in the amended bill that the Tax Commission had made a grossly excessive appraisalment of the Telegraph Company's property in Kansas; that the Telegraph Company had complied with the statute requiring it to make a statement or return to the Tax Commission; that such return was verified by its superintendent for the state of Kansas, and, as made, showed that the amount \$858,100.30 was the true and actual value of the property of the Telegraph Company in the state of Kansas; that the State Tax Commission, without any investigation of the truth or falsity of the return made by the Telegraph Company, and without any examination of the property with a view to determining its value, arbitrarily "and of set purpose," and hence fraudulently, increased the assessed value of the Telegraph Company's property in the state of Kansas to the sum of \$3,159,322. The bill prayed that the Tax Commission be enjoined from acting upon the assessment so made by it, and from using said assessment as a basis for equalizing the valuation and assessment of the Telegraph Company's property; that the assessment be annulled and set aside and declared void, and that a true assessment of its property be made. A payment of \$10,000 was made in court by the Telegraph Company for the benefit of the various taxing districts in the state, which it claimed, under the allegations of the bill, covered all just and legal taxes due from the Telegraph Company upon its property in the state of Kansas. The Circuit Court issued a temporary restraining order, but, upon the final hearing of the demurrer to the amended bill, set the restraining order aside and dismissed the amended bill.

A valid assessment is, of course, indispensable as a prerequisite to levying a valid tax. American & English Encyclopedia of Law, 660.

To determine the question presented by this record it will be necessary to briefly notice the provisions of the Constitution of Kansas and the legislation of that state relating to the assessment and levying of taxes. The word "assessment" as used in the Constitution (section 1, art. 11) means valuation of property by the proper officers for the purposes of taxation. *Hines et al. v. City of Leavenworth*, 3 Kan. 187. In other words, it is the official listing of property for the purpose of constituting a basis upon which taxes are to be levied.

By an act of the Legislature approved March 8, 1905 (Laws 1905, c. 502), entitled "An act to amend article 5, chapter 107, of the General Statutes of 1901, being sections 7530, 7531, 7532, 7533, 7534, 7535, 7536, 7537, 7538, 7539 and 7540 of the same, and to provide for the assessment of taxes on the property of telegraph, telephone and pipe-line companies, defining what constitutes such companies, requiring annual reports, and providing a penalty for neglect or refusal to make same, and repealing the sections mentioned," it is provided that every telegraph company doing business within the state, in the form and manner prescribed by statute shall make and file with the Auditor of State a verified return setting forth certain facts concerning the company's property to be assessed. Among other things a telegraph company is required to state the name of the company, the state in which it was organized, the location of its principal office, the name and address of its president, secretary, auditor, treasurer, and superintendent, the name and postoffice address of its chief officer or managing agent in Kansas, the par value of its shares of stock, and a detailed statement of the real estate owned by the company in the state of Kansas, where situated, and the value thereof, the whole length of its lines within the state, including all lines controlled and used by it under lease or otherwise, the number of miles in each county, together with a correct inventory of all other property owned by the company in Kansas on the 1st day of March, where situated and the value thereof, and the total gross receipts of the company for the year ending the 1st day of the next preceding January from whatever source derived within the state of Kansas. This act also provides that any company interested in any assessment at any time after the meeting of the Tax Commission as a board of assessors, and before the determination by the Tax Commission of the valuation for the purposes of taxation of the property of any telegraph company, may, on written application, appear before the Tax Commission and be heard in regard to the matter of the assessment and valuation of its property. It is further made the duty of the Tax Commission to report to the Auditor of State the total value of the property of telegraph companies in Kansas as assessed by it, and to file with the Auditor of State all statements and other papers connected with the assessment and valuation. From the total assessed value of the property of any telegraph company it is made the duty of the Auditor of State to deduct the value of any real estate situated in Kansas owned by such company; the value of the property of such company, after deducting the assessed value of real estate, is to be apportioned by the Auditor of State among the several counties through or into which

the lines of such company may run, so that each county will be assigned such a part of the entire valuation of the property within the state as will equal the relative value of the property of the company within the county to that in the state, and in proportion to the length of the lines owned by the company in such county might bear to the length of its entire lines in the state. After the assessment of the property of the Telegraph Company by the Tax Commission and before it has been certified by the Auditor of State to the several counties, it is made the duty of the Tax Commission, on application of any interested person or company, or on its own motion, to correct the assessment or valuation of the property of any such company in such manner as in its judgment will make the valuation thereof just and equal. Prior to March 6, 1907, the board of appraisers consisted of the Auditor, the Lieutenant Governor, the Secretary of State, the Attorney General, and the State Treasurer. By an act of the Legislature of Kansas approved on the date last mentioned (Laws 1907, c. 408) a state board was created to be known as the Tax Commission, composed of three persons to be appointed by the Governor by and with the advice and consent of the Senate, and this commission succeeded to, and took the place of, the Board of Railroad Assessors and the State Board of Equalization.

The last-named act necessarily worked an implied repeal of section 3 of the law of 1905 because it substituted the Tax Commission for the board of appraisers or assessors as provided for in that section. Taking the substance of the act from its title, it created a Tax Commission and defined its powers and duties, fixed the compensation of its members and employes, abolished the Board of Railroad Assessors and the State Board of Equalization, and provided penalties for the violation of certain provisions therein; repealed certain sections of the general statutes of Kansas therein mentioned, "and all acts and parts of acts in so far as they conflict with this act," and made certain appropriations for the purpose of carrying the act into effect. It is undoubtedly true that the act of 1908, being chapter 81 of the Session Laws of that year, was inoperative as to section 3 of the act of 1905, for the reason already suggested. It is to be noticed that the Telegraph Company is seeking by its bill to enjoin the preliminary work of assessment by the Tax Commission before that commission had completely exercised its quasi judicial discretion by equalizing the assessments throughout the state. Under the act of 1907, the commission is required to keep full minutes of its proceedings; the law of 1908 provides for the meeting of the Tax Commission on the second Monday in April for the purpose of assessing the property of telegraph companies, and in determining the value of such property for taxation, the board is directed by the statute to be guided by the value of other personal property within the state. The law of 1908 provides that the Tax Commission shall sit as a board of equalization on the second Wednesday of July in each year. It will thus be seen that ample provision is made for a hearing before the Board of Equalization by any person or corporation feeling aggrieved by the assessment made by the Tax Commission.

As we have pointed out, under the law of 1908 the commission is required to meet as a board of equalization on the second Wednesday in July of each year, and that an official record is kept of the assessments made at the April meeting and if the taxpayer is not satisfied he may apply to have the assessment corrected; but the board is not required to disclose the method employed by it in arriving at the value of the property assessed. The statute requires it to make an assessment of all telegraph lines and property at their true cash market value, and this it may ascertain in such manner as to it may seem fit. While no specific notice of an increase is required by the statute, the taxpayer is at liberty to examine the public record made by the commission at its April meeting, and if his assessment has been increased, he has the right to appeal to the Board of Equalization at its July meeting. As said by Mr. Justice Holmes, in *Chicago, Burlington & Quincy Railroad Company v. Babcock*, 204 U. S. 585, 27 Sup. Ct. 326, 51 L. Ed. 636: "Again, this board necessarily kept and evidently was expected by the statute to keep a record. That was the best evidence, at least, of its decisions and acts. If the roads had wished an express ruling by the board upon the deductions which they demanded, they could have asked for it and could have asked to have the action of the board or its refusal to act noted in the record. It would be time enough to offer other evidence, when such a request had been made and refused. *Fargo v. Hart*, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. Ed. 761; *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus*, 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729; *Have-meyer v. Board of Review*, 202 Ill. 446, 66 N. E. 1044." Here the equity powers of the court are invoked to relieve against anticipated injury consequent upon an anticipated fraudulent assessment before the assessment is completed, and the effect of an injunction would be to take away from the Tax Commission all power of discretion and judgment in arriving at a fixed and proper valuation.

The Telegraph Company did not pursue the remedy afforded by law to have its assessment corrected by the State Board of Equalization, but on the contrary brought its suit before the board had an opportunity to complete the exercise of its quasi judicial discretion by equalizing the various assessments throughout the state, and completing the assessment of this property. The result is that this suit is premature.

The decree of the Circuit Court is accordingly affirmed.

ROGERS v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. July 13, 1910.)

No. 2,009.

1. CUSTOMS DUTIES (§ 121*)—SMUGGLING—"CONTRARY TO LAW."

Rev. St. § 3082 (U. S. Comp. St. 1901, p. 2014), provides that if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise "contrary to law," or shall receive, conceal, buy, sell, or in any manner facilitate the transportation,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

concealment, or sale of such merchandise after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited and the offender fined or imprisoned. *Held*, that the words "contrary to law," as used in such section, relate to legal provisions other than those found in such section.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 121.*]

2. CUSTOMS DUTIES (§ 134*)—"SMUGGLING"—INDICTMENT.

An indictment, alleging that accused at Sault Ste. Marie, Mich., did unlawfully, knowingly, and fraudulently import and bring into the United States certain merchandise, to wit, 3½ yards of black woolen suiting cloth of the value of \$10, contrary to law—that is, clandestinely and without entering the same at the United States Customs Office and port of entry with the United States Collector of Customs and paying the duty thereon—the same being foreign merchandise subject to an import duty as provided in Act July 24, 1897, c. 11, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1623), sufficiently charged "smuggling," denounced by Rev. St. § 2865 (U. S. Comp. St. 1901, p. 1905), providing that if any person shall knowingly and willfully, with intent to defraud the revenue of the United States, smuggle, or clandestinely introduce into the United States, any goods, wares, or merchandise subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, or shall make out or pass, or attempt to pass, through the customhouse, any false, forged, or fraudulent invoice, etc., shall be guilty of a misdemeanor.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 337; Dec. Dig. § 134.*]

For other definitions, see Words and Phrases, vol. 7, p. 6535.]

3. CUSTOMS DUTIES (§ 134*)—"BRING INTO THE COUNTRY CLANDESTINELY"—"CLANDESTINELY INTRODUCE."

An indictment for smuggling, charging that defendant did "bring into the country clandestinely" certain dutiable goods, was synonymous with the provision of Rev. St. § 2865 (U. S. Comp. St. 1901, p. 1905), making it an offense to "clandestinely introduce" dutiable goods into the country with intent to avoid payment of duty.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 337; Dec. Dig. § 134.*]

For other definitions, see Words and Phrases, vol. 2, p. 1216.]

4. INDICTMENT AND INFORMATION (§ 59*)—STATUTES—INTENT OF DISTRICT ATTORNEY.

Where an indictment states an offense within any statute, it is not material that the district attorney had other statutes in mind when drawing it.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 59.*]

5. CRIMINAL LAW (§ 1056*)—TRIAL—EXCEPTIONS—TIME.

An exception to instructions taken after verdict is unavailable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2668, 2670; Dec. Dig. § 1056.*]

6. CUSTOMS DUTIES (§ 122*)—SMUGGLING—ELEMENTS OF OFFENSE.

Where defendant, having dutiable goods secreted on his person, knowingly passed the customs office at the dock where he entered the United States and ignored three distinct calls of the customs officer before his further progress was arrested and the goods disclosed, when he stated for the first time that he expected to enter the goods at the main customhouse some distance away, instead of at the dock, a finding that he intended to evade entering the goods or paying the duty at all, and that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

he was guilty of smuggling, was justified under the rule that a person becomes guilty of that offense by avoiding the first opportunity given to make a customs' declaration and pay the duty.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 263; Dec. Dig. § 122.*]

In Error to the District Court of the United States for the Western District of Michigan.

Thomas N. Rogers was convicted of unlawfully importing into the United States certain merchandise without entering the same in the United States customs and paying the duty thereon, and he brings error. Affirmed.

John W. Shine, for plaintiff in error.

George G. Covell, U. S. Atty., and Wm. K. Clute, Asst. U. S. Atty.

Before SEVERENS and WARRINGTON, Circuit Judges, and SANFORD, District Judge.

WARRINGTON, Circuit Judge. Plaintiff in error was prosecuted and convicted under an indictment of one count returned June 8, 1909, in which it was charged that Rogers on December 9, 1908, at Sault Ste. Marie, Mich.,

" * * * did unlawfully, knowingly and fraudulently import and bring into the United States certain merchandise, to wit, 3½ yards of black woolen suiting cloth of the value of, to wit, \$10, contrary to law, that is to say, clandestinely and without entering the same at the United States Customs Office and port of entry with the United States Collector of Customs * * * and paying the duty thereon; the same being foreign merchandise subject to an import duty as provided in act July 24, 1897 [30 Stat. 151, c. 11 (U. S. Comp. St. 1901, p. 1626)]. * * *"

The verdict was rendered June 15, 1909, and sentence to pay a fine of \$100 was pronounced on the following day. Proceedings in error were instituted to have the case reviewed here. Eight assignments of error are made, but only one exception appears to have been taken before the jury was discharged, and that was to the refusal of the court to grant certain special instructions.

It is disclosed by the evidence that on December 9, 1908, Dr. Rogers, who was a resident and practicing physician of Sault Ste. Marie, Mich., took passage upon the ferryboat at Sault Ste. Marie, Ontario, and crossed the river to his own city; that upon arrival of the boat at the dock in the latter city he entered a footway leading southwestwardly toward the northwest corner of the ferry ticket office and to a point within a few feet of the northeast corner of the customs office maintained there, the footway leading thence through a gate opening into a fenced inclosure and extending along the north, east, and south sides of the ticket office to a point opposite the southerly portion of the customs office, where the footway turned southwardly into a passageway extending along the east side of the immigrant office through another gateway and southwardly to an adjacent street car line. The distance between the west side of the ferry ticket office and the east side of the customs office is 14 feet; the former abutting on the east side and the latter on the west side of this 14-foot way.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

This way is generally used for vehicles and foot passengers alike, but at the time in question the passengers taking the ferry on the Ontario side, as well as those taking it on the Michigan side, were required to pay their fares on the Michigan side of the river; and gates were maintained in addition to those before mentioned, at the northeast and southwest corners of the ticket office, and a turnstile was in the footway upon the south side of that office.

Dr. Rogers had passed along the footway to and through the gate first mentioned to a point about one-half the width of the ticket office, when he was successfully hailed by a call from a customs deputy collector and inspector, who, standing within a few feet of the gate at the first turn in the footway, had vainly called to him (Rogers) three times before. Rogers then turned from an eastward to a westward course and walked to the customs office, where, being asked by the deputy "if he had any dutiable merchandise about him," he answered, "Yes, I have." Upon request of the deputy to let him have it, Rogers "took the cloth from under his overcoat and gave it" to the deputy. The latter testified that:

"It was pinned on his breast outside of his undercoat and under his fur coat with safety pins, and his overcoat was completely buttoned over it."

There are two customs offices in the city of Sault Ste. Marie, Mich. The main office is some distance, perhaps a mile, from the dock. The branch office is the customs office first mentioned herein and at the time had a sign "United States Customs Office" conspicuously posted at the door and in public view. The testimony of Rogers was in substance the same as that of the deputy. Rogers explained that his brother had given him the cloth to be made into a suit; that the reason he carried the cloth under his coat was that he intended to take it to the main customs office to have it appraised and to pay the duty there; that he had had a difficulty with a government immigration officer who was stationed at the dock, and he supposed he would be the one to appraise the goods; that, while he heard the customs deputy say "Doctor," he supposed he was saluting him and claimed to have said "Good day" in response, but when he heard him call out "Dr. Rogers" he stopped, and then walked to the customs office, where the conversation and giving up of the cloth took place as stated by the deputy. Rogers also made these statements:

"I had no intention to evade payment of the duty on the goods whatever.
* * * It was not my intention to enter the goods at the customs office at the dock, and I had them under my coat so I could get them by and go on up to the main office. I knew they were dutiable and that the customs office at the dock was located there as described."

The customs collector testified that:

"Goods below the value of \$10 are appraised at the dock office and paid there. Above that amount they are appraised and paid at my head office."

The cloth was appraised at \$7, and the duty amounted to \$5.70.

What offense, if any, was charged and committed? The case appears to have been treated below as involving the offense of "smuggling," yet, in spite of the familiar legal significance of that word, it is not found in the indictment. Some confusion has arisen in the

arguments because of this omission. A portion of the language of the indictment, as well as the indorsement upon it, shows that it was in part drawn under section 3082 of the Revised Statutes (U. S. Comp. St. 1901, p. 2014). But as observed by Mr. Justice White in *Keck v. United States*, 172 U. S. 434, 437, 19 Sup. Ct. 254, 255, 43 L. Ed. 505, when speaking of the words of that section "contrary to law":

"The words 'contrary to law' contained in the statute clearly relate to legal provisions not found in section 3082 itself."

See, also, *United States v. Chesbrough* (D. C.) 176 Fed. 778, 780; *United States v. Kee Ho* (D. C.) 33 Fed. 333; *United States v. Clafin*, 13 Blatchf. 178, 186, Fed. Cas. No. 14,798.

Counsel for both sides appear at the trial to have regarded the indictment in its entirety as sufficient to identify and so in effect to incorporate the elements as well as the acts constituting the offense of smuggling, as that offense is defined and denounced by section 2865 (page 1905). The learned trial judge evidently treated the indictment in the same way. It is stated in the record that "the court charged the jury, among other things, in substance":

"The goods may be said to have been introduced into the country, under this statute, when the respondent arrived at the customs office located on the dock, and if the respondent passed the customs office at that place with the intention of evading the duty, the offense was committed, and he would be guilty of the offense charged in the indictment, even though he was still within the inclosure."

Neither the form nor the sufficiency of the indictment was questioned by demurrer or motion of any character. Indeed, counsel for the accused in his supplemental brief seems anxious to show that the indictment is sufficient, definitely to charge the offense of smuggling. He says:

"The terms 'smuggling' and to 'clandestinely introduce' into the country mean the same thing, all 'relating to the actual passing of the goods through the customs lines.' *Keck v. United States*, 172 U. S. 435 [19 Sup. Ct. 261, 43 L. Ed. 505]."

The reason for this contention is doubtless to be found in that portion of the indictment which charges that defendant "did unlawfully, knowingly, and fraudulently * * * bring into the United States certain merchandise * * * clandestinely and without entering the same at the United States Customs Office * * * and paying the duty thereon. * * *" Manifestly to "bring into * * * clandestinely" is the same as to "clandestinely introduce"; and counsel for the accused rightly contends in effect that, if clandestinely introducing is not the same as smuggling, it is quite as certainly denounced as is smuggling by section 2865. See *United States v. Chesbrough* (D. C.) 176 Fed. 782, as to meaning of the word "bring" as used in the phrase "import or bring" of section 3082. Moreover, the true test of an indictment is not whether it might have been made definite and certain, but whether it contains every element of the offense intended to be charged and "sufficiently apprises the defendant of what he must be prepared to meet." *Cochran & Sayre v. United States*, 157 U. S. 286, 290, 15 Sup. Ct. 628, 630, 39 L. Ed. 704; *Dunbar v. United States*, 156 U. S. 185, 190, 15 Sup. Ct. 325, 39 L. Ed. 390.

The effort of the district attorney to sustain the conviction under sections 3098 and 3099 of the Revised Statutes (U. S. Comp. St. 1901, p. 2026)—which in substance inhibit and denounce neglect or refusal of masters of certain vessels and other persons coming into this country from adjacent foreign territory with dutiable merchandise, to deliver a manifest thereof at the office of the customs collector nearest to the place of crossing the boundary line—is not only seemingly inconsistent with his treatment of the indictment at the trial, but if sound is suggestive of fatal vagueness and uncertainty. The district attorney does not say that he had those sections in mind when drawing the indictment; but, as observed by Mr. Justice Harlan in *Williams v. United States*, 168 U. S. 382, 389, 18 Sup. Ct. 92, 94, 42 L. Ed. 509:

"It is wholly immaterial what statute was in the mind of the district attorney when he drew the indictment, if the charges made are embraced by some statute in force."

While the indictment is lacking in precision and certainty in furnishing means of reference to the particular statute rendering the act charged against the accused "contrary to law" within the meaning of section 3082 (Pagin's Fed. Prac. & Forms, 279; *United States v. Chesbrough* (D. C.) 176 Fed. 780), we cannot hold at this stage of the case, and in view of its history, that the indictment is defective in any prejudicial sense. *Rev. St. U. S. 1025*; *Dunbar v. United States*, 156 U. S. 185, 192, 15 Sup. Ct. 325, 39 L. Ed. 390; *Connors v. United States*, 158 U. S. 408, 411, 15 Sup. Ct. 951, 39 L. Ed. 1033; *Rosen v. United States*, 161 U. S. 29, 34, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; *Durland v. United States*, 161 U. S. 306, 315, 16 Sup. Ct. 508, 40 L. Ed. 709; *Ledbetter v. United States*, 170 U. S. 606, 614, 18 Sup. Ct. 774, 42 L. Ed. 1162; *Hardesty v. United States* (Sixth Circuit) 168 Fed. 25, 27, 93 C. C. A. 417.

At the close of all the evidence the defendant moved the court to direct a verdict in his favor, which was overruled. He also requested three special charges, which were denied and exceptions taken. The first of these charges was in form the same as the motion to direct. The second comprised for the most part statements of counsel's understanding of the effect of the evidence, and its closing sentence was "and therefore you are instructed to render verdict of not guilty." There was at last no difference between this charge and the first one. The third request embraced an abstract statement of duties of the customs officer and duties and rights of any person whose goods are seized, rather than instructions to the jury touching its duties according as it should find the facts to be in relation to defendant's conduct prior to the seizure. The validity of the exceptions must therefore be tested by the question whether there was any evidence fairly tending to prove the charges of the indictment. It should be stated, however, in passing, that no exception to the charge of the court was taken until after the verdict was rendered and the jury discharged; and, while an assignment of error in this regard was made respecting the charge, it is difficult to see why the court should consider the assignment if the exceptions were taken too late. *Hardesty v. United States*, *supra*. But we prefer to pass by the question and consider this alleged error,

like the others, in the light of the evidence. *Clyatt v. United States*, 197 U. S. 207, 221, 25 Sup. Ct. 429, 49 L. Ed. 726.

The point of the charge of which complaint is made is that the court instructed the jury that:

"If the respondent passed the customs office at that place (the dock) with the intention of evading the duty, the offense was committed."

As we understand the evidence, defendant certainly did pass the customs office located at the dock, and he did so with full knowledge of its location and of the fact that he had dutiable goods concealed on his person. Further, it was his intention, as he subsequently avowed, to pass this office without stopping to enter the goods or pay the duty. The deputy collector while standing within a very short distance of defendant was required to hail him four times before he responded; and yet defendant heard the earlier calls. Defendant was given full opportunity to explain, and he did explain to the jury, why he placed the cloth under his overcoat, and why he wished to and intended to pass the customs office at the dock and report at the distant customs office. His whole conduct and defense were fully described and stated to the jury. It cannot escape attention that, when defendant was accosted by the deputy customs collector, all reason for avoiding the immigration officer, and so to have the appraisement of the goods made and to pay the duty at the distant customs office, disappeared, and yet nothing of that kind was mentioned to the deputy. In view, then, of the charge of the learned trial judge, before shown, the verdict of the jury negatives all semblance of defense that Rogers intended to pay the duty at either of the customs offices. Hence we have no right to set aside the verdict and judgment, unless error of law was committed.

The contention, however, is that the acts of defendant were some evidence of an intent to smuggle, but that this was not sufficient. If this were all, we should agree to the proposition. *Keck v. United States*, *supra*. But as just pointed out this does not state the whole case. The ultimate theory of counsel is that defendant was entitled as matter of law to pass through and beyond the inclosure adjacent to the dock, before he could be found guilty of the charge. This impliedly admits that the offense could be completed by passing out of the inclosure and before reaching the other customs office. That office may therefore be eliminated from the question urged as to unexecuted intent to smuggle, and the inquiry confined to the customs office at the dock and the inclosure. Certainly no fact was involved and no principle announced in *Keck v. United States* which would require us to hold that the offense could not be completed within this inclosure. Keck's agent, who was in custody of the diamonds, had not left the ship, and so had not even left the place for declaring his custody and making entry of the diamonds, when they were seized. The distinction involved in this circumstance may be illustrated by two of the cases relied on by defendant's counsel.

In *Dodge v. United States* (Second Circuit) 131 Fed. 849, 65 C. C. A. 603 (the One Pearl Necklace Case), in answer to a claim of inconsistency between the decision in that case and the decision in the One

Pearl Chain Case, 123 Fed. 371, 59 C. C. A. 499, Judge Lacombe said, at page 852 of 131 Fed., at page 606 of 65 C. C. A.:

"There is a very essential difference between the two cases. Neither claimant made a proper entry of her jewelry; neither of them at the time of making entry mentioned orally to the customs officer that she had any jewelry with her, but one of them gave the officer a written declaration, which, in substance, advised him that she 'had in her baggage and on her person wearing apparel (including jewelry) which she had purchased abroad.' The other made no such declaration, oral or written."

And when Judge Holt came to the last trial of the One Pearl Chain Case (D. C.) 139 Fed. 510, 512, he interpreted the decisions of the Court of Appeals in the two cases thus:

"The court held in *U. S. v. One Pearl Necklace*, 111 Fed. 165, 49 C. C. A. 287, 56 L. R. A. 130, and the *Dodge Case*, 131 Fed. 849, 65 C. C. A. 603, that, if a person in entire good faith did not make the declaration, the goods might be forfeited. On the other hand, if the persons who brought the goods here intended to smuggle them, they had an opportunity to change their minds down to the time when it was their duty to make the necessary declaration; and, in my opinion (and I think that is the true construction of the opinion of the Circuit Court of Appeals in this case), the government cannot seize these goods as forfeited until the time has come when the person importing them has had an opportunity to declare them and has not done so."

Thus, one of those claimants saved her jewelry by availing herself of the first opportunity given to make the declaration, and the other claimant lost hers by failing to do so. The opportunity given in each instance was on shipboard, and the discovery of the jewelry in each case was on the wharf and within the bounds (the inclosure) set for passengers during examination of their baggage. Rogers' Case in the respect now under consideration is unlike the One Pearl Chain Case, and identical with the One Pearl Necklace Case. When he knowingly passed the customs office at the dock, and ignored three distinct calls of the customs officer, and as we must conclude, with the intent to evade entering the goods or paying the duty at all, he must be held to have purposely declined the opportunity furnished him to comply with the law, and completed the offense. Counsel's claim comes to be that one must be permitted not only to leave the ship and then to ignore both customs house and customs officer with intent to evade payment of duty altogether, but also to escape from the inclosure, before he can be said to have committed the offense of smuggling. But see *Keck v. United States*; and *United States v. 218½ Carats Loose Emeralds* (D. C.) 153 Fed. 643, 647, 648.

For the reasons stated, the assignments of error founded on the refusal of the court to grant a peremptory instruction and the special instructions requested, including the assignment based on the exception to the charge, must be overruled. The remaining assignments of error concern exceptions taken too late, and cannot be considered. *Michigan Insurance Bank v. Eldred*, 143 U. S. 293, 298, 12 Sup. Ct. 450, 36 L. Ed. 162; *Pacific Express Co. v. Malin*, 132 U. S. 531, 538, 10 Sup. Ct. 166, 33 L. Ed. 450; *United States v. Carey*, 110 U. S. 51, 3 Sup. Ct. 424, 28 L. Ed. 67; *N. Y. & N. E. R. R. Co. v. Hyde* (First Circuit) 56 Fed. 188, 5 C. C. A. 461.

The judgment must be affirmed.

In re GROVE.

(Circuit Court of Appeals, Third Circuit. July 14, 1910.)

No. 1,368.

1. CONTEMPT (§ 66*)—REVIEW—WRIT OF ERROR.

Where, in proceedings to punish a witness for contempt, a fine of \$1, payable to the United States was assessed, the case was one in which the fine was punitive, in vindication of the authority of the court, and not compensatory to the complainants in the principal cause, and hence the judgment was reviewable on a writ of error.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 223; Dec. Dig. § 66.*]

2. CONTEMPT (§ 66*)—WRIT OF ERROR—REVIEW.

On a writ of error to review a judgment assessing a fine against a witness for contempt of court, only questions of law can be considered.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 232; Dec. Dig. § 66.*]

3. CONTEMPT (§ 66*)—WRIT OF ERROR—REVIEW—ASSIGNMENTS OF ERROR.

On a writ of error to review a judgment assessing a fine against a petitioner for contempt of court, only such questions can be considered as are presented in the assignments of error each of which must be founded on some alleged defect in the record of the case, except as to proceedings reviewable under Court of Appeals rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii) declaring that the Court of Appeals, at its option, may notice a plain error not assigned.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 232; Dec. Dig. § 66.*]

4. CONTEMPT (§ 66*)—WRIT OF ERROR—EVIDENCE—BILL OF EXCEPTIONS.

Evidence taken in a criminal case is no part of the record unless brought into the record by some method known to the law.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 231; Dec. Dig. § 66.*]

5. CONTEMPT (§ 66*)—RECORD—STIPULATION IN PLACE OF BILL OF EXCEPTIONS.

A stipulation, in aid of a writ of error to review a judgment in a contempt proceeding, that the papers mentioned therein should "constitute the record" on the writ of error in connection with the certificate of the clerk that the printed volume was a true and faithful copy of the original pleas and proceedings in the case as per the stipulations of the counsel was sufficient to take the place of a bill of exceptions.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 231; Dec. Dig. § 66.*]

6. CONTEMPT (§ 66*)—WRIT OF ERROR—REVIEW—ASSIGNMENTS OF ERROR.

Assignments that the court erred in entering the order adjudging petitioner guilty of contempt and alleging error in the refusal of the court to deny the order, while not sufficiently specific to conform to the best practice, were sufficient to justify the inspection of the record by the appellate court to ascertain whether there was any apparent error.

[Ed. Note.—For other cases, see Contempt, Dec. Dig. § 66.*]

7. WITNESSES (§ 21*)—SUBPOENA—REFUSAL TO OBEY—CONTEMPT.

In a suit against the C. Company for patent infringement in the construction of certain torpedo boat destroyers for the United States, a request was made to the Secretary of the Navy for a certified copy of the plans and specifications filed by defendant in connection with its bid in so far as they related to the construction of the turbine propelling machinery, etc. The Secretary replied that the furnishing of such information was considered detrimental to the interest of the United States,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

whereupon the request was recalled by the court after which a subpoena was served on petitioner, who was defendant's president, requiring him to produce before the examiner the plans, drawings, specifications, and other illustrative and descriptive papers, relating to the construction of such vessels. It was shown that the Navy Department had taken elaborate precautions to keep these plans and papers secret, and petitioner, in response to the subpoena, produced them sealed, but refused to permit them to be opened on the theory that to do so would be detrimental to the interests of the United States, and would expose trade secrets not patented. At a subsequent hearing a statement by the Navy Department was filed reciting that while it was unwilling, for reasons affecting public interest, to furnish copies of the papers asked for, yet so far as it was concerned, if the papers were put in evidence, otherwise than by the act of the Department, the making public thereof would not cause the discovery of military or other secrets detrimental to the public interest. *Held*, that the petitioner's refusal to disclose such documents while unsustained, was not contumacious, and was not punishable as for contempt of court.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 40; Dec. Dig. § 21.*]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Proceedings to punish Henry S. Grove for contempt of court. From a judgment assessing a fine (176 Fed. 925), he brings error. Reversed.

Clifton V. Edwards, for plaintiff in error.

Richard N. Dyer, for defendants in error.

Before BUFFINGTON and LANNING, Circuit Judges, and BRADFORD, District Judge.

LANNING, Circuit Judge. This case comes before us on a writ of error to the Circuit Court of the United States for the Eastern District of Pennsylvania. The matter sought to be reviewed is an order of the Circuit Court adjudging Henry S. Grove guilty of contempt of that court for having refused to produce before the examiner, in response to a subpoena duces tecum, issued in the patent infringement case of International Curtis Marine Turbine Company and Curtis Marine Turbine Company of the United States v. William Cramp & Sons Ship & Engine Building Company, certain documents called for in the subpoena. The penalty imposed by the court was a fine of \$1 payable to the United States of America. The case is therefore one in which the fine was punitive and in vindication of the authority of the court, and not compensatory to the complainants in the principal cause. It follows that the order of the Circuit Court is reviewable on a writ of error. *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997; *Id.*, 133 Fed. 165, 66 C. C. A. 291; *Matter of Christensen Engineering Co.*, 194 U. S. 458, 24 Sup. Ct. 729, 48 L. Ed. 1072. At the threshold of the case, however, we are confronted with an objection by the Curtis Companies, defendants in error, hereinafter called the complainants, that the assignments of error rest on no bill of exceptions or other proceeding presenting for review any

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

question of law. It is contended, therefore, that on this ground the writ of error should be dismissed.

The so-called record before us is a printed volume containing the bill of complaint in which the complainants charge that the defendant therein named, William Cramp & Sons Ship & Engine Building Company, is infringing certain of the complainants' patents, the answer of the defendant, the replication, notice of motion to punish Henry S. Grove, president of the defendant company, for contempt, the evidence taken in the principal cause up to the time of serving the notice, ex parte affidavits taken on behalf of the complainants for use on the hearing of the motion, ex parte affidavits taken on behalf of Grove for use on said hearing, the opinion of the Circuit Court, the order adjudging Grove in contempt, the petition for a writ of error, the assignments of error, the writ of error and the citation. There is no bill of exceptions, nor is there any statement signed by the judge who heard the matter certifying that the volume contains a true copy of the record of the cause heard by him. There is, however, a stipulation signed by counsel that the papers above mentioned "shall constitute the record sur writ of error of Henry S. Grove" in the case, and there is a certificate of the clerk of the Circuit Court that the printed volume is a true and faithful copy of the original pleas and proceedings in the case as per the stipulation of the counsel.

A contempt case like the present one, where the fine imposed is payable to the United States, and where the party adjudged in contempt is not a party to the cause in which the contempt occurs, is in its nature a criminal and not a civil proceeding. The judgment is final. For these reasons it is reviewable on a writ of error. There is no reason for assuming that the practice in prosecuting a writ of error in such a case differs from the general practice in such prosecutions. Nothing but questions of law can be considered. These questions must be presented in the assignments of error, and each assignment of error must be founded on some alleged defect in the record of the case. The only authority for departing from this practice is contained in the eleventh rule of this court (following the thirty-fifth rule of the Supreme Court [11 Sup. Ct. iii]) which declares that the court, at its option, may notice a plain error not assigned. A writ of error addresses itself to any defect apparent on the face of the record provided the defect be pointed out in the assignment of errors, but the evidence taken in a cause is no part of the record unless, by some method known to the law, it be imported into the record. "Evidence, whether written or oral, and whether given to the court or to the jury, does not become a part of the record unless made so by some regular proceeding at the time of the trial and before the rendition of judgment. Whatever the error may be, and in whatever stage of the cause it may have occurred, it must appear in the record, else it cannot be revised in a court of error exercising jurisdiction according to the course of the common law. A bill of exceptions undoubtedly is the safest method, as it is the most comprehensive one in its operation; and where the facts are disputed, and cannot be arranged except from evidence admitted under the ruling of the court as to its admissibility, oftentimes it becomes the only effectual mode by which

all the rights of the complaining party can be preserved. On the other hand, where there is no dispute in regard to the facts, and consequently no necessity for any ruling of the court in admitting or rejecting evidence, the same purpose may be safely accomplished by a special verdict, or, according to the rule established in this court, by an agreed statement of facts." *Suydam v. Williamson*, 20 How. 427, 433 (15 L. Ed. 978). And see, also, *Storm v. United States*, 94 U. S. 76, 24 L. Ed. 42; *Insurance Co. v. Piaggio*, 16 Wall. 378, 386, 21 L. Ed. 358.

While we have in the present case no bill of exceptions, we have a record made up by agreement of the parties. The agreement of counsel was not merely that the papers mentioned in their stipulation should be printed in the record, but that they should "constitute the record." The case differs in this respect from *Continental Gin Co. v. Murray Co.*, 162 Fed. 873, 89 C. C. A. 563. In that case there was an agreement that certain affidavits should be printed in the record, but there was no agreement that they should constitute a part of the record, and no bill of exceptions or proceedings of any kind by which the affidavits could have been imported into the record. Consequently, this court, finding in the record only the motion for attachment for contempt, the order to show cause and the judgment, and finding no error in that record, affirmed the judgment. Having a record before us, we turn to the assignments of error. There are but two of them. The first alleges error in entering the order adjudging Grove guilty of contempt, and the second alleges error in the refusal of the court to deny the order. These assignments, though not sufficiently specific to conform to the best practice, are sufficient, we think, to justify our inspection of the record to ascertain whether there be in it any apparent error.

The record shows that on April 4, 1909, the complainants, owner and licensee of certain patents for improvements in elastic-fluid turbines, filed their bill of complaint charging the defendant with infringement of the patents. Issue was joined by the filing of answer and replication. While the complainants were taking their proofs before the examiner they applied to the Circuit Court, and obtained from it a request addressed to the Secretary of the Navy that, if not inconsistent with the public interests, a certified copy of the plans and specifications filed by the defendant with the Navy Department for the building of two certain torpedo boat destroyers, in so far as said plans and specifications related to the construction and conditions of operation of the turbine propelling machinery, and including any papers submitted by the defendant in addition to the plans and specifications explaining the construction or conditions of operation of the so-called Zoelly turbine, be furnished to the counsel for the complainants. Subsequently, the Secretary of the Navy replied that, in his opinion, "the furnishing by the Department of the Navy to the complainants herein of the documents in the said request of the court concerning the Zoelly turbine engine would be detrimental to the interests of the United States." Thereupon the Circuit Court recalled and vacated its request.

The complainants then served upon Henry S. Grove, president of the defendant company, a subpoena requiring him to produce before the examiner "the plans, drawings, specifications, and other illustrative and descriptive papers, copies of which were submitted by the defendant to the Secretary of the Navy of the United States and filed in the Navy Department of the United States relating to the construction and operation of the steam turbines which the defendant contracted with the United States to make and sell by contracts dated October 1, 1908, covering the construction of torpedo boat destroyers, Nos. 30 and 31, and including the plans or drawings relating to such steam turbines, copies of which have been filed in the Navy Department under section 'sixth' of said contracts." A package of papers, under seal, containing, it was said, all the documents called for by the subpoena, was produced before the examiner by Mr. Grove, but, under advice of counsel, he refused to permit the package to be opened or the contents to be examined until after the court had passed on the following objections to the disclosure:

"1. The papers in question are privileged communications by the defendant to the United States Navy Department, and the disclosure thereof to the complainant, and to the public, would be prejudicial to the interests of the United States in that it would disclose military secrets, and be detrimental to the interests of the government, and would be prejudicial to the defendant's interest, in that it would disclose trade secrets and features of design not covered by and having no relation to the patents in suit.

"2. The Secretary of the Navy, through the United States District Attorney, has already filed in this court a return to a request issued by the court to the Navy Department, for copies of the documents in question, which return certifies that the furnishing of the documents would be detrimental to the interests of the United States.

"3. There is no connection between the patents in suit, or either of them, and the documents in question, and it does not appear that the complainant is not in position to prove any alleged act of infringement without resorting to the necessity of disclosing to the complainant the trade secrets and designs of the defendant.

"4. That the turbine machines of the complainant have not proven to be successful in commercial practice, and the only apparent result of compelling a disclosure of the documents in question would be to enable the complainant to obtain possession of the features of design worked out by the defendant at defendant's expense.

"5. That the documents in question relate wholly to work done for, and on behalf of the United States government in the building of government war vessels and the court is without jurisdiction to order an injunction against the United States government or the defendants acting as agents of the government in the building of such vessels, and being without jurisdiction to issue an injunction against the government, and the government having declined to give copies of the drawings upon the ground that the same would be prejudicial to the interests of the government, the court ought not now to compel a disclosure to the complainant of the documents in question.

"6. That the documents called for are merely secondary evidence, the originals being on file in the United States Navy Department."

The record of the case further shows that in June, 1908, the Navy Department advertised for bids for building 10 torpedo boat destroyers, and addressed a letter to the defendant stating that if it desired data on which to submit bids the Department would forward them "with the understanding that the information contained therein is to

be regarded as strictly confidential." The defendant requested the information and it was forwarded with this statement:

"All of the above information is to be considered *strictly confidential* (Italics by the Navy Department), and is to be used solely for the purpose of preparing estimate of cost as a basis of bids, and the Department expects and requires that the William Cramp & Sons Ship & Engine Building Company take all possible precautions to prevent any of the plans, specifications or other information pertaining to these vessels being seen by any unauthorized person, and especially by any person not a citizen of the United States; and the copying of the plans, specifications, or other data is prohibited."

On September 1, 1908, the defendant returned to the Department the plans and specifications previously forwarded to it, and also submitted to the Department its own plans and specifications for the work to be done. The Department accepted the defendant's bid, upon the defendant's plans and specifications, for 2 of the 10 destroyers, and forwarded to it the plans, specifications, and instructions for the work, with this notice:

"You will also please note the Bureau's instructions regarding the confidential nature of these plans and specifications, and will exercise every possible precaution to prevent unauthorized persons, and persons not citizens of the United States, from having access to same or to any other information concerning this vessel. You will also take receipt in duplicate from your employes to whom copies of the specifications may be intrusted, forwarding these receipts to this office for record. The blank receipts for this purpose are bound in each copy of the specifications."

The notice also required that the specifications be returned to the Navy Department on the completion of each vessel.

Upon the action of Mr. Grove in refusing to allow the sealed package containing the specifications and other papers to be opened before the examiner, the complainants moved to have him adjudged guilty of contempt. On the hearing of that motion it was contended on behalf of Mr. Grove that it "would be detrimental to the interest of the United States" to compel the production of the papers. The Circuit Court thereupon continued the further hearing of the motion for a period of two weeks in order to afford the Navy Department an opportunity to inform the court whether the plans and specifications could be put in evidence without causing the discovery of military or other secrets detrimental to the public interest. (See opinion, 176 Fed. 925.) At the next hearing the Secretary of the Navy had caused to be filed with the court a statement that the Navy Department is "unwilling, for reasons affecting public interests, to furnish the copies asked for in this case, but that, so far as it is concerned, if the papers referred to above are put in evidence otherwise than by the act of the Department the making public thereof would not cause the discovery of military or other secrets detrimental to the public interests." Thereupon the circuit court adjudged Grove guilty of contempt, and ordered him to pay the above-mentioned penalty of \$1.

The objection that the production of the papers called for will disclose military or other secrets of the United States detrimental to the public interests is disposed of by the statement of the Secretary of the Navy that their production will not cause such disclosure. The objec-

tion that no injunction can be awarded in the principal case because of the government's interest in the construction of the torpedo boat destroyers, and that for that reason the papers ought not to be produced, is invalid because it presents a question which can be properly considered only on final hearing of the principal case. The objection that the complainants' turbines have not proven successful in commercial practice requires the weighing of evidence, which we cannot do on a writ of error. The objection made in the brief on behalf of Grove that the complainants have no right to the disclosure because they have not proven title to the patents is answered by the fact that their proofs are not yet closed.

The only remaining objection needing special notice is the one that the production of the papers called for in the subpoena would disclose trade secrets of the defendant and features of design, not covered by and having no relation to the patents sued on. The subpoena is very broad in its terms. It calls not only for the plans, drawings, and specifications for the work on the steam turbines, but for "other illustrative and descriptive papers copies of which were submitted by the defendant to the Secretary of the Navy." It seems to us quite possible that a wholesale production of the papers thus called for will give to the complainants information not material to the issues in the patent suit and which Grove, as president of the defendant company, ought not to be required to disclose. John F. Metten, the defendant company's chief engineer, makes the following statement in his affidavit:

"Defendant's engineers, under my direction, carefully and with great expenditure of time and effort designed, proportioned, and calculated, with a view to meeting the peculiar conditions existing, each part of the turbines for destroyers 30 and 31, and the turbines for these destroyers as designed by defendant's engineers include many entirely new and extremely valuable features of construction and also of design, proportion, and calculation. Many of these features cannot be protected in any other way than by maintaining secrecy regarding them. As long as kept from the public they are of great value to the defendant, but if disclosed other manufacturers could copy them without redress to defendant. Defendant therefore has exercised unusual care to prevent such features from losing their secret character, and the same are not known outside the defendant company so far as I know. Many of the features above referred to are shown in the drawings and papers covered by the subpoena duces tecum served upon Mr. Grove, and a disclosure of such papers would necessarily carry with it a disclosure of said features."

On the other hand, Mr. Livermore, who, in his affidavit for the complainants, states that he has compared the construction and mode of operation of the turbines proposed to be constructed by the defendant, as that construction and mode of operation are described by two witnesses who have seen the plans on file with the Navy Department, with one of the Curtis patents in suit, declares that in his opinion the defendant's turbines, as thus described, show infringement of that Curtis patent. He gives his reasons for his opinion. We think that at least some of the papers called for by the subpoena, which we understand are copies or duplicates of those filed with the Navy Department, will show facts material to the issue. In such circumstances, what should the court do to secure for the complainants the production of

evidence material to their case without unnecessary disclosure of the defendant's trade secrets?

In 3 Wigmore on Evidence, § 2212, it is said:

"In an epoch when patent rights and copyrights for invention are so easily obtained and so amply secured, there can be only an occasional need for the preservation of an honest trade secret without resort to public registration for its protection. Such instances do occur, but an object of the patent and copyright laws is to render them as rare as possible, and the presumption should be against their propriety. In other words, a person claiming that he needs to keep these things secret at all should be expected to make the exigency particularly plain. In the next place, the occasion for demanding such a privilege arises usually in actions where the party claiming it is one charged with infringing the rights of another by fraudulent competition in business, and the existence of the fraud can be proved only by investigating the claimant's methods of business. In such cases it might amount practically to a legal sanction of the fraud if the court conceded to the alleged wrongdoer the privilege of keeping his doings secret from judicial investigation. No privilege at all should there be conceded, although as much privacy as possible might be preserved by compelling disclosure no farther than to the judge himself, or to his delegated master or auditor, if (as is usual) the cause is tried by chancery procedure. * * * What the state of the law actually is would be difficult to declare precisely. It is clear that no absolute privilege for trade secrets is recognized. On the other hand, courts are apt not to require disclosure except in such cases and to such extent as may appear to be indispensable for the ascertainment of truth. More than this, in definition, can as yet hardly be ventured."

In *Edison Electric Light Co. v. United States Electric Lighting Co.* (C. C.) 45 Fed. 56, it appears that certain documents required by a subpoena duces tecum to be produced before the examiner in a patent suit were brought into court, and Judge Lacombe directed that they be delivered to the examiner. "When any one of them is called for by the defendant," said he, "if objection to its exhibition is made by counsel for complainant, the examiner will certify the objection to the court and send therewith the document itself. Thereupon the court will rule upon the objection." It seems to us this practice might be adopted in the present case, for we do not understand that the rule of practice prescribed in *Blease v. Garlington*, 92 U. S. 1, 23 L. Ed. 521, exempts a federal court from the duty of protecting a witness who may be called on to give evidence clearly privileged and not material or relevant to the issue. See *Dowagiac Mfg. Co. v. Lochren*, 143 Fed. 211, 214, 74 C. C. A. 341.

After Grove had produced the sealed package before the examiner, he was asked the following questions to which he made the following answers:

"Q. This sealed package which you have produced here contains, as I understand you, all the papers called for by the subpoena except the plans or drawings filed under section 6 of the contract? A. I am informed and believe that this package contains all the papers filed in connection with the bid and all of the drawings relating to the steam turbines filed subsequent to the bid under section 6 of the contract. Q. Your understanding is, then, that this package contains all the papers called for by the subpoena? A. Yes. Q. Do you decline to have these papers inspected at the present time and put in evidence by complainants' counsel? (Defendant's counsel advises the witness that he is entitled to decline to have the papers examined until this question has been passed on by the court.) A. Under ad-

vice of counsel I decline to have the papers examined until ordered to do so by the court."

There was no absolute refusal to permit the papers to be introduced in evidence. The attitude of the witness, in view of the Navy Department's repeated injunctions to keep strictly confidential the information contained in these papers, and in view, also, of the fact that the Secretary of the Navy had filed with the court the above-mentioned statement that the furnishing of the information requested by the court would be detrimental to the interests of the United States, and that the court had thereupon recalled its request, was reasonable and highly proper. It does not appear that he has in any wise contemned the authority of the court. On the contrary he expressly submitted himself to its authority. It is said in the brief of the complainants that after the circuit court had concluded that the papers should be exhibited to complainants' counsel, the complainants' counsel suggested that an order directing the examiner to disclose the papers would be sufficient, but that the defendant's counsel insisted that an order adjudging contempt be made to the end that a writ of error might be sued out. We do not, however, find anything in the record to support the statement that the defendant's counsel assumed any such position. The order in the printed volume overruling the defendant's objections to the disclosure of the papers and directing Grove to appear before the examiner for further examination, is not signed, is not mentioned in the stipulation of counsel specifying the papers that should constitute the record, and therefore is no part of the record. Indeed, when the case came first before the court, on the facts as they existed when Grove was before the examiner, the court itself seems to have doubted whether it was Grove's duty to submit the papers for inspection, for the hearing was continued for two weeks in order to learn further from the Navy Department what its position in the matter really was. It was not until after the reply of the Department came, qualifying in a very material respect the answer it had previously given to the court's request for copies of the papers, that the court concluded that the papers should be submitted to complainants' counsel.

We think the case is not one of contempt, and the order is reversed, with costs.

BRYSON v. GAILLO.

(Circuit Court of Appeals, Sixth Circuit. June 7, 1910.)

No. 2,022.

1. MASTER AND SERVANT (§ 264*)—INJURY TO SERVANT—EVIDENCE ADMISSIBLE UNDER PLEADINGS—SUFFICIENCY OF ALLEGATIONS.

Where plaintiff was injured while working as an employé in the basement of a building under construction by defendant as contractor by the slipping and falling upon him of steel beams, three of which were being lowered into the basement at once by means of a derrick, an allegation in his petition "that the tools and appliances then and there owned and used by the defendants were inadequate to lift more than one beam at a time," together with a further allegation of negligence in attempting to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lift the beams by fastening them merely by a single loop near the center, were sufficient to authorize the admission of evidence of the failure of defendant to furnish guide lines to steady the beams, shown to be a proper and usual appliance, under Rev. St. Ohio 1908, § 5096, which provides that the allegations of a pleading shall be liberally construed with a view to substantial justice between the parties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

2. COURTS (§ 359*)—STATE LAWS—CONSTRUCTION IN FEDERAL COURTS—CONFORMITY STATUTE.

Under the federal conformity statute (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]), which provides that the pleadings in actions at law in the federal courts shall conform as near as may be to those in the state courts, the federal courts may look to the state statutes upon the question of the construction of pleadings in such actions.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 359.*]

Conformity of practice in common-law actions to that of state courts, see notes to *O'Connell v. Reed*, 5 C. C. A. 594; *Nederland Life Ins. Co. v. Hall*, 27 C. C. A. 392.]

3. PLEADING (§ 430*)—VARIANCE—STATUTORY PROVISIONS.

Under Rev. St. Ohio 1908, § 5294, which provides that no variance shall be deemed material unless it has actually misled the adverse party to his prejudice, and that when it is alleged that a party has been so misled the fact must be proved to the satisfaction of the court, which may then permit an amendment of the pleading, there cannot be a fatal variance where there was no claim of being misled by the adverse party when the evidence was offered, but it was met by counter evidence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1438; Dec. Dig. § 430.*]

4. MASTER AND SERVANT (§§ 285, 286*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.

Evidence, in an action by a servant against the master to recover for a personal injury, *held* such as to render it proper to submit to the jury the questions of defendant's negligence, and whether such negligence caused the injury by rendering unsafe the place where plaintiff worked.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §§ 285, 286.*]

5. MASTER AND SERVANT (§ 201*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—CONCURRING NEGLIGENCE OF FELLOW SERVANTS.

If the failure of the master to provide and maintain a safe place to work contributed to the servant's injury, he is liable for such injury, notwithstanding the concurring negligence of fellow servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 515-534; Dec. Dig. § 201.*]

Concurrent negligence of master and fellow servant, see note to *Maupin v. Texas & P. Ry. Co.*, 40 C. C. A. 236.]

6. WORDS AND PHRASES—"INADEQUATE."

The word "inadequate," as applied to appliances, may signify insufficiency or lack of "appliances."

7. WORDS AND PHRASES—"SNUB ROPES."

Guide lines used to steady beams in their descent from a derrick platform are called "snub ropes."

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Action by Gaetano Gallo against Thomas B. Bryson. Judgment for plaintiff, and defendant brings error. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

This action was begun in the common pleas court of Cuyahoga county, Ohio, by Gaetano Gallo against the Tidewater Building Company and Thomas B. Bryson, to recover damages in the sum of \$20,000 for personal injuries alleged to have been suffered by Gallo while in the employ of defendants and through their negligence. The building company is a corporation organized under the laws of New York, and Bryson is a citizen and resident of that state. The case was removed to the court below on the ground of diversity of citizenship, and was tried on the petition filed in the state court and separate answers and a reply filed in the trial court. At the close of the plaintiff's evidence a motion to direct a verdict in favor of the building company was granted, and a like motion by Bryson was denied. A verdict for \$5,000 and judgment thereon were rendered against Bryson. The case is pending here on proceedings in error.

Bryson, a contractor, was engaged in constructing a building in Cleveland, and Gallo, a laborer in the employ of Bryson, was engaged in mixing and wheeling concrete within the building as far as it had progressed, at the time of the injury. The building was about 200 feet square and fronted on two streets. A platform with a derrick upon it was maintained on one side of this building at the level of one of the streets as a place and means for receiving materials and then lowering them into the cellar and basement. Gallo's work was in the basement, and the place provided for mixing concrete was directly under this platform. The accident was caused by the fall of material from the derrick. It was attempted to lower three steel beams at one time, each weighing about 700 pounds, by fastening the derrick chain around them at their center, when they slipped from their fastening and so injured Gallo as to require amputation of one of his hands.

The plan of conducting the work involved a division of it into three parts, to wit, iron work, carpenter work, and unskilled labor. One Eldridge was the superintendent and in control of all the men and work. He had an assistant, named Lowery. The iron work was under the immediate charge of a foreman named Schmunk; and under him was an iron worker named Keith, who fastened the chain to the three beams which fell and injured Gallo. The carpenters were under the control of another foreman, and the unskilled laborers like Gallo were under control of still another foreman, named Stevenson; but neither of the last-mentioned foremen seems to have been immediately concerned with the lowering of steel beams.

W. B. Stewart, for plaintiff in error.

H. F. Payer, for defendant in error.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). Although there are quite a number of assignments of error, the controversy is reducible to two issues. One arises upon a claim that the accident was caused by admitted negligence of certain fellow servants of Gallo who were engaged at the derrick in giving orders for lowering and in handling the three steel beams. The other grows out of the receiving of evidence, and of a portion of the charge of the court below, touching a claim that Bryson failed to furnish appliances necessary to steady the beams as they were lowered and so failed to furnish Gallo a safe place in which to work. Stating these issues in other language: They concern the violation of primary duties, first, by Gallo's fellow servants, and, second, by Gallo's employer, Bryson.

The admitted negligence is claimed on behalf of Bryson to have grown out of an order given by Schmunk as foreman of the iron workers to Keith as an iron worker under him, to lower at one time the three beams in question instead of one at a time as previously di-

rected by Superintendent Eldridge. One complaint is that the court below erroneously submitted to the jury the question of negligent operation of proper appliances by fellow servants of Gallo. But we think the charge was in favor of Bryson upon this feature. As illustrative of this, we may refer to the following portion:

"Nor does the fact that a person is hurt, or the fact that the plaintiff was hurt, and his injury was due to the fact that somebody who was working there, like Keith or the other associates of his, was negligent—was not exercising ordinary care—make the defendant liable. The negligence of some fellow workman of the plaintiff, resulting in injury to the plaintiff, would not, in and of itself, or because of that fact alone, make the employer liable."

This was emphasized by a statement shortly following it:

"* * * And so the plaintiff must show by a preponderance of the proof, before he can recover, that it was the defendant's negligence which was responsible for the falling of the beams."

We may therefore safely pass by the question of fellow service or of liability in that regard, and turn to a consideration of the important question touching the claim of failure of the master to furnish necessary appliances. The claim of Gallo is that there was a failure to furnish guide lines called "snub ropes," to steady the beams in their descent from the derrick platform to the floor of the basement. The objection of Bryson is that no such failure was alleged in the petition. Keith was permitted to testify that there was no "guide line or snub line there" for him to use, when attempting to lower the three beams, and defendant's counsel at the time objected "on the ground that it is not covered by the petition; there is no allegation against us for failure to have such." It must be conceded that the petition does not in express terms contain such an allegation. It does contain many allegations of specific negligence; and one inquiry is whether any of them separately, or in connection with others, may fairly be regarded as broad enough to justify admission of this evidence. Among the allegations are the following:

"* * * They (defendants and their superior agents and servants) were careless and negligent in undertaking to lift by means of said derrick at one time three metal beams of such great weight and size, and the plaintiff says that the tools and appliances then and there owned and used by the defendants were inadequate to lift more than one beam at a time. They were further careless and negligent in this, to wit, that they just prior to attempting to lift said beams had recklessly fastened and secured the same merely by a single loop over and around said beams and near the center thereof, instead of securing and fastening the same by at least two loops near the ends thereof, so as to secure and insure a proper balancing of said beams when the same would be lifted in the air."

Again:

"* * * In failing to apprise him of their purpose then and there to elevate said beams in the air in the manner and under the conditions aforesaid, and in failing to provide for him a safe place in which to work."

These allegations, as well as the others, were traversed in the answer by simple denial. What is the true scope and meaning of the words "that the tools and appliances then and there owned and used by the defendants were inadequate to lift more than one beam at a time"? It was nowhere alleged that the derrick or its depending

cable, chains, or appliances were broken by the weight of the beams or otherwise. It is within the ordinary and accepted meaning of the word "inadequate," as used in the allegation, that it may signify insufficiency or lack of "appliances." True the word is followed by the words "to lift more than one beam at a time"; but these words must be read in connection with other allegations such as the succeeding language, in which it is charged that it was attempted "to lift said beams" by fastening them merely by a single loop near the center instead of fastening them "by at least two loops near the ends thereof so as to secure and insure a proper balancing of said beams when the same would be lifted in the air." The complaint therefore was not of inherent weakness in appliances, but rather of an insufficiency of appliances for balancing the beams when it was attempted to lift two or more at one time from the derrick platform and to lower them to the basement. If this meaning or its equivalent is not applied, it is hard to conceive of any purpose at all in using "inadequate." Enough appears in the evidence to show that a guide line or snub line was a proper and usual appliance for staying and balancing beams when so carried.

It is not meant to say either that the language quoted or that the language of the petition as a whole is as clear as it should have been respecting averment of violation of the primary duty of the master. But the present petition was prepared under the Ohio Code of Civil Procedure and was filed in an Ohio court. Under section 914, Rev. St. U. S. (1 U. S. Comp. St. 1901, p. 684), the practice and pleadings in a case like this are required to conform "as near as may be" to the practice and pleadings, etc., prescribed in the state within which the federal court is held. We may therefore upon such a question as this look to the Civil Code of Ohio to ascertain how such a pleading should be construed. *Glenn v. Sumner*, 132 U. S. 152, 156, 10 Sup. Ct. 41, 33 L. Ed. 301; *Roberts v. Lewis*, 144 U. S. 653, 656, 12 Sup. Ct. 781, 36 L. Ed. 579; *Nudd et al. v. Burrows*, 91 U. S. 426, 442, 23 L. Ed. 286. No question arises here like that in *Liverpool & L. G. Ins. Co. v. N. & M. Friedman*, 133 Fed. (6th Circuit) 713, 716, 66 C. C. A. 543. By section 5096 of that code it is provided that:

"The allegations of a pleading shall be liberally construed, with a view to substantial justice between the parties."

See, also, section 4948; *Clay v. Edgerton*, 19 Ohio St. 549, 2 Am. Rep. 422; *McCurdy v. Baughman*, 43 Ohio St. 78, 1 N. E. 93.

Construing the language of the petition liberally "with a view to substantial justice between the parties," we are not persuaded that the trial court committed error of a prejudicial character in admitting the evidence in question.

But we need not rest this conclusion merely upon the language of the petition. It is to be observed that the defendant at no time presented a motion to make the petition definite and certain. The objection that there was nothing in the petition to suggest that the claim in dispute would be made, or that evidence would be offered in its support, is not convincing. Defendant did not in the objection as made or elsewhere claim to be taken by surprise, or in any manner to be misled by the introduction of such evidence. On the contrary,

he met the claim by testimony and tried the case to its end apparently with as much preparation as if specific issue had been made in that regard by the pleadings. It is earnestly insisted, however, that fatal variance intervened.

Presumably plaintiff would have been allowed to amend his petition, if amendment had been suggested by counsel and deemed necessary by the court. As observed by Judge Severens in *Hernan v. American Bridge Co.*, 167 Fed. (6th Circuit) 930, 936, 93 C. C. A. 330, 336:

"The authority vested in the federal courts to amend the process, pleadings, and proceedings in cases brought before them is ample; probably not less so than in any other system of jurisprudence."

Recurring to the Ohio Code of Civil Procedure respecting questions of pleading and amendment, by section 5294 it is provided:

"No variance between the allegation in a pleading, and the proof, shall be deemed material, unless it has actually misled the adverse party to his prejudice, in maintaining his action or defense upon the merits, and when it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must also be shown in what respect he has been misled; and thereupon the court may order the pleading to be amended, upon such terms as are just."

Section 5295 provides:

"When the variance is not material, the court may direct the fact to be found according to the evidence, and may order an immediate amendment, without costs."

It follows that, whether amendment was necessary or not, at most there was not under the facts pointed out a material variance. *Railway Co. v. Lavalley*, 36 Ohio St. 221, 225; *Sibila v. Bahney*, 34 Ohio St. 399, 408; *Benninger v. Hess*, 41 Ohio St. 64, 68; *Cincinnati St. Ry. Co. v. Whitcomb*, 66 Fed. (C. C. A., 6th Circuit) 915, 14 C. C. A. 183; *Derham v. Donohue*, 155 Fed. (C. C. A., 8th Circuit) 385, 386, 83 C. C. A. 657; *Washington & Georgetown R. v. Hickey*, 166 U. S. 521, 531, 532, 17 Sup. Ct. 661, 41 L. Ed. 1101; *Baltimore & Potomac R. v. Cumberland*, 176 U. S. 232, 238, 20 Sup. Ct. 380, 44 L. Ed. 447.

Furthermore, in view of what has been shown, it is not perceivable why section 5115 of the Ohio Civil Code is not applicable. It provides:

"The court, in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed, or affected, by reason of such error or defect."

We therefore conclude that we should consider this case as though admittedly an issue had been distinctly formulated by the pleadings alleging and denying failure of the master to supply the necessary guide lines, or "snub ropes," as they are called, for use in staying and balancing the beams. It is not necessary to set out and analyze the evidence introduced upon this subject. It is enough to say that our study of the record satisfies us that there was conflict in the testimony and that the jury was fairly and clearly instructed upon the subject. Said the learned trial judge:

"So we have the questions: Did the failure of the men to attach these ropes cause the accident? Was it on account of the absence of the ropes that the injury to the plaintiff resulted? Was there at the time available for the use of Keith and his associates rope of sufficient quantity to be used for such snub line or guide line, or both, according as one or both were necessary under the conditions then existing? Did Keith make a suitable search or suitable inquiry for such rope, under all the circumstances? Ought he to have made a further search than he did make? Ought he or his associate, Schmunk, to have inquired of Eldridge, the superintendent? Did they do what, under all the circumstances of the situation that surrounded them—the danger, if any, that they might reasonably apprehend from the use of these instrumentalities in that way to lower these beams—they ought to have done as men of ordinary prudence to satisfy themselves that there was no rope available for use on these beams? If they did and found no such rope, and the failure to find it and use it was the cause of the accident, then the plaintiff is entitled to recover."

The fellow-servant doctrine and the great number of decisions cited in that behalf by the learned counsel for defendant below thus become irrelevant. We believe upon the facts that this case must be ruled by the principles affirmed in the decision of the Supreme Court in *Kreigh v. Westinghouse & Co.*, 214 U. S. 249, 257, 29 Sup. Ct. 619, 622, 53 L. Ed. 984. No question of contributory negligence is presented; and under the verdict and judgment we must assume that Bryson failed to discharge his primary duty to furnish sufficient appliances properly to manipulate the beams during their descent to the basement, and that he failed to provide for Gallo a safe place in which to work as alleged in his petition. This negligence is not affected by the circumstance that those engaged at the derrick and with the beams were also negligent in performing the work. As said by Mr. Justice Day in the case just cited:

"If the negligence of the master in failing to provide and maintain a safe place to work contributed to the injury received by the plaintiff, the master would be liable, notwithstanding the concurring negligence of those performing the work. *Grand Trunk R. R. Co. v. Cummings*, 106 U. S. 700 [1 Sup. Ct. 493, 27 L. Ed. 266]; *Deserant v. Cerillos Coal Railroad Co.*, 178 U. S. 409, 420 [20 Sup. Ct. 967, 44 L. Ed. 1127], and cases there cited."

The assignments of error must be overruled, and the judgment affirmed, with costs.

TIPPETT & WOOD v. BARIHAM.

(Circuit Court of Appeals, Fourth Circuit. July 12, 1910.)

No. 969.

1. CORPORATIONS (§ 478*)—MORTGAGES—AFTER-ACQUIRED PROPERTY CLAUSE.

Under an after-acquired property clause in a corporation mortgage securing bonds, any property acquired by the mortgagor subsequent to the execution of the mortgage, and which is within the general description contained therein, will become as fully subject to the lien of the mortgage in equity as if such property had been owned by the mortgagor at the date of the execution of the mortgage, subject to such limitations as are imposed upon it when acquired by the mortgagor.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 478*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. CORPORATIONS (§ 478*)—MORTGAGES—AFTER-ACQUIRED PROPERTY CLAUSE—IMPROVEMENTS ON REAL ESTATE—RESERVATION OF LIEN BY CONTRACTOR.

A water company issued bonds secured by a mortgage of all the property it then owned or should thereafter acquire. It subsequently acquired a tract of land and contracted with petitioners to construct a standpipe thereon as a necessary and permanent part of its waterworks system, and which was attached by bolts, to a concrete foundation constructed by the company. *Held*, that a provision of the contract by which petitioners reserved title to the standpipe, with the right to remove it if the contract price was not paid, was ineffective as against the mortgage creditors.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 478.*]

Appeal from the Circuit Court of the United States for the Eastern District of Virginia, at Norfolk.

Suit in equity by John A. Barham against the Peninsula Pure Water Company and causes consolidated therewith. Tippet and Wood, intervening petitioners, appeal from an order disallowing their claim to priority as creditors. Affirmed.

The question at issue upon this appeal arises between the holders of bonds of the Peninsula Pure Water Company issued under and secured by a mortgage to the Knickerbocker Trust Company and Tippet & Wood, the appellants.

By deed bearing date February 1, 1906, and recorded in the clerk's office of Elizabeth City county, Va., February 16, 1906, the Peninsula Pure Water Company conveyed to the Knickerbocker Trust Company of New York City all of its property, rights, and franchises to secure an issue of \$300,000 of first-mortgage bonds. This deed contains what is generally known as the "after-acquired property clause," the language being: "Does grant, bargain, sell and convey * * * all other property, real, personal or mixed, of whatsoever kind or description, and wheresoever situated now owned or possessed by it, or which may hereafter be acquired by it, the said Peninsula Pure Water Company; also all corporate and other franchises, privileges, rights, benefits, immunities and exemptions * * * either by legislative grant or contract, or otherwise." By deed bearing date March, 18, 1906, and recorded March 29, 1906, Thomas Harmond and wife conveyed to the Peninsula Pure Water Company a certain tract of land located in the town of Hampton, in the county of Elizabeth City. And by a contract bearing date March 9, 1906, but which was actually executed some time after that date, Tippet & Wood, the intervening petitioners, entered into an agreement with the Peninsula Pure Water Company and Whetstone & Company by which they agreed to erect for the use of the Peninsula Pure Water Company a certain standpipe for the price of \$8,148, and according to plans and specifications referred to in said contract, said contract being under the corporate seal of all parties. This standpipe was subsequently erected on the tract of land purchased of Thomas Harmond et ux., and was completed according to plans and specifications, although the water company was placed in the hands of the receivers before there was a formal acceptance of the standpipe by it. The water company prepared a concrete foundation upon which the standpipe was constructed, and to which it was attached by bolts and taps. This contract which was never recorded contained the following clauses: "No right, or title to said standpipe, or to the material of which the same is composed, shall pass to Whetstone & Company or Peninsula Pure Water Company, or to any other persons or companies until all the payments above mentioned shall be fully made; and, if in any case all the payments are not made, Tippet & Wood may enter upon the property and remove the material or standpipe as furnished by them." "If said Whetstone & Company and Peninsula Pure Water Company shall keep and perform all the terms of this agreement and make no default in any of said payments as they become due, and in that case said Tippet & Wood will make, execute and deliver to Whetstone & Company or Peninsula Pure Water Company a good and sufficient bill of sale for said

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

standpipe." Said standpipe was built and completed according to plans and specifications prior to receivership proceedings; but default was made in the payments provided for leaving a balance unpaid of \$2,548, with interest from February 1, 1907, and \$97.78, with interest from March 1, 1907 (this latter sum was for repairs and labor caused by the alleged delay of the water company to make proper tests after completion of the work), whereupon Tippet & Wood filed its petition setting up its contract and praying leave of court to enter upon the premises and remove the said standpipe according to the terms of its contract.

The decree for sale of the water companies' properties included the standpipe in question, the court reserving "to all persons claiming a lien or liens against any of the assets or property herein authorized to be sold the same liens, rights, or claim against the money derived from the said sale as such person or persons may have, or could set up and establish against the said assets or properties as if no sale had been had hereunder," Tippet & Wood consenting, without prejudice, that its claim be paid either in money or by removing the standpipe; the properties of the water companies including the standpipe in question claimed by Tippet & Wood were subsequently sold as a whole and the said sale duly confirmed.

The report of the special master filed on September 29, 1909, allowed the claim of Tippet & Wood as an unsecured debt, and disallowed the priority of the same over the first mortgage bonds. Tippet & Wood, by counsel, filed exceptions to said report of the special master, which exceptions were overruled by the court.

William C. L. Taliaferro, for appellant.

Henry W. Anderson and William H. White, Jr. (Munford, Hunton, Williams & Anderson, on the brief), for appellees.

Before GOFF, Circuit Judge, and KELLER, District Judge.

KELLER, District Judge (after stating the facts as above). In the argument it was admitted that if the standpipe which was the subject of the contract between appellants, Whetstone & Co. (the general subcontractors) and Peninsula Pure Water Company, became a fixture, so as to become annexed to the freehold, it would pass under the lien of the mortgage by virtue of the "after-acquired property" clause; but it was strenuously insisted that by the terms of the contract it is apparent that no such annexation was contemplated by the parties to that contract. We do not so understand this contract that the subject of it was never to become annexed to the freehold, but rather that there was an attempt to so preserve the status of the subject of the contract as that, in the event of necessity, it might be reclaimed as personal property the title whereunto had not been parted with by the appellants. The standpipe was to be erected "for the use of the Peninsula Pure Water Company," and when erected in accordance with specifications attached to and made a part of the agreement was to be "accepted by Whetstone & Co. and Peninsula Pure Water Company."

The special master found: That the standpipe in question was erected upon a foundation which is supposed to be 25 feet in diameter and 10 feet in depth, and is attached to this foundation by anchor bolts 10 feet in length and 2 inches in diameter. These anchor bolts are imbedded in the foundation. The standpipe is 18 feet in diameter and 140 feet high above the top of the foundation. That the standpipe is a part of the original construction work of the system of

waterworks intended to be constructed, and an indispensable part of such system, as without such a standpipe it would have been impossible for the water company to have furnished its consumers with water. That it is one of the integral parts of the property which as a whole was to constitute the security of the mortgage creditors.

As between the parties to the contract doubtless the rights reserved to Tippet & Wood would be binding, but as the question here is between the appellants, on the one side, and the trustee under the mortgage and the bondholders, on the other, it is pertinent to inquire whether there is any reason or principle upon which the interests of these latter parties who were not parties to this contract can be affected by it. There is a line of cases which, with more or less unanimity, holds that where a mortgage exists on real estate, and an accession is subsequently made of property agreed between the vendor and the mortgagor to be treated as personalty and a reservation of title until paid for agreed upon between vendor and mortgagor-purchaser, such accession, if it can be severed from the realty without injury to the latter or to the value of the security for the mortgage debt as it stood before the improvement was made, will be impressed with the same character as between the vendor and the mortgagee as between the vendor and mortgagor; in other words, that it does not become real estate, and may be removed without invading the rights of the mortgagee. Of this class are *Campbell v. Roddy*, 44 N. J. Eq. 244, 14 Atl. 279, 6 Am. St. Rep. 889, *Binkley v. Forkner*, 117 Ind. 185, 19 N. E. 753, 3 L. R. A. 33, *German Sav. & L. Soc. v. Weber*, 16 Wash. 95, 47 Pac. 224, 38 L. R. A. 267, and *Northwestern Mut. L. Ins. Co. v. George*, 77 Minn. 319, 79 N. W. 1028, 1064, and these cases and some others support this doctrine more or less completely.

Upon the other hand, there are many cases (some of which will be hereinafter referred to) which hold that personal property incorporated into or affixed to real estate in such manner that it would be subject to the lien of an existing mortgage thereon as between the mortgagor and mortgagee will be so subject to the lien of the mortgage, notwithstanding the existence of an agreement between the vendor and the mortgagor that it shall retain its character as personal property, unless the mortgagee be also a party to such agreement. This is what is generally known as the Massachusetts rule, and it has been affirmed by many other courts of last resort, and particularly by the Supreme Court of the United States in several cases hereinafter separately referred to.

We think this latter doctrine announces the correct principle, especially where the application is, as in the present case, confined to a case wherein the mortgage (containing an after-acquired property clause) has been drawn for the purpose of embracing the entire working plant of the corporation, including its franchises, as in such cases it is usually true that the mortgage is given at a time when the real estate is but very insufficient security for the debt, and the subsequent accessions are very generally made by the expenditure of the funds derived by reason of the negotiation of the bonds secured by such a mortgage, and the mortgage is made and received in contemplation of

such accessions. In such cases the equities of the beneficiaries under the mortgage should and must attach to such accessions as, under the description contained in the mortgage, are included within it, unless some higher equity or a legal title intervenes. In this case the mortgage to the Knickerbocker Trust Company was executed February 1, 1906, and recorded February 16, 1906. The deed from Thomas Harmond and wife to the Peninsula Pure Water Company for the land upon which the standpipe was erected was executed on March 8, 1906, and recorded on March 29, 1906. The contract between appellants Whetstone & Co. and the Peninsula Pure Water Company was dated March 9, 1906, but was not really executed until some time after its date, and was not recorded.

Under an after-acquired property clause such as that contained in the mortgage executed to secure the bondholders in the case at bar, any property acquired by the mortgagor subsequent to the date of execution and delivery of the mortgage, and which is within the general description contained therein, will become as fully subject to the lien of the mortgage in equity as if such property had been owned by the mortgagor at the date of the execution and delivery of the mortgage. *Pennock v. Coe*, 23 How. 117, 16 L. Ed. 436; *Galveston, etc., R. R. Co. v. Cowdrey*, 11 Wall. 459, 20 L. Ed. 199; *Branch v. Jesup*, 106 U. S. 478, 1 Sup. Ct. 495, 27 L. Ed. 279; *Thompson v. White Water, etc., R. R. Co.*, 132 U. S. 68, 10 Sup. Ct. 29, 33 L. Ed. 256. As a matter of course, such subsequently acquired real estate comes under the lien of the mortgage subject to such limitations as are imposed upon it when acquired by the mortgagor—in other words, only such interest passes as passed to the mortgagor—and hence, had the property conveyed by Thomas Harmond and wife to the Peninsula Pure Water Company been subject to a lien (for purchase money or otherwise) on March 8, 1906, when it was acquired, such lien would have been preserved as against any claims of bondholders or trustee. Of this nature were the facts in the cases of *Wood v. Holly Mfg. Co.*, 100 Ala. 326, 13 South. 948, 46 Am. St. Rep. 65, and *Holly Mfg. Co. v. New Chester Water Co. (C. C.)* 48 Fed. 879, cited by appellants. So also if personal property, which is not and never becomes a part of the freehold mortgaged, is acquired by the mortgagor after the execution and delivery of the mortgage, the interest of the mortgagor may pass under the after-acquired property clause of the mortgage if the general description in that clause will cover it, but it must pass burdened by whatever restrictions were imposed upon it in respect to the mortgagor, because only such title can pass to the trustee as was vested in the mortgagor through whom it passed. This was the situation in *New Orleans, etc., Ry. Co. v. U. S.*, 79 U. S. 362, 20 L. Ed. 434, *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339, and *Meyer v. Car Co.*, 102 U. S. 1, 26 L. Ed. 59, cited by the appellants, and the situation is readily distinguishable from that existing in the case at bar. In the case at bar the structure in issue, having become affixed to a part of the freehold which, at the time it was so affixed, was subject to the lien of the mortgage in equity, thereby became (except as to parties to the contract) a part of the real estate, and, by operation of law, became subject to the mortgage without regard to any agreement be-

tween the mortgagor and the person furnishing or erecting such property or structure.

In *New Orleans, etc., R. R. Co. v. U. S.*, 79 U. S. 363, 20 L. Ed. 434, 436, cited by appellants, the court draws a clear distinction between the character of the personal property in that case (rolling stock) which never became affixed to the freehold, and property of the character of that in the case at bar, and held that, if the property had been rails or other material which became affixed to and a part of the principal thing mortgaged, the existing mortgage on the real estate would have had priority of lien over any lien reserved for purchase money.

In *Porter v. Pittsburg Steel Co.*, 122 U. S. 267, 7 Sup. Ct. 1206, 30 L. Ed. 1211, where the contract between the bridge company and the railway company provided that the bridges erected by it should remain the property of the bridge company until they had been fully paid for and that, in default of payment, the bridge company should have the right to remove the bridges and bridge material, the Supreme Court of the United States said:

"The bridges became a part of the permanent structure of the railroad, as much so as the rails laid upon the bridges or upon the railroad outside of the bridges. Whatever is the rule applicable to locomotives and cars, and loose property susceptible of separate ownership and of separate liens, and to real estate not used for railroad purposes, as to their being unaffected by a prior mortgage given by a railroad company, covering after-acquired property, it is well settled in the decisions of this court that rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage will be held by the lien of such mortgage in favor of bona fide creditors as against any contract between the furnisher of the property and the railroad company, containing stipulations like those in the contracts in the present case. *Dunham v. Railway Co.*, 1 Wall. 254 [17 L. Ed. 584]; *Galveston Railroad v. Cowdrey*, 11 Wall. 459, 480, 482 [20 L. Ed. 199]; *United States v. New Orleans Railroad*, 12 Wall. 362, 365 [20 L. Ed. 434]; *Dillon v. Barnard*, 21 Wall. 430, 440 [22 L. Ed. 673]; *Fosdick v. Schall*, 99 U. S. 235, 251 [25 L. Ed. 339]."

To the same effect see *Clary v. Owen*, 15 Gray (Mass.) 522; *Hunt v. Bay State Iron Co. et al.*, 97 Mass. 283; *Thompson v. Vinton*, 121 Mass. 139; *Hopewell Mills v. Taunton Savings Bank*, 150 Mass. 519, 23 N. E. 327, 6 L. R. A. 249, 15 Am. St. Rep. 235; *Ekstrom v. Hall*, 90 Me. 186, 38 Atl. 106; *McFadden v. Allen*, 134 N. Y. 489, 32 N. E. 21, 19 L. R. A. 446; *Bass Foundry v. Gallentine and others*, 99 Ind. 525; *Cunningham v. Cureton*, 96 Ga. 489, 23 S. E. 420; *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 85 N. W. 698, 53 L. R. A. 603, 84 Am. St. Rep. 867; *Demby v. Parse*, 53 Ark. 526, 14 S. W. 899, 12 L. R. A. 87; *Anderson v. Creamery Package Mfg. Co.*, 8 Idaho, 200, 67 Pac. 493, 56 L. R. A. 554, 101 Am. St. Rep. 188; *Watertown, etc., Co. v. Davis*, 5 Houst. (Del.) 192. In *Clary v. Owen*, *supra*, what we have called the Massachusetts doctrine is thus tersely expressed:

"We think it is not in the power of the mortgagor by any agreement made with a third person after the execution of the mortgage to give to such person the right to hold anything to be attached to the freehold, which, as between the mortgagor and mortgagee, would become a part of the realty."

In *Hunt v. Bay State Iron Company and Others*, *supra*, the court expressed the same view saying:

"Nor do we suppose that the mortgagor in possession is competent to bind existing mortgagees by any agreement to treat as personalty annexations to the freehold. The legal character of the rails when once laid down is determined by the law to be that of real estate. Mortgagees as well as all other parties in interest are entitled to this rule of law which can be taken from them only by their own waiver."

In *Meagher v. Hayes*, 152 Mass. 228, 25 N. E. 105, 23 Am. St. Rep. 819, the same court held that a building put on mortgaged land and annexed to it in the usual way, notwithstanding an agreement between the owner of the building and the mortgagor that it should remain personal property with the right of the owner to remove it, became a part of the mortgage security, the mortgagee not being a party to such agreement, and that the purchaser of the land at foreclosure sale became the owner of such building, though he bought with notice of such agreement.

We think the rule as enunciated by all these cases is applicable to the case at bar, and that there was no error in the decree entered by the Circuit Court on the 27th day of January, 1910, overruling the exceptions of the appellants to the report of the special master filed on the 29th day of September, 1909, and the same is accordingly affirmed, with costs.

TRAVELERS' INS. CO. v. THORNE.

(Circuit Court of Appeals, First Circuit. May 27, 1910.)

No. 860.

1. INSURANCE (§ 96*)—BROKERS—AGENCY FOR INSURED—BREACH OF WARRANTY.

Plaintiff was born without fingers on his right hand, and testified that his right eye had become inflamed through a cold caught while a boy; that the eye was still disfigured; and that its removal had been suggested by a surgeon, though he did not notice any impairment of sight. B., an insurance agent, not employed by defendant, applied to plaintiff to take out insurance, which he agreed to do. B. applied to his own company, but the application was refused. He then went to defendant's office and presented an application for the policy in question, in which B. answered the question as to whether plaintiff had ever been refused, with the words, "not to my knowledge," plaintiff not having been informed of the refusal by B.'s company. B. also answered in the affirmative a statement that plaintiff was in sound condition mentally and physically, that his hearing and vision was not impaired, and that he was not suffering from any mental or bodily infirmity or deformity; the application being signed: "I personally solicit and recommend this risk," B., "Broker, Solicitor, Agent or Subagent." The policy was made out, delivered to B., who collected the premiums from plaintiff, paid the same to defendant's agent, by whom B. was paid his commissions. The policy provided that all the warranties made by insured on acceptance of the policy were true. *Held*, that B. was the agent of plaintiff, and not of the insurance company, and that the latter was therefore not estopped to assert B.'s misstatements as constituting breaches of warranty in defense to an action on the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 126; Dec. Dig. § 96.*]

2. COURTS (§ 365*)—FEDERAL COURTS—RULES OF DECISION—STATE DECISION.

Where two insurance contracts were obtained at the same time through the same agent through misrepresentations on his part, the fact that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

after a liability had accrued on both policies the state Supreme Court in an action on one policy decided that the agent was the agent of the insurer, and therefore precluded the latter from relying on such misrepresentations as constituting breaches of warranty and defenses, did not require the federal court in a suit brought on the other policy to follow the state decision as a rule of law established in that state at the time of the contract; the federal court being authorized to form an independent judgment on such question as a matter of general law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 950; Dec. Dig. § 365.*

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

In Error to the Circuit Court of the United States for the District of Maine.

Action by Fred S. Thorne against the Travelers' Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Harvey D. Eaton, for plaintiff in error.

George W. Heselton, for defendant in error.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

LOWELL, Circuit Judge. This was an action at law to recover on two policies of accident insurance. Each insured the plaintiff, "provided * * * (9) that all of the warranties following made by the insured upon acceptance of this policy are true." The defense was a breach of the following warranties contained in the policy:

"I. No application ever made by me for health or accident insurance has been declined. * * * M. * * * I am in sound condition mentally and physically; my hearing or vision is not impaired; I have never had nor am I now suffering from or subject to fits, disorders of the brain, or any bodily or mental infirmity or deformity. * * *

The policy was issued under the following circumstances: Burns, the duly appointed agent of the New York Life Insurance Company and of the Employers' Liability Insurance Company, called on the plaintiff and urged him to take out some insurance with Burns. Thorne told Burns that he would take \$10,000 insurance with the latter, \$5,000 combination life and health insurance and \$5,000 accident insurance. From an old insurance policy which was handed him by the plaintiff's clerk Burns testified that he got the "date of his (Thorne's) birth, the occupation, and the data that was necessary to file the application." He then filled out an application blank and obtained \$5,000 insurance in the Casualty Company. He was asked why he did not get the above-mentioned insurance from his own company rather than from the Casualty Company, and answered, "I didn't want it." But he went thereupon to his own company, the Employers', and apparently to an agent of a rank higher than his own, and presented an application for the rest of the \$10,000. This application was refused. He then went to the defendant's office and presented an application in part as follows:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(Printed) "No application ever made by me for life, health or accident insurance has been declined; no life, health or accident policy ever issued to me has been canceled; nor has any renewal thereof been refused by this or any other company or association—except as herein stated." (In Burns' writing) "Not to my knowledge." (Printed) "My habits of life are correct and temperate. I am in sound condition mentally and physically. My hearing or vision is not impaired. I have never had nor am I now suffering from or subject to fits, disorders of the brain, or any bodily or mental infirmity or deformity—except as herein stated." (In Burns' writing) "Yes."

It was not disputed that the answer last mentioned was intended to deny the plaintiff's infirmity and deformity. The application was signed:

"I personally solicit and recommend this risk. T. S. Burns, Broker, Solicitor, Agent or Subagent."

Thereupon the policies were made out and handed to Burns. The plaintiff appears to have approved the increased insurance. He sent a check for the premiums to Burns, who indorsed it to the defendant's agent. The agent paid Burns his commission, and Burns delivered the policies to the plaintiff.

The plaintiff thereafter had an accident to his eye within the terms of the policies, and the defendant refused to pay the sum insured because of the plaintiff's infirmity or deformity. The other defense of former refusal of application was not raised in the defendant's original letter, perhaps because the fact was then unknown.

The plaintiff was about 50 years old when the policy was issued. He was born without fingers on his right hand. He testified that his right eye had become inflamed through a cold caught while swimming as a boy; that the eye was still disfigured by a swelling; that its removal had been suggested by "a very eminent surgeon," but that he did not notice any impairment of sight. Burns testified that he had "noticed it wasn't a perfect hand," and that "there was an imperfection on the lower side of one of the eyes—a small projection."

Sundry instructions were asked and rulings were made in the course of the trial to which the defendant excepted. The jury returned a verdict for the plaintiff. The defendant sued out this writ of error. In deciding the case we find ourselves obliged to consider one proposition which makes an answer to all other questions unnecessary: Should the learned judge upon the evidence have directed a verdict for the defendant? If he should have done so, all other rulings and all admissions and exclusions of evidence become immaterial.

The plaintiff was deformed in his right hand. In the language of the applications and of the policies he was "suffering from bodily deformity." It is hard to believe that he was not suffering also from impaired vision and deformity of the eye. If, however, his testimony be taken to mean that his vision was wholly unimpaired, that may have been a question for the jury, and we will refer to it no further. An application for insurance made by the plaintiff through Burns had been refused before the policy sued on was applied for, and on the same day.

Two statements of the application were therefore false. Two warranties of the policy were broken. The plaintiff testified that he knew nothing about the applications, and did not examine the policies. The defendant did not dispute the plaintiff's personal good faith. At the argument before us the plaintiff hardly denied the breaches of warranty, but chiefly argued that the defendant had waived the breach through the knowledge and conduct of its agent Burns. In support of his argument the plaintiff relied upon the decision of the Supreme Court of Maine in *Thorne v. Casualty Company*, 76 Atl. 1106, decided and reported in a suit brought by this plaintiff for the accident here in suit on the policy of the Casualty Company above mentioned. The Casualty Company in that suit raised the defense of deformity, though not that of former refusal of application. The Maine court sustained a verdict for the plaintiff, and said:

"The reply of the plaintiff is 'that the company is estopped as regards this special matter of defense because of agent's knowledge.' The question then is: Should the knowledge of Burns in procuring this policy be regarded as that of the defendant? We think it should under the doctrine of estoppel. Rev. St. c. 49, § 93, provides as follows: 'All notices and processes which, under any law, by-law or provision of the policy, any person has occasion to give or serve on any such company, may be given to or served on its agent, or on the commissioner, as provided in the preceding section, with like effect if given or served on the principal. Such agents and the agents of all domestic companies shall be regarded as in the place of the company in all respects regarding any insurance effected by them. The company is bound by their knowledge of the risk and of all matters connected therewith. Omissions and misdescriptions known to an agent shall be regarded as known to the company, and waived by it as if noted in the policy.' * * * The defendant's home office was in New York City. Its representative in this state was the corporation, Macomber, Farr & Whitten. Through this corporation it transacted its business and dealt with all its policy holders in Maine. This corporation appears to have been more than a general agent. It had authority to issue policies direct from its office and did so issue the policy in question. The same day that the application was taken to this office, the policy, signed in blank by the officers of the home company, was written and countersigned by its representative in this state, delivered to Mr. Burns and by him delivered to the plaintiff. This policy could not have gone to New York and returned the same day. They were not only to be regarded under the statute 'as in the place of the company in all respects,' but were as a matter of fact subrogated to the authority of the company to issue policies, at least, to issue this policy to the plaintiff. Had they sent one of their office force to Mr. Thorne, and had he done precisely what Mr. Burns did, and knew precisely what Mr. Burns knew with respect to the applicant, could it be possible that the defendant company could repudiate the acts and knowledge of this office employé on the ground that he was not an agent? If so, the statute intended for the protection of the assured becomes a deception and an open door to the commission of fraud. The defendant could receive all the benefits of premiums without the assumption of any of the risks of insurance. But what is the distinction between the sending out an office employé to solicit this policy, and ratifying the acts of Mr. Burns, who had solicited it? Mr. Thorne had no knowledge of the company in which he was to be insured. His application was made out by Mr. Burns, who had full knowledge of the risk. Mr. Burns took the application away and returned with a policy duly issued by the defendant company for which he paid the required premium. By delivering the policy to Mr. Burns to be by him delivered to the plaintiff, Macomber, Farr & Whitten by that act made Mr. Burns their agent. But, when they made him their agent, they were presumed to have knowledge that whatever Mr. Burns knew of the physical defects of the assured they would be charged with knowing. The statute will not permit an authorized agent to escape responsibility by using dumm-

mies. The Macomber, Farr & Whitten Company were therefore put upon their inquiry as to whether Mr. Burns was cognizant of any physical defects, knowledge of which might be regarded as a waiver of any warranty. Not having made inquiry, which it may be presumed would have revealed Burns' knowledge, they must now be estopped from asserting that they did not know of the defects of which Burns knew. Therefore Mr. Burns' knowledge became their knowledge, and their knowledge, under the statute, became that of the defendant company. We think the logical deduction from the facts is that the defendant company should under the statute be made chargeable with knowledge of the physical defects of the assured, and held to have waived so much of the warranty in the application as related to them."

With the most unfeigned respect for the learned state court, we are unable to follow its reasoning or to reach its conclusion. It held that Burns was the defendant's agent in the purchase and issuance of the policy. Upon this proposition hangs all the court's reasoning. We can find no evidence that Burns was the defendant's agent. His manual delivery of the policies to the plaintiff appears to us to have been an act done by him as the plaintiff's broker. He was employed by the plaintiff to get the insurance. His discretion to choose the company did not weaken his agency. In the applications he spoke in the plaintiff's name. The qualification of his signature as "Broker," etc., was only to comply with Rev. St. Me. c. 49, § 96, and need not be discussed further. To us it seems that the defendant did not ratify the acts of Burns. We do not think that a contractor, in ignorance thereof, ratifies or condones false statements of the contractee's agent upon which the contract is based merely by delivering to that agent the instrument of the contract that he may hand it to his principal; and we do not think that the contractee's agent is made the agent of the contractor merely because the money paid to the latter passes to him through the agent's hands. We think that the payment of the commission by the defendant to Burns according to the common usage did not affect the matter. The false statements of the application upon which are based the warranties of the policy are expressed as the representations of the plaintiff. If, in making them, Burns was acting as the defendant's agent, they would be valueless to the defendant and altogether meaningless. Let us suppose that A. employs B., a real estate broker, to hire a cottage for him at the seaside for three months. B. obtains, by false representations, a written agreement for a lease from C. embodying the representations as the warranties of A. B. hands the agreement to A. having received the rent from A. and paid it to C., and having received his commission from C. Can C. be held upon the agreement under these circumstances, on the theory that B's. knowledge of the falsity of the representations is his knowledge, and that through B's agency he has waived the conditions which he inserted for his own protection? We think not, and we think the case put is analogous to the case at bar. Burns was the agent of Thorne, not the agent of the insurance company.

After examining the earlier cases decided by the Supreme Court of Maine, we are unable to find in them support for the proposition above quoted, that "by delivering the policy to Mr. Burns to be by him delivered to the plaintiff (the defendant) by that act made Mr. Burns, their agent."

The question presented to us is not that of the construction of a Maine statute, but of the effect of the act of an insurance company in dealing in the usual manner with an applicant's insurance broker. There is strength in the argument that this effect is a matter of general law concerning which the federal courts should reach an independent decision. But, even if this be not true, yet we have not here to deal with a class of decisions or a rule of law established in Maine at the time the contract was entered into. The Casualty Company's case arose out of the same circumstances as did the case at bar. With all disposition to lean toward agreement with the state court we find ourselves unable to agree. That we are not compelled to follow its decision appears to us settled by *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. — where the decision of the state court dealt with that which was more nearly a matter of local law than does the Maine case cited.

The judgment of the Circuit Court is reversed, the verdict is set aside, the case is remanded to that court for further proceedings not inconsistent with this opinion, and the appellant recovers its costs of appeal.

THE MAIN.

THE MAY V. NEVILLE.

(Circuit Court of Appeals, Second Circuit. June 14, 1910.)

Nos. 259-260.

COLLISION (§ 45*)—STEAMER AND SCHOONER CROSSING—INSUFFICIENT LOOKOUT.

The schooner *May V. Neville*, which had been anchored in the anchorage grounds in lower New York Bay to the west of the channel, got under way, and when crossing the Main Ship Channel in a southeasterly direction, with the wind, toward the entrance of the Swash Channel, came into collision with the steamship *Main*, which was coming up on the east side of the main channel. Three steamships were passing down on the west side, but one had passed before the schooner started, and she passed under the stern of the second, the third being a mile astern, and kept her course and speed until the collision. The day was bright, and she was making a speed of 3 to 3½ knots through the water and about 2 knots over the bottom; the tide being flood. The *Main* was going at a speed of 11 knots or more, and did not observe that the schooner was moving until she came out from under the stern of the steamship 1,500 feet or less away, although she was in view until a few seconds before when the down-bound steamer came between them. *Held*, that the schooner was not in fault for crossing the ship channel as she did under the circumstances shown, and, as she kept her course and speed as required by the rules, the *Main* was solely in fault for the collision for failing to keep a better lookout for vessels from the anchorage grounds, and to sooner observe the approach of the schooner, and reduce speed so as to keep out of her way.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 45.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by James H. Hawley, as owner of the schooner *May V. Neville*, against the steamship *Main*, the North German Lloyd,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

claimant, and cross-libel by the claimant against the schooner. Decree for libelant, and claimant appeals. Affirmed.

Joseph Larocque, for appellant.

F. M. Brown, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The collision occurred on November 22, 1906, about 11 a. m. The sun was shining brightly, and there was a fresh breeze from about N. W. by W. The tide was first half of the flood. The Neville had been lying at anchor in the Lower Bay of New York for several days. West Bank Light bore about N. E. by E. from her one mile away, and she was a little over half a mile from the westerly boundary of the Main Ship channel. Having concluded to get under way, she set three head sails and broke out the anchor, turned around on her heel, and started off directly before the wind to go down the Swash channel for the entrance to which she headed. Having only three head sails set, her progress was slow, about 3 to 3½ knots through the water or 2 knots over the bottom. The mate and crew were engaged setting the mizzen sail, but it was not fully hoisted at the time of collision. These facts are undisputed. About this time three large steamers, La Savoie, the Friedrich der Grosse, and the Amerika were coming down the channel, but the Savoie was so far in advance of the others that her presence was not a factor in the situation. As to the relative positions of the schooner and the other vessels the testimony is conflicting. The master of the schooner was the only one on board of her who observed what was going on, the mate and the crew being busy with the sails. He asserted repeatedly that the Friedrich der Grosse and the Amerika both crossed his bows. The mate and one of the crew corroborate him. The testimony of wholly disinterested witnesses, however, is so overwhelmingly to the contrary that we not only discredit these statements from the schooner, but are inclined to extend some measure of discredit to other parts of their testimony. It is conclusively established that the schooner entered the Main Ship channel, passing the line of buoys which mark its western boundary, astern of the Friedrich der Grosse and across the bows of the Amerika. She proceeded on towards the Swash channel, and, when close to the red and black buoy at the junction of that channel with the Main Ship channel, came into collision with the Main, which was upward bound and keeping well over to the eastern side of such channel.

The District Judge found the schooner free from fault because she kept her course and speed and held the Main in fault because she did not stop and reduce speed and come to a full stop if necessary, instead of undertaking to cross the bows of the schooner.

The District Judge found that the steamer came up the channel "at full speed, 14 or 15 miles an hour." This finding is criticised; it being contended that the weight of testimony indicates that the speed was 10 or 11 knots. We do not think the difference material. At the lower speed it was still practicable to reduce sufficiently to allow the schooner to cross without rendering the Main unmanageable or inter-

fering with her navigation relative to the outgoing steamers which she was encountering in a narrow channel, provided her navigators had taken the schooner into consideration as a navigating unit to be cared for a reasonable time before the intersection of their respective courses was reached. That is the only point in the navigation of the Main, which we need consider.

Bearing in mind the relative positions of the vessels as above set forth, it is apparent that for a certain period of time the *Friedrich der Grosse*, 525 feet long, hid the schooner from the view of those on the Main; but, as she was going $13\frac{1}{2}$ knots and the Main, concededly, 11 knots, the period of occultation is one to be counted by seconds. On the bridge of the Main were her captain, the Sandy Hook pilot, Beebe, the Senior Second Officer Scheidling, Quartermaster Prins, Second Officer Arndt. No report of the presence of the schooner was made to the pilot or captain, either by a hail from a lookout forward or by the suggestion of any one on the bridge, before she appeared under the stern of the *Friedrich der Grosse*. The pilot was naturally giving his attention to the three steamers coming down, and did not look over to anchorage ground to see if any of the vessels there were making preparation to get under way. He first saw the *Neville* when she came out underneath the stern of the *Friedrich der Grosse*, the Main at the time just lapping the latter. He estimated her distance off at 1,500 feet, and at once began to navigate with reference to her. The captain first saw the schooner when the *Friedrich der Grosse* had passed. She was inside the line of black buoys, came out just behind the *Friedrich*, and drove across the channel. He said to the pilot, "I think that schooner comes here," to which the latter at first replied: "No; he is at anchor," but quickly reached the same conclusion as the captain, and said, "We can do nothing only put the helm hard aport and give him a signal," which was done. The captain makes the distance between place of sighting and place of collision much less than the pilot does. The first officer did not see the schooner till just before collision. The quartermaster first noticed her about 300 metres away. Arndt, the second officer, says that, when he first noticed the *Neville* in motion, she came out from the stern of the *Friedrich der Grosse*. Before the Main passed the latter steamer he saw a schooner, which he thinks is the one collided with, to the west of the main channel lying in a position not dangerous to his vessel "about heaving up anchor or making some other manœuvres." He could not remember whether she had sails set or not. From that time until she emerged from under the stern of the *Friedrich der Grosse* he did not observe her. This witness was attending to the engine telegraph. Scheidling, senior second officer, who was lookout on the bridge, says that after *La Savoie* went by "on the west side of the main channel, out of the channel, was a schooner apparently at anchor. At least I didn't notice that she was under way. When we had passed the *Friedrich der Grosse*, we suddenly saw that the schooner was under way and made headway." He estimates that she was a mile and a half up when he first noticed her. She was then carrying three foresails. He looked at her through glasses, could not notice that she was making headway for which reason he did not draw the pilot's attention to her, and thought maybe

she was drying her sails. We cannot find in the record any further observation of the schooner until she surprised the captain and pilot of the Main by suddenly coming into view under the stern of the Friedrich. If they had known before the Friedrich passed between their vessel and the schooner that the latter was under way headed across the channel they could have so navigated their vessel as to avoid collision, if the schooner held her course and speed as all the witnesses conceded she did.

Upon the evidence above set forth, we are satisfied that the Main was in fault for not sooner observing that the Neville was navigating on a course which, if maintained, would intersect their own. We cannot say whether Arndt or Scheidling first saw the schooner, nor does the latter say how she was heading when he looked at her through the glasses. It may fairly be presumed that she had not yet turned around, otherwise he would hardly have conjectured that she was at anchor drying her sails. It would certainly be an odd experience to see a vessel lying at anchor with three foresails set, heading S. E. when a fresh breeze was blowing from the N. W. But conceding that when Arndt and Scheidling first saw the schooner she was at anchor or at least had not yet swung around on her course, and was a mile and a half up, as Scheidling says, nevertheless, some one should have looked again to see if there was any vessel navigating to the west of the channel before the Friedrich der Grosse cut off the view in that direction. Had such an observation been made, it would have disclosed the true situation, as the testimony from the Friedrich conclusively shows. The schooner's course intersected the channel at an obtuse angle. The Friedrich was approaching that course from the north, the Main from the south. Manifestly until the Friedrich got abreast of the Neville there was nothing to hide the latter from a lookout on the Main, for, as Scheidling says, La Savoie had passed before he first saw the schooner. Any one looking from the Main towards the schooner during the time intervening before the advent of the Friedrich would have seen what those on the latter vessel saw. The captain of the Friedrich says he first saw the schooner ahead on his starboard bow about three or four points, that he saw she was already under way on a southerly course with three foresails set, and making as he estimated three or four knots an hour. We are satisfied that, if a careful lookout had been kept on the Main, her watch officers would have seen that the Neville was under way on a course to intersect their own, before the Friedrich passed between them. There is nothing in the record to show that the pilot, if then notified of the schooner's presence, could not have avoided her without difficulty. Indeed, he practically admitted on cross-examination that with the Eastern half of the channel free (as the evidence shows it was) there would have been no trouble in avoiding the schooner if he had seen her in motion headed to cross the channel before the Friedrich shut her out. We therefore find the Main in fault for not maintaining a sufficient lookout.

The navigation of the schooner remains to be considered. All concede that from the beginning to the end she maintained her course and speed. Her captain was her only lookout, but, as will be seen from

our subsequent discussion of the main charge of fault made against her, that circumstance in no way contributed to the collision. It is charged that she was navigating with an insufficient number of sails. She hoisted her foresails only at the outset because it was necessary to make her turn without forereaching in order to avoid other vessels anchored near her. This was an entirely proper proceeding, and we are not satisfied that, after she had laid her course, she was unduly slow in hoisting her mizzen sail. Certainly she maintained her course and speed without it, which was what the rule required. If she had had more sail on, she would have crossed ahead of the Main; if less sail, she would not have reached the intersection until after the Main had passed, but we find nothing in the circumstances which would require her to depart from the wholesome rule as to course and speed to port her helm and try to pass under the stern of the Main. The principal charge of fault is that she initiated the train of causes which brought about the collision by undertaking to cross the channel at an improper time, viz., when there were three steamers coming down and one going up.

The Main Ship Channel is not a wide one, and the large deep draught ocean steamers who have to navigate in it on their way in and out of this port take up a considerable part of its width when passing each other at a safe distance. When there are several of them in the channel at the same time under certain conditions of wind and tide, there is great difficulty in successfully executing manœuvres necessary to avoid collision with some vessel crossing the channel and consequent risk of collision with some other vessel already there. In reaching the conclusion hereinafter set forth, we are not to be understood as holding that the rule directing a sailing vessel encountering steamers to keep her course will always excuse her for driving across such channel when it is already so crowded with unwieldy vessels that her presence would seriously embarrass navigation therein. Cases may be conceived where we should have to condemn a sailing vessel for thus unnecessarily embarrassing the navigation of other vessels. But we do not think the situation presented here was so embarrassing as appellant's counsel contends. Of the three steamers outward bound *La Savoie* passed before the schooner got under way. The evidence from all sides abundantly corroborates the statement of the master of the schooner to that effect. Although as usual there is conflict in the estimates of distances, it seems quite clear that the *Friedrich der Grosse* and the *Amerika* were at least a mile apart. The evidence from the *Friedrich* shows that it was plain to all on board of her that she would pass before the *Neville* could reach the channel. We have then merely the case of a sailing vessel crossing the channel between two steamers a mile apart when a third steamer is coming up on the eastern side of the channel, this on a bright clear day when the movements of all vessels could be seen while they were yet a great way off. Her continuance on her course made it necessary for these two steamers to manœuvre so as not to collide with her, but they were warned of her movements (or could have been warned if they had watched) sufficiently long in advance to enable them so to manœuvre without substantial embarrassment to their navigation. The *Amerika*

saw her over a mile away and avoided collision by porting a little and stopping her engines, but that was because at first the pilot thought he could pass ahead of her, and so did not manœuvre to let her pass ahead of him till he had got quite close. He could equally well have avoided her by reducing his speed sooner. The Main should have seen her at a sufficient distance to have avoided collision by a mere reduction of speed which would not have embarrassed her navigation. We cannot therefore find the Neville in fault for initiating a manœuvre which interfered improperly with the navigation of other vessels in the channel, and, since she kept her own course and speed, we concur with the District Judge in the conclusion that the Main was solely in fault.

The decree is affirmed, with interest and costs.

ALEXANDER v. REDMOND et al.

(Circuit Court of Appeals, Second Circuit. June 30, 1910. Memorandum on Mandate. July 26, 1910.)

No. 262.

1. APPEAL AND ERROR (§§ 1000, 1009*)—EQUITY—DISPOSITION OF CAUSE.

On an equity appeal, the facts as well as the law are open for consideration, regardless of whether there has been a jury trial, and the issues must be disposed of on the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3025-3927, 3970-3979; Dec. Dig. §§ 1000, 1009.*]

2. APPEAL AND ERROR (§ 1175*)—RESERVATION OF MOTION TO REOPEN CASE.

A reservation of a motion to reopen a case does not extend to the circuit court of appeals. Appeal in equity brings the cause up for final disposition.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1175.*]

3. BANKRUPTCY (§ 303*)—PREFERENCES—AGENCY—EVIDENCE—SUFFICIENCY.

Evidence in a suit to set aside an assignment of accounts as a preference in bankruptcy *held* to show that the assignee was agent of defendants.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 303.*]

4. BANKRUPTCY (§ 303*)—PREFERENCES—INSOLVENCY—EVIDENCE—SUFFICIENCY.

Evidence *held* to show that a concern was insolvent when it assigned accounts to a preferred creditor.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 303.*]

5. BANKRUPTCY (§ 166*)—"PREFERENCE"—INTENT.

Under Bankr. Act July 1, 1898, c. 541, § 60, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), providing that a transfer by an insolvent person within four months preceding bankruptcy shall be deemed to be a preference if it enables a creditor to obtain a greater percentage than others of his class, intent of insolvent to give a preference is immaterial; it being sufficient under the express terms of the section that the transferee have reasonable cause to believe that a preference was intended.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 166.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5498, 5499; vol. 8, p. 7759.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. BANKRUPTCY (§ 303*)—PREFERENCES.

Evidence *held* to show that the agent of a creditor in receiving an assignment of accounts had reasonable cause to believe that the debtor was insolvent, and that the transfer constituted a preference.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 303.*]

7. BANKRUPTCY (§ 166*)—PREFERENCES—AGENCY.

A creditor's agent's reasonable cause to believe that a transfer by the debtor is intended as a preference is imputable to the creditor.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 166.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit by Peter Alexander, trustee in bankruptcy, against Henry S. Redmond and others. From a decree for defendants, plaintiff appeals. Reversed and remanded, with instructions.

The trustee in bankruptcy of Born & Co., a corporation, brought a bill in equity against defendants, composing the firm of Redmond & Co., to set aside an assignment made to them by Born & Co. on September 1, 1908, within four months of the filing of the petition in bankruptcy, on the ground that the result of said assignment was to enable the defendants to obtain a greater percentage of their debt than any other creditors of the same class, and that defendants on receiving said assignment had reasonable cause to believe that by said assignment said Born & Co. intended to give a preference. A jury was impaneled to try the issues, but, when plaintiff rested, defendants after stating that they rested subject to request for permission to reopen the case, moved for the direction of a verdict in their favor, which motion was granted.

McLaughlin, Russell, Coe & Sprague (F. C. McLaughlin and Guernsey Price, of counsel), for appellant.

Paul C. Schnitzler, for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). This being an appeal in equity, the facts as well as the law are open for our consideration, as they would be even if the jury had rendered a verdict without direction, and the issues must be disposed of upon the record brought here from the circuit court. No reservation of a motion to reopen the case extends to this court. The circumstance that a jury was impaneled is immaterial. Appeal in equity brings the cause here for final disposition. The sixtieth section of the bankruptcy act provides:

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, made a transfer of any of his property, and the effect of the transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. If a bankrupt shall have given a preference and the person receiving it or to be benefited thereby, or his agent acting therein, shall have cause to believe that it was intended to give a preference, it shall be voidable by the trustee," etc. Act July 1, 1898, c. 541, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445).

Redmond & Co., bankers in New York, had for a period of two years discounted the bankrupt's paper. On August 12, 1908, they bought from it a draft on London for £500, which was not accepted

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

when presented to the drawee. Upon demanding repayment of the \$2,431.80 paid Borrn & Co. for such draft, its representative on August 29th stated that it was in no condition to pay the money then. A conference was arranged for September 1st, and as a result of that conference a written assignment was that day made by Borrn & Co. to H. Thomas, the representative of Redmond & Co., of certain enumerated accounts standing on the books of the former against customers to whom it had sold and delivered goods. These accounts aggregated \$2,615.22, of which \$2,169.81 has been collected and received by defendants.

The district judge "dismissed the complaint on the merits," and judgment to that effect, was entered; in substance, though not in form, a decree dismissing the bill.

The several propositions relied upon by defendants in support of this appeal may be separately considered.

It is first contended that the accounts were assigned not to defendants, but to Thomas, and that the bill could not be maintained because Thomas is not a party defendant. The testimony showed that prior to September 1, 1908, the bankrupt owed Thomas nothing, had had no dealings with him, and did not know of his existence; that the negotiations of that day were had in the bankrupt's office with Schnitzler, counsel for Redmond & Co., who were creditors to the amount of about \$2,500 and insisting upon payment or security; that the arrangement agreed to as a result of such negotiations was that Borrn & Co. should "give an assignment of accounts to secure this claim"; that, when agreement was reached, Schnitzler stepped to the telephone and called up Redmond & Co., whereupon shortly afterwards Mr. Thomen, one of the partners of that firm, arrived with Mr. Thomas, who was introduced to those present, one of the witnesses stating that it is his impression they were informed that he was Redmond & Co.'s cashier or was in the cashier's department. This testimony fairly warrants the inference that Thomas acted in the transaction merely as the agent for Redmond & Co. It was sufficient *prima facie* to put defendants to their proof, and, since there is nothing in the record to controvert or qualify it in any way, we conclude that Thomas was a mere cover for the firm.

It is next contended that Borrn & Co. was not insolvent on the day the assignment was executed. It is not necessary to review the testimony at length. The books of the concern were in evidence. They were examined by a competent accountant, who testified to what their entries disclosed. There was a book surplus on that date of about \$25,000, made out by figuring machinery and fixtures at \$18,000 and accounts receivable at over \$100,000 out of a total of \$170,000 assets. The president admitted on the stand that \$50,000 to \$55,000 of these accounts receivable had been dead accounts for a year—nothing paid on them. A year after bankruptcy the trustee had succeeded in collecting less than \$3,000 of accounts receivable in addition to the \$2,100 collected by defendants on accounts assigned to them. The accountant could find nothing recorded in the books sufficient to account for any sudden change of condition intermediate August 1st and November 13th when petition in bankruptcy was filed. We are entirely sat-

ified that the condition of Borrn & Co. on September 1, 1908, was exactly what its counsel told Schnitzler it was at the interview on that day—"hopelessly insolvent."

It is next contended that complainant has not proved an intent to give a preference. This was the ground on which the district judge decided the cause holding that, although "all the parties suspected that it was an illegal preference, the bankrupt corporation was in hopes that, by the help of its other creditors, it might weather the storm, and, expecting this, did not intend to give Redmond & Co. more than the other creditors." We do not think the "intent" of Borrn & Co. is material because the statute expressly provides that a transfer by an insolvent person within the four-months period shall be deemed to be a preference, if its effect will be to enable any creditor to obtain a greater percentage than others of his class. The result of the transfer and not the mental attitude of the transferrer is made the test. The last part of section 60, quoted *supra*, provides that in order to set aside a preference by suit against the transferee it must be shown that he "had reasonable cause to believe that it was intended thereby to give a preference." But it is surely enough to show that he had reasonable cause to believe that there was such intent, without inquiring into the actual mental attitude of the person from whom he receives the property transferred. If he has reasonable cause to believe that that person is insolvent and has also reasonable cause to believe that the effect of the transfer will be to enable the transferee to obtain a greater percentage of his debt than any other creditor of the same class, the requirements of the concluding part of section 60 are fully met.

At the interviews held on September 1st which resulted in the execution of the written transfer of book accounts there were present Frank Borrn, president of the company; Carlos Borrn, its secretary; Harris, counsel for a creditor; Ahrens, a creditor; Bond, counsel for Borrn & Co. Harris testified: That, Frank Borrn having stated to Schnitzler that the business of the firm was in the hands of certain of his creditors, witness interposed, and said that "that was hardly a correct statement of Mr. Borrn." That he represented a large creditor at Rochester, and that he was then in New York, not in connection with the claim he represented, but in connection with a proposed deal by virtue of which C. H. Tenney & Co. was to take over the hat business of Borrn & Co. That he showed Schnitzler a preliminary agreement relative to that matter, which he had been discussing with Tenney & Co. That he (witness) had ascertained the concern (Borrn & Co.) was bankrupt, and that the only salvation that he saw for the creditors was the opportunity to make a deal with Tenney & Co., and for that reason he wanted Redmond & Co. to be indulgent about their claim. That in reply Schnitzler insisted on payment, saying that, if he could not do anything else, he would throw the firm into bankruptcy. That some one suggested, he is not sure who it was, that there be a transfer of accounts. That he said he "didn't think that would be any good," and Bond said the same thing. That Ahrens said to Schnitzler that he did not see why his client should get a preference over himself, to which Schnitzler replied that he thought they

were entitled to a little preference over the rest of them, because it had not been owing so long, and they (R. & Co.) had taken it under a misapprehension. That, after further discussion, Schnitzler said: "I will take this assignment and take my chances on it, if you people will permit it to be given." That in about an hour the papers were prepared, whereupon, referring to them, Bond said: "Well, if you want this, all right, but I don't think that it is worth the paper it is written on." That witness said: "I don't think it is worth that if this thing goes into bankruptcy." That Schnitzler replied: "Well, go ahead and fix it up, and I will take my chances." That thereupon Schnitzler called up Redmond & Co. and Thomen and Thomas came in, the latter bringing \$2,500 in cash which he turned over to Borrn as soon as the assignment was executed, and which thereafter Borrn handed to Thomen. Frank Borrn testified to the same effect, saying that he was the one that suggested the transfer. Bond gave similar testimony, adding that he personally stated to Schnitzler that Borrn & Co. were hopelessly insolvent, also that, when Schnitzler called up Redmond & Co., he heard him ask for Thomen to come at once and bring \$2,500 in bills. Ahrens and Carlos Borrn corroborated Harris' account of what took place. There is no contradiction of any part of it. Whatever may have been the hopes and expectations of the officers of Borrn & Co. as to their being able with outside help to weather the storm, we are satisfied that when the transfer was made the agent of Redmond & Co. had reasonable cause to believe that Borrn & Co. was insolvent, and that the effect of the transfer would be to enable them to obtain a greater percentage of their debt than other creditors of the same class in the event of the insolvent not being able to secure further capital to enable it to go on and pay all its debts in full. We think such "belief," with which on the proof Redmond & Co. are chargeable, must be held to be a "belief" that it was "intended thereby to give a preference."

The decree is reversed, with costs, and cause remanded, with instructions to decree in conformity with this opinion.

Memorandum on Mandate.

PER CURIAM. The defendants-appellees ask that the order for mandate provide that the cause be remanded for a new trial, instead of instructing the district court to decree in conformity with the opinion of this court, which is the usual form.

The question presented in this application has been considered and disposed of in the opinion already filed. The cause did not come here upon a writ of error to review judgment following a trial at law; the proceeding was in equity and the appellate court in an equity cause disposes of the whole cause on the record presented to it, without sending it back for a second trial. The practice of trying equity suits in the court of first instance according to the forms of actions at law apparently invites confusion and mistakes, but that is no reason why the well-settled practice in equity appeals should be changed.

VOGEMAN et al. v. RAEBURN et al.

(Circuit Court of Appeals, Second Circuit. July 1, 1910.)

No. 268.

ADMIRALTY (§ 66*)—LIBEL—AMENDMENT—CONFORMITY TO PROOF.

Where, on a libel for breach of a charter party, respondents admitted liability, and there was uncontradicted proof of substantial damages, libelants having pleaded a mistaken measure of damages, the court properly exercised its discretion in permitting an amendment of the libel to conform to the proof by inserting a demand for damages occasioned by the loss of profits in respect of the transportation of such cargo as would have been carried on the vessel.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 533; Dec. Dig. § 66.*]

Appeal from the District Court of the United States for the Southern District of New York.

Libel by Heinrich Vogeman and others against John Raeburn and another for breach of a charter party. The Commissioner awarded damages, fixed at \$2,061.37, and defendants appeal. Affirmed.

J. Parker Kirlin and Charles R. Hickox, for appellants.

Wallace, Butler & Brown (James K. Symmers, of counsel), for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. In October, 1900, the libelants chartered the respondents' steamship *Miramar* for a voyage from New York to Europe and return. The ship was not tendered, as provided in the charter and, there being no question as to its breach, the case was sent to a commissioner to compute the amount of libelants' damages. After carefully considering the testimony he found:

That but for the respondents' breach of charter, the libelants would have made in freight of the steamship <i>Miramar</i> the sum of.....	\$19,857 05	
To earn the same libelants must have paid for charter hire	11,736 90	
For port charges.....	3,770 53	
For coal.....	2,288 25	17,795 68
Leaving as libelants' net freight.....		\$2,061 37

This is a fair and conservative estimate and as favorable to the respondents, as is justified by the evidence. It would appear from the record that respondents offered no proof and did nothing to assist the libelants although many of the essential facts were in their exclusive control.

For instance, they refused to produce the log book and much time was taken in proving facts regarding the speed of the *Miramar*, and other facts, which the log book should have shown at a glance.

It is fair to assume that if the amount of the award could have

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 180 F.—7

been reduced by the facts recorded in the log book it would have been produced.

The testimony taken before the commissioner was not objected to by the respondents upon the ground that it tended to support a measure of damages not alleged in the libel. Both parties filed exceptions to the report and the libellants moved for an amendment conforming the pleadings to the proofs by inserting a demand for damages occasioned by the loss of profits in respect of the transportation of such cargo as would have been carried by the *Miramar*.

The motion was granted and this action of the court is assigned as error; it is, indeed, the principal point argued.

We have, then, an admitted liability of the respondents to respond in damages, uncontradicted proof showing substantial damages and an order of the district judge permitting an amendment conforming the libel to the proofs. This action of the judge was entirely within his discretion and was, we think, a wise exercise of that discretion. Unquestionably the libellants were damaged by the failure of the respondents to keep their agreement to deliver the ship. Without objection, on the ground that the libel was defective, the libellants proved their damages and it would seem almost a miscarriage of justice to deprive them of the amount thus lost because the pleader based his claim for damages upon a mistaken theory. The respondents were in no way misled, the course of the trial would have been the same if the libel, as amended, had been originally filed.

The allowance of the amendment was not an abuse of discretion. *Davis v. Adams*, 102 Fed. 520, 42 C. C. A. 493; *The Wildenfels*, 161 Fed. 864, 89 C. C. A. 58; *Southern Express Co. v. Platten*, 93 Fed. 936, 36 C. C. A. 46.

The decree is affirmed, with interest and costs.

NOTE.—The following is the opinion of Adams, District Judge, filed in the court below:

ADAMS, District Judge. This was an action brought in May, 1901, by Heinrich Vogemann et al. against William H. Raeburn et al. to recover the damages said to have resulted from a breach of a charter party, dated October 23, 1900, of the steamship *Miramar*, hired to the libellants, to commence service after arriving in New York, where she was due on the 27th of October, 1900. The libellants further allege:

"Fourth.—The libellants have performed all the terms and conditions of said agreement or charter party on their part to be performed, but the respondents have refused to permit the steamship *Miramar* to continue the voyage aforesaid toward New York or to begin the performance of the charter party aforesaid and said steamer has not been tendered to these libellants for use thereunder nor has said charter party been in any respect performed by the respondents, although performance thereof has been duly demanded.

Fifth.—By reason of the premises the libellants have been compelled to obtain and have obtained but at a necessarily increased cost, certain other tonnage for the transportation of the cargo by them engaged for the voyage intended to be made by the steamship *Miramar* aforesaid. But they have been unable to obtain sufficient vessels therefor although due diligence has at all times been used, and have lost the profits in respect of the transportation of such cargo, all to the loss and damage of these libellants in the sum of \$2,000."

The answer admitted that the steamer was chartered as alleged and as follows:

"Fourth.—They deny the matters alleged in the fourth article of the libel, except that they admit that the said Steamship *Miramar* did not proceed to

the port of New York, and that the said steamship has not been tendered to H. Vogemann, for use under the charter party of October 23, 1900.

They further allege that said Steamship Miramar did not proceed to the port of New York, and was not tendered to H. Vogemann, such tender having been waived as hereinafter set forth. * * *

Further answering, and as a separate defense herein, the respondents allege that the said charter of October 23, 1900, was signed 'by authority of owners and for myself as charterer. (Signed) H. Vogemann,' and contained the clause, 'charterers to have the option of cancelling if steamship not ready 31st October.' Said steamship Miramar when chartered, was at, or due at Tybee, near Savannah, Georgia, and was duly ordered to proceed to New York, to enter upon the charter to the libellants. On October 24th, said vessel duly sailed from Tybee for New York. On her voyage, and without fault on the part of the said steamship, or of these respondents, the said vessel became disabled and was towed into the port of Savannah, for repairs. Subsequent thereto, and before October 31, 1900, the said H. Vogemann was informed and knew that the said vessel could not reach New York, on or before October 31, 1900. Upon the receipt of such information, he entered into negotiations with the respondents, for a recharter of the said Steamship Miramar, upon other and different terms than those contained in the said charter party of October 23, 1900, by which the obligation of tendering said vessel at the port of New York, under the terms of said charter party of October 23, 1900, as respondents are advised, was waived by the charterer. The respondents, nevertheless, offered to cause the said steamship to proceed after her repairs were completed, to the port of New York, and enter upon a performance of said charter party of October 23, 1900, but the charterer neglected and refused to reply specifically to such offer, and wilfully conducted himself with the intention of misleading, and actually did mislead the respondents.

On information and belief the respondents allege that no damage has accrued to the libellants in the premises, and they further allege that if any damage has accrued, it was caused solely by the action and conduct of the said H. Vogemann, and not by any fault on the part of the respondents."

When the case was thus at issue it came on for trial February 7, 1902, and after the introduction of 3 exhibits for the libellants but no testimony and the respondents having failed to introduce any evidence, it was referred by interlocutory decree to a commissioner March 3, 1902, which, *inter alia*, provided:

"Ordered, adjudged and decreed that the libellants have and recover from the respondents the amount of the damages, if any, by them sustained, by reason of the matters and things alleged in the libel herein, with interest."

Nothing was done in the matter until March 6, 1906, when the libellants moved for a commission to Glasgow. The order was entered but no commission was issued, because the libellants did not take the further proper steps to obtain one. On the 21st of June, 1906, certain depositions were taken on behalf of the libellants in Philadelphia which were filed here July 6, 1906. The deponents were George M. Mason, John D. Spence and Robert C. McMurchy. Mason testified in brief that he was not the master of the Miramar at the time of the matters in controversy here. He gave testimony, however, with reference to voyages since January, 1905. Spence testified that he was not on the vessel in 1900 but joined her as chief engineer on the 10th of September, 1904. He produced logs covering from the 11th of June, 1905 and gave some testimony respecting different kinds of coal and their steaming qualities. Mr. McMurchy testified that he joined the Miramar in 1900 as chief officer and was on her when she put into Savannah on her way to New York to enter upon the charter in this case and went from there to Glasgow, Scotland. He also gave some testimony with respect to the vessel's speed. These depositions were duly returned.

Upon them and the testimony of several witnesses for the libellants, examined before the Commissioner, no evidence having been offered on behalf of the respondents, the Commissioner reported that the libellants were entitled to recover \$2,844.72.

Upon the filing of the report, the libellants moved to amend their libel so that instead of alleging (Par. 4 of libel, *supra*) loss through having been compelled to obtain other tonnage and being unable to obtain sufficient vessels to replace the Miramar, they seek to allege as follows;

"Fifth: By reason of the premises the libellants have lost the profits in respect of the transportation of such cargo as would have been carried on the 'Miramar,' all to the loss and damage of these libellants in the sum of Thirty-five hundred dollars (3,500)."

The motion to amend has been strenuously opposed by the respondents, principally upon the ground of inconsistent sworn statements, which it is contended constitute a variance. It is, moreover, suggested by them that if the variance is not fatal, it proves the lack of knowledge on the part of the libellants as to whether or not they actually lost any opportunity to carry cargo by means of their inability to load the *Miramar* and creates an uncertainty as to the facts which should prevent the recovery of anything more than nominal damages.

The libellants certainly were rather lax in their method of proceeding and it inclines me to support the respondents' claim for the enforcement of strict rules with respect to an amendment but in looking through the case, they seem to have substantiated a claim for actual damages which it would seemingly be unjust to deprive them of on technical grounds. I therefore allow the amendment.

The exceptions do not present any features which require discussion. The Commissioner has apparently reached a just result and all of the exceptions will be overruled, excepting that the item of interest, \$733.35, allowed by the Commissioner, will be stricken out. There could have been no recovery until the granting of the amendment and as that was only reached by this decision, it seems proper that interest should be excluded.

THE HARLEM RIVER NO. 2.

(Circuit Court of Appeals, Second Circuit. June 14, 1910.)

No. 240.

TOWAGE (§ 11*)—INJURY TO TOW BY STRIKING BRIDGE PIER—LIABILITY OF TUG.

A tug with a loaded coal barge on each side was passing up Harlem river, and when about to pass through the east draw of the Willis Avenue Bridge a large tug with a car float at her side appeared across the channel in front, entirely obstructing the passage, and in endeavoring to back out, there being an ebb tide running up the river and strongly against the eastern bank, the barge on the port side of the tug struck against an obstruction four feet below the high-water line on the piling around the central pier of the bridge and was injured. The east draw was 120 feet wide, and the tug and tows were 61 feet. The west draw was obstructed by vessels which prevented a view up the river. *Held*, that the tug was not negligent and could not be held responsible for the combination of circumstances which placed her in a position from which she could not extricate herself without great danger of striking one side or the other even by the most careful navigation, nor was it a fault that her master did not know of the submerged obstruction which caused the injury.

[Ed. Note.—For other cases, see *Towage*, Cent. Dig. §§ 11-23; Dec. Dig. § 11.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by Warren A. Leonard against the steam tug *Harlem River No. 2*; James H. McConnell, claimant. Decree for respondent, and libelant appeals. Affirmed.

On appeal from a decree dismissing a libel filed by the owner of the scow-barge *Isabella* against the steam tug *Harlem River No. 2*, charging the tug

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

with negligent towage in bringing the barge into collision with the central abutment of the Willis Avenue Bridge, which crosses the Harlem river.

On the morning of September 18, 1907, the *Isabella* laden with coal was taken in tow by the steam tug *Harlem River No. 2* at 96th street, East river, destined for 136th street, Harlem river. The *Isabella* was on the port side of the tug and another coal barge, the *Eureka*, was upon her starboard side. The tide was ebb, running from two to three knots an hour and, at the Willis Avenue Bridge, set strongly across towards the Bronx side of the river and against the right-hand abutment, which was of stone. The left-hand draw of the bridge was, at the time in question, filled with car floats with cars thereon, making it impossible to see through the draw and up the river beyond. When the *No. 2* was about 250 feet from the bridge her pilot observed *Transfer No. 7* with a large car float crossing from the Manhattan to the Bronx side of the river, directly across the passageway which he was to take. Seeing that it was impossible to pass, he reversed and, in order to avoid striking the stone abutment on the Bronx side, brought the port quarter of the *Isabella* against the central pier, causing the injury complained of.

Carpenter & Park, for appellant.

James J. Macklin and De Lagnel Berier, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge (after stating the facts as above). The combination of circumstances which brought about the collision with the central abutment of the bridge was one for which the tug cannot be held responsible. The tide was ebb, setting upstream towards the Hudson river and against the Bronx abutment of the bridge. The tug was proceeding up the river with a tow on each side, the *Isabella* on the port side and another coal barge, the *Eureka*, on the starboard side. The *Isabella* was towed stern first at the request of her master, the entire width of the flotilla being about 61 feet. The width of the draw on the Bronx side was 120 feet, leaving a space of about 30 feet on either side, assuming that the tug navigated directly in the center of the draw. The Manhattan side of the draw was choked with car floats, making it impossible to see up the river on that side for some distance. As the *No. 2* approached, the large tug *No. 7*, with a railroad float loaded with cars on her starboard side, projected herself without warning directly across the draw. The *No. 2* was confronted with a sudden peril for which she was in no way responsible. She could not proceed on her course without collision with the float. As the tide was setting across the draw, it was a difficult manoeuvre to back without coming in contact either with the piling surrounding the central abutment or with the Bronx abutment, which was of stone. She did collide with the piling around the central abutment. No fault can be predicated of her action in this regard. It would have been remarkable if she had been able to stop and back her unwieldy tow against a cross tide without striking one or the other of these abutments. It is said that she should have signalled her intention to go through the draw, but we are referred to no rule requiring her to do so. She was navigating on the right-hand side of the river, intending to pass through the right-hand draw. There were no boats coming down the river and apparently her course was clear. Undoubtedly there was grave fault somewhere—first, in permitting the car floats to tie up in the western draw, not only obstructing the chan-

nel but the view of navigators going up and down the river; second, in permitting the piling around the central pier to become out of order, and third, in permitting the unwieldy car float to close up the easterly draw without warning of her intention so to do. For these faults, however, the No. 2 is in no way responsible. It is said that she should have had a lookout, but we fail to see how a lookout would in any way have averted the disaster. He could have seen nothing which the pilot of the tug failed to observe. It is true that one of the witnesses, the master of the steam tug Mattie, which was following the No. 2, says that he saw the railroad float crossing the eastern draw when he was at 122d street, which is four blocks from the bridge, but later on in his testimony he makes it clear that it was not his intention to convey this impression. He says that when he saw No. 7 she was entering her slip on the Bronx side of the river and entirely clear of No. 2 and her tow and that he did not see the car float when it was obstructing the passage. Indeed, from the testimony and the diagrams furnished, we think it would be well nigh impossible to see the car float at the point first indicated by the witness.

This brings us to what are practically the only questions in dispute, namely: Was the Isabella injured by contact with the central pier, and if so, was the injury occasioned by conditions the existence of which the master of the tug knew or ought to have known? Assuming that the first question should be answered in the affirmative, we proceed to an examination of the second. The master testified that he did not know the condition of the spiling around the central pier below the high-water line. The testimony indicates that the obstacle which caused the injury to the Isabella was over four feet below the high-water line. A witness who made photographs at low water, after the accident, testifies to the dilapidated condition of the central pier, but we think it would be establishing too stringent a rule to hold tugs liable because their masters are not acquainted with the condition of the abutments of all the drawbridges along the river which are only visible at low water. In view of all the circumstances we cannot say, having in mind the other perils which confronted him, that the master of the No. 2 was at fault by reason of the contact with the central pier. The tug was neither a common carrier nor an insurer. The highest possible degree of skill and care was not required of her. A pilot navigating a narrow, crowded tidal stream crossed by many bridges is sufficiently occupied in avoiding visible perils and should not be charged with fault because, for instance, he is unaware of submerged projecting bolt heads in the piling of an abutment which, except in case of an unforeseen emergency, could not cause injury to his tow.

The decree is affirmed, with costs.

CATCHINGS v. CHATHAM NAT. BANK.

(Circuit Court of Appeals, Second Circuit. July 26, 1910.)

No. 312.

BANKRUPTCY (§ 167*)—PREFERENCES.

Where a partner borrowed money of a bank, the notes being signed by him and indorsed by him in the firm's name, payment of the notes to the bank by the firm within four months of the partner's bankruptcy did not constitute a preference to the bank; it not having received any of the bankrupt's property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 282; Dec. Dig. § 167.*]

In Error to the District Court of the United States for the Southern District of New York.

Action by Waddill Catchings, trustee in bankruptcy of Max Scheuer, against the Chatham National Bank. There was a directed verdict for defendant, and plaintiff brings error. Affirmed.

This cause comes here upon a writ of error to review a judgment of the District Court, Southern District of New York, in favor of defendant in error who was defendant below. The action was brought to recover \$16,000, which it was averred defendant had received from the bankrupt within the four months' period, defendant knowing at the time of the transfer that it was intended thereby to give a preference to said defendant. At the close of the testimony a verdict in favor of the defendant was directed by the court.

Theodore Price (Henry S. Dottenheim, of counsel), for plaintiff in error.

Steele & Otis (F. H. Edwards, of counsel), for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). The facts are somewhat complicated, but, when they are fully stated, it will appear that the question presented is a simple one and has already been decided by this court.

Max Scheuer was petitioned in bankruptcy on January 9, 1906, having been insolvent for several months previously. From 1880 to 1892, he was a member of the firm of S. Scheuer & Sons, composed of his father and two of his brothers, Ralph and Isaac. In 1892 the father died and the three sons continued the business under the firm name. Max was the business man of the firm from a financial standpoint, who arranged for loans and dealt with the banks. In 1892, before his father's death, he negotiated a loan from the bank on his own note for \$750, indorsing it in the name of the firm because the bank officers told him they required two names on all discounted paper. The firm and Max had separate accounts, and he deposited the proceeds in his own account. The loan was from time to time renewed, and was gradually increased until in 1903 the loans aggregated \$16,000, at which sum they continued. The proceeds were deposited in Max's account, and as notes became due he paid them with his personal checks. Part of the money loaned, Max informed the bank, was for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

his personal use and part for assessments on real estate owned jointly by himself and his father and later by him and his father's heirs. In December, 1905, the loan was represented by four notes of \$4,000, each falling due January 8th, February 19th, March 12th, and April 11th, respectively, all signed by Max, and all indorsed by S. Scheuer & Sons. Besides this loan to Max the bank was creditor of S. Scheuer & Sons to the amount of \$60,000. The evidence seems to indicate that part of that at least was on the notes of the firm, indorsed by one or other of the partners, but it may be that some part was represented by paper of customers of the firm which they had discounted. It is not material how it accrued. The amount of indebtedness is conceded.

Toward the end of December, 1905, Ralph informed the president of the bank that Max had been guilty of irregularities, that he had been stealing from the firm on a large scale and it was necessary to break with him, that they no longer wanted to continue in business with him. He also told the president that the real estate his father held had been sold. He asked that the direct indebtedness of the firm should be renewed, so that they could be continued in business. This the bank's officer agreed to do and to advance further loans, and witness said that he would assume the indebtedness represented by Max's notes with the firm's indorsements. Subsequently as each note came due it was paid by the firm with its own check.

On January 4, 1906, a written agreement was entered into between Max and Ralph whereby the former sold, assigned, and set over all his right, title, and interest in all the assets of the partnership and the latter agreed to pay therefor the sum of \$16,000 by assuming the payment of the four notes.

In *Mason v. National Herkimer Co. Bank*, 172 Fed. 529, 97 C. C. A. 155, we had under consideration the question as to the effect of payment of a bankrupt's note by the indorser who upon such payment credits the amount against an indebtedness due by such indorser to the bankrupt. The proposition was contended for that the bank has thereby received a preference. We held that:

"The one thing absolutely essential to a preference is that the bankrupt transfer some portion of his property to the creditor. If the creditor receive none of the bankrupt's property, there is no preference. And that is the primary difficulty with the complainant's case. The defendant bank received no property or money of the Newport Company. The Sheard Company as indorser of the note took it up and paid its own funds therefor."

This ruling is controlling of the case at bar. A distinction is sought to be made by suggesting that the firm was not liable on these notes; but we are not satisfied that such is the case. The signature of the firm's name was by the partner who had charge of the financial business of the concern, the same partner who signed the firm's name as maker on the notes which one or other of the partners indorsed. The bank was not chargeable with knowledge of the dealings of the partners between themselves, or with what arrangements they might have made as to how money should be borrowed by discount of notes and how the proceeds of such notes should be distributed. Apparently when the bank and Ralph made their arrangements the former could

have obtained judgment against the firm if it had defaulted on the notes which bore its indorsement, and nothing in the record satisfies us that such appearance was deceitful.

The judgment is affirmed.

In re OZARK COOPERAGE & LUMBER CO.

(Circuit Court of Appeals, Eighth Circuit. May 3, 1910.)

No. 100.

BANKRUPTCY (§ 184*)—SALE OF PROPERTY BY BANKRUPT—VALIDITY—SUFFICIENCY OF DELIVERY.

Petitioner contracted in advance for the purchase of the lumber sawed at bankrupt's mill at stated prices for the different grades. The contract provided that as sawed the lumber should be piled in a specified manner: that twice each month petitioner should have the new piles estimated and should then make a payment thereon of \$10 per thousand, and have each pile numbered and branded with its initials "O. C. & L. Co.," and that such acts should constitute a full delivery of the same. *Held* that, considering the nature of the property, such delivery was sufficient under Rev. St. Mo. 1899, § 3410 (Ann. St. 1906, p. 1940), providing that "every sale made by the vendor of goods and chattels in his possession or under his control, unless the same be accompanied by delivery in a reasonable time, regard being had to the situation of the property, and be followed by an actual and continued change of possession of the things sold, shall be held to be fraudulent and void as against the creditors of the vendor or subsequent purchasers in good faith," and that petitioner acquired title and possession of the lumber so estimated, set aside and marked within four months prior to the bankruptcy as against the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 275; Dec. Dig. § 184.*]

Petition for Review of Proceedings of the District Court of the United States for the District of Missouri, in Bankruptcy.

In the matter of Joseph H. Huggins, bankrupt. On petition by the Ozark Cooperage & Lumber Company to review an order of the District Court. Reversed.

George B. Webster, for petitioner.

Frank Kelly, for respondent trustee.

Before HOOK and ADAMS, Circuit Judges, and J. B. McPHERSON, District Judge.

HOOK, Circuit Judge. This petition to revise involves the ownership of 245,000 feet of hardwood lumber sawed at mills near Campbell, Mo., belonging to Joseph H. Huggins who was adjudged a bankrupt. The petitioner, the Ozark Cooperage & Lumber Company, claims by purchase from the bankrupt before the commencement of the proceeding in bankruptcy. It is not questioned that the transaction was in good faith, that the petitioner paid a substantial part of the purchase price and that both parties intended the title to the lumber should pass. The narrow question is whether there was such a delivery as is required by a Missouri statute. It is a question of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

local law. *Security Warehousing Co. v. Hand*, 206 U. S. 415, 27 Sup. Ct. 720, 51 L. Ed. 1117; *Knapp v. Milwaukee Trust Co.* (March 7, 1910), 216 U. S. 545, 30 Sup. Ct. 412, 54 L. Ed. —; *Bankruptcy Act*, § 67e, 70a (Act July 1, 1898, c. 541, 30 Stat. 564-566 [U. S. Comp. St. 1901, pp. 3449, 3451]).

The Missouri statute provides that "every sale made by the vendor of goods and chattels in his possession or under his control, unless the same be accompanied by delivery in a reasonable time, regard being had to the situation of the property, and be followed by an actual and continued change of the possession of the things sold, shall be held to be fraudulent and void, as against the creditors of the vendor, or subsequent purchasers in good faith." Rev. St. Mo. 1899, § 3410 (Ann. St. 1906, p. 1940). This statute has been construed to mean that the change of possession must be open, notorious, and unequivocal, such as to apprise the community or those accustomed to dealing with the party that the property has changed hands, and to prevent him from deriving a false credit from the continuance of an apparent ownership. *Claffin v. Rosenberg*, 42 Mo. 439, 97 Am. Dec. 336; *Lesem v. Herriford*, 44 Mo. 325; *Stewart v. Bergstrom*, 79 Mo. 524; *Rice, Stix & Co. v. Sally*, 176 Mo. 107, 75 S. W. 398; *Rice, Stix Dry Goods Co. v. Sally*, 198 Mo. 682, 96 S. W. 1030; *Thomas v. Ramsey*, 47 Mo. App. 84. In *Stewart v. Bergstrom* and *Thomas v. Ramsey* it was held that the mere marking of dots on railroad ties without otherwise indicating a change of dominion or possession was insufficient. In *Rice, Stix Dry Goods Co. v. Sally* the putting up of a sign reading "Sarah H. Sally's Store" in connection with other acts was held to satisfy the law.

In the case at bar it appears from the petition to revise, and there is nothing before us to contradict it, that a written contract between the petitioner and the bankrupt made more than a year before the adjudication provided that petitioner was to purchase the lumber sawed at the bankrupt's mills at designated prices for the various kinds and grades. When sawed, the lumber was to be piled or stacked at or near the mills, according to detailed specifications. Twice each month the petitioner was to cause the lumber so piled to be estimated, and each stack was then to be numbered and branded with petitioner's initials "O. C. & L. Co." and it was to make an advance payment thereon of \$10 per thousand feet. The contract further provided that when the advance payment was made "the act of estimating, marking, and setting aside of the said piles of lumber, shall constitute a delivery of the same for all intents and purposes, to the said Ozark Cooperage & Lumber Company, further delivery being hereby expressly waived." The course specified was pursued. After the lumber in controversy was sawed it was piled as directed in the contract, estimated by the petitioner, each stack was marked legibly in front with petitioner's initials, and the advance payment thereon was made, before the proceedings in bankruptcy were begun. We think this was a sufficient compliance with the statute. It contemplates that in determining whether there has been a sufficient change in possession regard should be had to the character and condition of the

property. Some kinds of personal property may be readily delivered from hand to hand, and interested persons may rightfully expect that method to be observed. In other cases, the character of the property and the circumstances of its situation preclude such a delivery; and other indicia of a change of ownership, such as signs, brands and marks are generally accepted as sufficient. Each case, however, as it arises, should be determined by its own peculiar facts and circumstances. The contract here contemplated that the newly made lumber should remain for a time at the mills, stacked in a particular way for curing and seasoning before shipment. That was perhaps necessary, at any rate it was entirely proper, and it cannot be said that whilst so situated it was not lawfully the subject of barter and sale. The marking of the initials of the name of the purchaser on each pile of lumber where they would most likely be seen was indicative of a status or title which could not have been ignored in good faith by anyone dealing with the prior owner. The statute was not intended to permit a creditor or subsequent purchaser to close his eyes to the obvious significance of things about him. If the signs following the other acts of the parties had read, "This lumber belongs to the O. C. & L. Co.," it is doubtful a serious contention would have been made, yet having regard to the situation and condition of the property, the customs of business men adapted thereto, and the letter of the statute and its intent, we think that what was done was the equivalent.

The petition to revise is sustained, and the order of the District Court is vacated, with direction to allow the claim of the petitioner to the property in controversy.

NEW YORK & N. J. TRANSP. CO. v. CORNELL STEAMBOAT CO.

(Circuit Court of Appeals, Second Circuit. June 14, 1910.)

No. 254.

TOWAGE (§ 11*)—SINKING OF TOW—LIABILITY OF TUG.

A tug *held* not liable for the sinking of a barge, which filled and sank where she had been left by the tug, after the breaking of the towing bitt, on the ground of negligence in so leaving her; the evidence tending to show that the sinking was due to water which splashed into the hole left by the broken bitt, and could have been prevented by the exercise of proper care by her master.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11-23; Dec. Dig. § 11.*]

Appeal from the District Court of the United States for the Eastern District of New York.

Suit in admiralty by the New York & New Jersey Transportation Company against the Cornell Steamboat Company. Decree for respondent, and libellant appeals. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The following is the oral opinion of the District Court, by Chatfield, District Judge:

I am satisfied from the testimony that the question of possible landing at Third street had nothing to do with this matter. The tug Cleary, acting as helper to the tug Terry, which was doing the towing, having properly taken one boat to the dock and come back for the other, was unable, in the ordinary course, to take the second boat to the same dock, and, seeing that the dock could not be made, went on to Newtown creek. The only thing that had anything to do with the sinking of the boat, which has been proven by the libellant, was the breaking of this bitt, which was undoubtedly caused while the boat was going ahead, but which was due to a sudden strain in moving the boat alongside of the other barge. The bitt apparently broke because it was deficient in strength, and that was something that could not be apparent to either the persons towing or to the owners of the barge upon a superficial examination.

Nothing has been shown to indicate any cause for the sinking of the boat, except the splashing of the water into this hole that was made in the boat. According to the evidence the boat did not rest on the bottom until after she had sunk, to a certain extent, at least. The testimony of all the witnesses shows that the only possible cause of the sinking was that water got into the boat, and libellant has shown absolutely nothing to explain how that water got into the boat unless it went through the hole. There is a question as to whether the captain of the tug properly maneuvered the boat when attached as she was by what is called a "strap," and whether after an accident occurred in which the bitt was broken his leaving the boat under those circumstances was negligence; also if there was negligence in leaving the boat under these circumstances, whether that was more than a breach of the contract of towing.

The libellant has proven no negligence so far as the method of leaving the boat is concerned, nor has he shown anything for which the tugboat would be responsible, unless the boat was too heavily loaded, and unless the danger from the hole was so apparent that he should not have left the boat to shift for herself. Aside from those questions, there was no negligence on the part of the tug in leaving the boat to be looked after by her captain; and, if the sinking occurred through the captain's failure to pump her out, that should be considered in reference to the negligence of the tugboat, if any, in leaving her there. I am inclined to think that the captain could have prevented the sinking of the boat if he had taken care of the boat; the only cause shown for the sinking of the boat being the slopping in of the water. It is not the question whether he could have done something at the time he found she was sinking. It is the question whether he could have done something before that by taking proper care of his boat. I am inclined to think that is the point of the case. I am bound to find on the evidence that the boat did not careen until after she was on the bottom. All the witnesses say that the boat did careen, but that was after there was some water in her.

I think I will dismiss the libel, for the reasons that I have stated.

Wray & Callaghan and Stephen Callaghan, for appellant.
Amos Van Etten, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Decree affirmed, on opinion of the District Court.

In re J. B. BREWSTER & CO.

Appeal of BREWSTER & CO.

(Circuit Court of Appeals, Second Circuit. June 30, 1910.)

No. 258.

BANKRUPTCY (§ 317*)—ALLOWANCE OF CLAIMS—COSTS OF SUIT.

Bankr. Act July 1, 1898, c. 541, § 63a, subd. 3, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447), provides that debts of the bankrupt may be proved and allowed against his estate which are founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt. Long before bankruptcy proceedings were instituted, claimant sued the bankrupts to enjoin the use of a certain word in connection with their business. It was stipulated between the parties that the referee should not be limited to the statutory allowance, but that his fee should be at the rate of \$25 per hour or fraction of an hour for the time occupied on the reference, and in preparation of his report, and that each side should pay one-half of the stenographer's bill; the prevailing party to tax his share thereof as a disbursement in the case. The referee announced his decision for claimant, delivering his report to claimant, and directed judgment in its favor. Claimant paid the stenographer's fees, and the referee's fees were paid prior to filing of proceedings in bankruptcy. *Held*, that the items of stenographer's and referee's fees constituted costs in the equity suit.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 317.*]

Appeal from the District Court of the United States for the Southern District of New York.

In the matter of J. B. Brewster & Co., bankrupts. From an order reversing an order of the referee allowing a claim of Brewster & Co., claimant appeals. Affirmed.

This cause comes here upon appeal from an order reversing an order of the referee allowing a claim filed by Brewster & Co. against the bankrupt's estate. The relevant section of the bankruptcy act is 63a, which reads as follows: "Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract, express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments." Act July 1, 1898, c. 541, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447).

Shearman & Sterling (John A. Garver, of counsel), for appellant.
Guernsey Price and Michel Kirtland, for appellee.

McLaughlin, Russell, Coe & Sprague, for trustee.

Richard B. Kelly, for Fifth Nat. Bank of City of New York.

Before LACOMBE, COXE, and WARD, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PER CURIAM. Long before the bankruptcy proceedings were instituted Brewster & Co. brought an equity suit in the state court against the bankrupts to enjoin the use of the word "Brewster" in connection with their business. All the issues were referred for trial. At the commencement of the trial, it was stipulated between the parties that "the referee shall not be limited to the statutory allowance but that his fee shall be fixed at the rate of \$25 per hour or fraction of an hour for the time occupied on the reference and in the preparation of his report." It was further stipulated that each side should "pay one-half of the stenographer's bill on presentation of the same, the prevailing party to be allowed to tax his share of the stenographer's bill on presentation of the same, as a disbursement in the case."

On April 22, 1908, the referee in the suit formally announced to the parties his decision in favor of the plaintiff, and on May 5, 1908, he duly signed and delivered his report to the plaintiff, directing judgment in its favor with costs. The total amount of stenographer's fees paid by plaintiff prior to referee's decision was \$999.99, and the referee's fees were \$3,825, the whole of which was paid prior to the filing of petition in bankruptcy on May 7, 1908. There were other taxable costs, but the present claim is confined to these two items. Judgment in the equity suit, which includes costs and disbursements, was not entered until after May 7, 1908.

The single question here presented is whether these items of claim are to be considered as costs in the equity suit, or as a debt due prior to the institution of bankruptcy proceedings upon a contract express or implied. We are referred to no authorities in the federal courts passing upon this question, nor have we found any. Undoubtedly there was an express contract between the bankrupts and the claimant as to these items, but that contract did not change their character. Charges such as these are part of the necessary expenses of a suit for which the defeated party is to reimburse the successful party. Stenographer's fees are generally covered by some such stipulation, and, when so covered, are taxed with the bill of costs. Referee's fees always go with the costs. The agreement proved here fixes their amount at a sum in excess of statutory rates. We concur with the district judge, and affirm his order.

WRIGHT CO. v. HERRING-CURTISS CO. et al.

(Circuit Court of Appeals, Second Circuit. June 14, 1910.)

No. 324.

1. PATENTS (§ 298*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction against an alleged infringer of an unadjudicated patent should not be granted where the question of infringement is concededly one of fact as to the operation of defendant's device, and the showing is entirely by ex parte affidavits, which are conflicting.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 478; Dec. Dig. § 298.*

Grounds for denial of preliminary injunctions in patent infringement suits, see note to *Johnson v. Foos Mfg. Co.*, 72 C. C. A. 123.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. PATENTS (§ 312*)—INFRINGEMENT—INJUNCTION—FLYING MACHINE.

A preliminary injunction against infringement of the Wright patent, No. 821,393, for a flying machine, *held* not warranted by the proofs.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 312.*]

Appeal from the Circuit Court of the United States for the Western District of New York.

Suit in equity by the Wright Company against the Herring-Curtiss Company and Glenn H. Curtiss. Defendants appeal from an order granting a preliminary injunction. 177 Fed. 257. Reversed.

This cause comes here upon appeal from an order of the Circuit Court, Western District of New York, granting a preliminary injunction in a bill in equity brought for infringement of a patent. The patent is No. 821,393, issued May 22, 1906, to Orville Wright and Wilbur Wright for a flying machine. The patent has never been adjudicated otherwise than on motion for this injunction and upon a similar motion against another alleged infringer.

Emerson R. Newell (J. Edgar Bull, of counsel), for appellants.

Edmund Wetmore and Williamson & Smith (H. A. Toulmin, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. There is no dispute as to the proposition that the question whether or not there has been infringement of this patent, however broadly it may be construed, depends upon the question whether or not in defendant's machine a tendency to spin or swerve is checked or counteracted by the operation of the vertical rudder. That of course—on its theoretical and on its practical side—is a question of fact. The record before us contains numerous affidavits which were not presented until after original decision and which, as both sides state, were admitted upon motion for rehearing without discussion of their contents by the court, but for the purpose of bringing the case more fully before the Court of Appeals.

In this record, upon the question of fact above stated, there is a sharp conflict of evidence, numerous affiants testifying. All their statements are *ex parte* affidavits made without any opportunity to test their probative force by cross-examination. Under such circumstances, it seems to us, irrespective of any of the other questions in the case, that infringement was not so clearly established as to justify a preliminary injunction. See decisions of this court in *Westinghouse v. Montgomery*, 139 Fed. 868, 71 C. C. A. 582; *Hall Signal Co. v. General Railway Co.*, 153 Fed. 907, 82 C. C. A. 653.

The order is reversed, with costs.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WRIGHT CO. v. PAULHAN.

(Circuit Court of Appeals, Second Circuit. June 14, 1910.)

No. 326.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 177 Fed. 261.

Clarence J. Shearn, Israel Ludlow, and James Hamilton, for appellant.

Williamson & Smith (H. A. Toulmin, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. This is an appeal from an order granting preliminary injunction in a suit on the Wright patent which is sued upon in Wright Company v. Herring-Curtiss Company (filed to-day) 180 Fed. 110. At the outset of appellee's brief it is stated that the essential question on which the controversy pivots is whether or not defendant in using the alleged infringing machines utilized the rear vertical rudder in conjunction with the ailerons or adjustable margins in maintaining lateral balance.

In this case as in the other we have conflicting affidavits as to questions of fact, and for the reasons expressed in the Herring-Curtiss we think the order for preliminary injunction should be reversed, with costs.

METAL STAMPING CO. v. GERHAB.

(Circuit Court, E. D. Pennsylvania. August 1, 1910.)

No. 8.

PATENTS (§ 328*)—INFRINGEMENT—THILL COUPLING.

The A. H. Worrest patent, No. 662,050, for improvements in thill-coupling, embracing a spring attached to a moving jaw or dog and to a lever, held not infringed by defendant's patent of a thill-coupling embracing a spring, patented December 18, 1904.

In Equity. Bill by the Metal Stamping Company against Lena Gerhab. Bill dismissed.

Samuel G. Metcalf and Wm. A. Megrath, for complainant.

Howard P. Denison and Francis T. Chambers, for defendant.

HOLLAND, District Judge. This suit was brought to restrain infringement of letters patent No. 662,050, granted November 20, 1900, to Alfred H. Worrest, for improvements in thill-couplings. This patent was assigned by the patentee to the complainant company.

The defenses set up are: (1) Complainant's patent is a mere paper patent; inoperativeness; and abandonment of the coupling attempted

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to be made under it. (2) Prior use. (3) Invalidity by reason of the prior patent art. (4) Noninfringement.

The defense of noninfringement should be sustained. We do not think it necessary to consider any of the other defenses, further than to examine into the prior art, for the purpose of ascertaining the exact extent of the improvement made by the complainant's patentee in the patent in suit.

The complainant's patent, as claimed by the defense, is a mere paper patent. It was never of any practical use, as the shape of the spring was such as to cause them to break, and hence was abandoned as a failure so far as the public was concerned. The invention, as set forth in the specifications—

"relates to improvements in thill-couplings wherein the wear of the coupling-bolt is automatically taken up, and the objects are (1) to close the opening in the thill iron where through the coupling-bolt is connected to the thill by a dog, which automatically takes up the wear of the bolt; (2) to control the dog through a mechanism that is, when in use, practically unobservable; (3) to control the loop through the flat curve spring; (4) to control the spring that closes and holds the dog through a lever, the free end of which swings forward in close relation to the thill iron; (5) to close the dog by the lever that automatically prevents said dog from opening."

The claims which it is alleged the defendant infringes are 2, 3, and 6, and are as follows:

"2. The combination, in a thill-coupling, of the coupling-bolt, a hook-eye connected with the thill and having the opening in the under side, a pivoted dog adapted to enter said opening and engage the coupling-bolt, a lever separated from the dog, and a spring having one end pivoted to the dog and the other end pivoted to the lever, for the purpose specified.

"3. The combination, in a thill-coupling, of the coupling-bolt, a hook-eye connected with the thill and having the opening in the under side, a pivoted dog having a lip thereon and adapted to enter said opening and engage the coupling-bolt, a lever separate from the dog, and a spring having one end pivoted to the lip of the dog and the other end secured to the lever, for the purpose specified."

"6. The combination, in a thill-coupling, of the coupling-bolt, a hook-eye connected with the thill and having the opening in the under side, a dog pivoted below said bolt, a lever fulcrumed to the thill and in front of the dog, a downwardly-curved spring having one end pivoted to the dog below the pivot of said dog and the other end pivoted to the lever between the dog and the fulcrum of said lever, for the purpose specified."

The essential elements of these claims are (1) a coupling-bolt; (2) a hook-eye connected with the thill and having the opening in the under side; (3) a pivoted dog attached to enter said opening and engage the coupling-bolt; (4) a lever separated from the dog; (5) a spring having one end pivoted to the dog and the other end pivoted to the lever; (6) the lever fulcrumed to the thill and in front of the dog.

All these elements appear in the prior patents. In the Worrest patent, No. 646,531, issued April 3, 1900, there appears (1) a coupling-bolt; (2) a hook-eye connected with the thill and having the opening in the under side; (3) a pivoted dog adapted to enter said opening and engage the coupling bolt; (4) arms separated from the dog; (5) a spring having one end pivoted to the lever or arms. The

other end, however, of the spring is riveted to the dog, but operates in effect the same as the spring end pivoted to the dog in the patent in suit. The Bradley patent, No. 646,568, issued April 3, 1900, differs from the prior Worrest patent, issued the same date, in that the moving jaw or dog is not adapted to enter the opening and engage the coupling-bolt.

All the elements found in the patent in suit were found in the early Worrest patent, with the exception of the shape of the spring; and, if the patent in suit is to be sustained, it must be restricted to the precise form of the spring shown in the drawings, and, being so restricted, the defendant's spring does not infringe. It is claimed, and we think satisfactorily so, that this form resulted in the breaking of the spring so frequently that the article never went into public use. The defendant's spring, however, is manufactured under a patent issued to it on December 18, 1906, by the United States Patent Office subsequent to the issuance of the patent in suit. The presumption is not only in favor of the validity of the patent because of this fact, but the evidence in the case shows very decidedly that it is regarded as a valuable thill-coupling by the general public as it has gone into general use.

The defendant's patent has a fixed jaw, called a hook-eye, and a movable jaw or dog, a spring attached to the movable jaw or dog, and to a lever, the same, or similar, to those found in the complainant's coupling. These, we think, are all found in the prior art and are common property. The spring of the complainant, however, differs from those found in the prior art, and the defendant's spring differs from that of the complainant. The coupling as made by the complainant failed to engage the public attention. It was not regarded as satisfactory, because of the tendency of the spring to break. The defendant's spring, which is in the form of a compound curve, so as to increase the resiliency and distribute the strain throughout its entire length, is found to be very durable and safe as a thill-coupling. The centralizing of the spring's tension at any one point, which occurs in a spring having a uniform circular or bow-shaped curve extending from end to end, is avoided by the use of the curve-shaped spring.

The difference, as frequently occurs in patent cases, is very small, but apparently in this case sufficient to turn a failure into a success. The complainant's coupling has failed to perform the work for which it is intended and is not being generally used, while the defendant's coupling is a success and in general public demand and in public use.

We conclude that the defense of noninfringement is sustained, and the bill should therefore be dismissed, with costs.

McCREERY ENGINEERING CO. v. MASSACHUSETTS FAN CO. et al.

(Circuit Court, D. Massachusetts. June 24, 1910.)

No. 667.

1. PATENTS (§ 287*)—INFRINGEMENT—ACTS CONSTITUTING.

A bill to restrain the infringement of a patent for a ventilating device will not lie against county commissioners, merely because a contractor for a public building has placed an infringing device in such building, without its having been specified in the contract and without knowledge on their part of the patent, which device has not been used.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 457-459; Dec. Dig. § 287.*]

2. STATES (§ 191*) — STATE AGENCIES — COURTHOUSES — INJUNCTION AGAINST USE OF INFRINGING DEVICE.

Under the statutes and decisions of Massachusetts, a courthouse is an agency of the state, and county commissioners, when required by statute to build and maintain a courthouse, act therein as representatives of the state, and they cannot be enjoined from operating a ventilating apparatus placed in a courthouse by a contractor for its construction, on the ground that the operation infringes a patent.

[Ed. Note.—For other cases, see States, Dec. Dig. § 191.*]

In Equity. Suit by the McCreery Engineering Company against the Massachusetts Fan Company and the County Commissioners of Essex County, Mass. On pleas. Plea of the County Commissioners sustained, and of the corporation defendant overruled.

Samuel D. Elmore, for complainant.

Stewart, Coolidge & Rand and Roberts, Roberts & Cushman, for defendants.

LOWELL, Circuit Judge. This was a bill in equity to restrain the infringement of letters patent No. 917,185, issued to Taylor for an improvement in ventilation. The bill was brought against a corporation concerned in the furnishing of a courthouse at Salem, in the county of Essex and commonwealth of Massachusetts, and against the three persons who are now county commissioners for that county, apparently in their official capacity. The pleas of the commissioners set forth that, as county commissioners and by virtue of a certain statute, they entered into a contract with a stranger to the present bill for building the county courthouse above mentioned. The contract did not provide specifically for the use of the alleged infringing device, but this was installed by the subcontractor, here defendant, without further connection or communication with the defendant commissioners. The device is installed in the courthouse. It has not been operated by any of the commissioners or by any one else. The defendant corporation's plea is to the same effect, and apparently rests its own defense upon the want of jurisdiction in this court to restrain altogether the use of the device alleged to infringe. The hearing before the court was on bill and plea.

Thus far the commissioners have committed no tort. To put the case most favorably for the complainant, they have, through their

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

agent, bought a patented device from an infringer without satisfying the patentee's claims, being ignorant of their existence. This is not infringement, and the vague charges made in the bill of conspiracy and of profits received by the commissioners are negatived by the plea. Therefore the defendant commissioners have thus far done nothing actionable, and, if they may be enjoined in this proceeding, it is only because they are deemed likely to commit a future tort. This is imperfectly charged against all the defendants generally:

"That the use of said inventions by the said defendants, and their preparation for and avowed determination to continue the same, and their aforesaid unlawful acts in disregard and in defiance of the rights of your orators, have the effect to and do encourage and induce others to infringe."

The defendant commissioners cannot continue an unlawful act which they have not yet begun to commit, and as to them the bill, unamended, must be dismissed on the grounds just mentioned. The complainant may seek to amend, however, and, as the commissioners do not deny their intention to use, an amendment is probable. It was assumed at the argument that they rested their defense on the ground that, while the county of Essex may be a corporation suable, yet the county courthouse is an agency of the commonwealth, and that no injunction will issue to restrain a state from using a courthouse for the state's purpose.

If the defendant's contention concerning the nature of the courthouse is correct, this case is governed by *Belknap v. Schild*, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. Ed. 599, and *International Postal Supply Co. v. Bruce*, 194 U. S. 601, 24 Sup. Ct. 820, 48 L. Ed. 1134. In the latter case the Supreme Court refused an injunction against a postmaster from using an infringing device then leased to the United States. As to the defendant commissioners, the only question here left open is therefore this: Is the county courthouse such an agency of the commonwealth as to be like a post office in the latter's relation to the United States?

This is largely a question to be determined by the statutes and decisions of Massachusetts. In *Morse v. Norfolk County*, 170 Mass. 555, 556, 49 N. E. 925, the Supreme Court of Massachusetts said:

"Courthouses are built and maintained strictly for public purposes. The use of them is not limited to the inhabitants of a county, but it extends to all who have a right to resort to the courts, or to the public offices which are usually contained in courthouses. The expense of providing courthouses is imposed on the counties; but the control of the work of building them is not given to the counties. This control is usually given to the county commissioners, though the Legislature might, if it saw fit, intrust it to persons specially designated for that purpose. For example, the courthouse in Boston was authorized to be built by a special commission appointed by the mayor. St. 1885, c. 377; St. 1886, c. 122; St. 1887, c. 101; St. 1892, c. 288. See, also, *Prince v. Crocker*, 166 Mass. 347, 360, 44 N. E. 446, 32 L. R. A. 610. In short, the Legislature may by general or special laws make such provision as it sees fit in respect to the erection and control of courthouses, and may authorize and require a county to raise and appropriate the necessary money therefor; and in performing such a service, the designated officers, whether county commissioners or otherwise, are acting under the direction of the laws of the state, and not as agents of the county."

In Opinion of the Justices, 167 Mass. 599, 600, 46 N. E. 118, the Supreme Court said:

"They [the county commissioners] have some duties or functions which concern the people of the state at large. But it seems to us that they are essentially a local body. They are elected by the people of a county, and their duties relate chiefly to the affairs and interests of the county. Some of their duties are much like duties performed by selectmen, or by a mayor and aldermen, except that their jurisdiction extends over the whole county. In Nantucket, selectmen by law perform the duties of county commissioners. In Suffolk County, these duties are performed in part by municipal officers."

From a comparison of this language, it seems that the duty of the commissioners to build and equip courthouses is a duty or function which concerns the people of the state at large. Their duty to maintain a courthouse once erected seems to be of the same sort. Rev. Laws Mass. c. 20, generally, and especially sections 5 and 24. For the most part, the use of a courthouse is not that which is limited to the inhabitants of the county. To close the commonwealth's courts is to assail its sovereignty rather than to incommode the citizens of Essex county. Even if ventilation be less necessary to the holding of a court than are light and heat, concerning which proposition no opinion is here expressed, yet to deny ventilation to a courtroom is at the least to embarrass the administration of the state's justice. For these reasons I am of opinion that no injunction should issue to restrain the defendant commissioners from operating the ventilating machinery, even if they thereby infringe the complainant's patent. As to the commissioners, therefore, this bill, amended or unamended, will stand dismissed, without prejudice to an action at law against them individually for infringement.

For what purpose the defendant corporation entered its plea is not clear. Past infringement is not denied, and future infringement is not improbable. That the defendant commissioners are not liable, for the reasons above stated, does not release the defendant corporation from liability. Its plea is therefore overruled.

OLEK v. FERN ROCK WOOLEN MILLS.

(Circuit Court, E. D. Pennsylvania. July 9, 1910.)

No. 684.

NEW TRIAL (§ 75*)—GROUNDS—VERDICT—ADEQUACY.

Where there was sufficient evidence to carry the case to the jury, but in the court's judgment the great weight of the evidence was against plaintiff's right to recover anything, plaintiff's motion for a new trial for inadequacy of the verdict returned in its favor will not be allowed.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 151; Dec. Dig. § 75.*]

At Law. Action by Ignatz Olek against the Fern Rock Woolen Mills. A verdict was returned for plaintiff, and defendant moves for judgment non obstante and for a new trial. Overruled.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Joseph J. Goodman and George Demming, for plaintiff.
F. B. Bracken, for defendant.

HOLLAND, District Judge. The sole reason assigned for a new trial in this case is the inadequacy of the verdict of \$250, returned by the jury in favor of the plaintiff. It was a claim for personal injury resulting to the plaintiff because of the defendant's negligence in not having provided plaintiff with a safe place to work, and further failed to warn the plaintiff of a certain passageway or aisle in the mill of the defendant company in which the plaintiff worked, which resulted, as plaintiff alleges, in his falling over an obstruction in this passageway, through which he was attempting to walk, and which passageway, it was alleged, was insufficiently lighted. There was sufficient evidence of defendant's negligence to carry the case to the jury, but in the judgment of the court the great weight of the evidence was against the plaintiff's right to recover anything.

The defendant in this case objects to the granting of a new trial for the reasons stated, and the court is not inclined, in this case, to sustain the plaintiff's motion on the ground of the inadequacy of the verdict simply because it appears to be illogical. We think the authorities uniformly support the proposition that where the court is of the opinion that the verdict should have been for the defendant upon evidence which would have justified such a verdict, and especially, as in this case, where the preponderance of the evidence was in favor of the defendant, a court should not set aside a verdict simply upon the ground of inadequacy. *Reading v. Texas Pacific Ry. Co.* (C. C.) 4 Fed. 134; 2 *Sedgwick on Damages*, 656.

The motion for a new trial is overruled, and, for the reason that this case was one which was properly submitted to the jury, we refuse to enter judgment on the motion non obstante veredicto.

WILLIAMS v. AMERICAN BRIDGE CO.

(Circuit Court, E. D. Pennsylvania. May 17, 1910.)

No. 858.

MASTER AND SERVANT (§ 170*)—INJURIES TO SERVANT—FELLOW SERVANTS—INCOMPETENCY.

Where plaintiff was injured by the negligence of a fellow servant who was incompetent to perform the work allotted to him by defendant's foreman, and defendant had not exercised reasonable care to ascertain the fellow servant's competency, defendant was liable for plaintiff's injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 336; Dec. Dig. § 170.*]

At Law. Action by Edward H. Williams against the American Bridge Company. Verdict for plaintiff. On defendant's motion for a new trial and for judgment notwithstanding the verdict. Motions denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

John Eckstein Beatty, for plaintiff.
J. W. Bayard and John G. Johnson, for defendant.

J. B. McPHERSON, District Judge. I have gone carefully over the testimony in this case, and am unable to see how the questions in dispute could have been withdrawn from the jury. Under the charge of the court they must have found: (1) That Marter, the plaintiff's fellow servant, was not competent to do the work properly which the defendant's foreman permitted him to undertake; (2) that the defendant did not exercise reasonable care in the effort to ascertain Marter's competency; and (3) that the plaintiff's injury was directly due to Marter's lack of skill. On each of these subjects I think there was sufficient evidence to require its submission.

The motions are refused, and an exception is sealed to the refusal of judgment notwithstanding the verdict.

Ex parte HARLAN et al.

(Circuit Court, N. D. Florida. November 1, 1909.)

1. HABEAS CORPUS (§ 112*)—SENTENCE—CORRECTION ON HABEAS CORPUS.

On application to the federal Circuit Court for habeas corpus by one convicted therein, the court can correct the sentence if it be excessive or resentence, and hence where persons convicted of conspiring to commit a federal offense under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), were sentenced to imprisonment "at hard labor," on habeas corpus proceedings the trial court can amend the sentence *nunc pro tunc* by striking the quoted words, which are not authorized by the statute.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 112.*]

2. CRIMINAL LAW (§ 1208*)—PUNISHMENT—JUDICIAL POWER.

When statutes prescribe particular modes of punishment, a court cannot inflict another, and hence under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), authorizing imprisonment for conspiracy to commit a federal offense, imprisonment "at hard labor" is unauthorized.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3281-3295; Dec. Dig. § 1208.*]

3. HABEAS CORPUS (§ 85*)—EVIDENCE—PARDON—LETTERS.

A letter from the President's secretary to a senator showing a commutation of sentence is of no effect on habeas corpus proceedings by the prisoners; the President's action properly appearing by the warrant of commutation or a certified copy thereof.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 85.*]

4. PARDON (§ 8*)—WHEN EFFECTIVE.

A pardon is not effective until delivered to the prisoner or to some one for him, being until that time subject to withdrawal and being merely a promise of pardon.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. §§ 10-15; Dec. Dig. § 8.*]

5. PARDON (§ 4*)—COMMUTATION OF PUNISHMENT—PRESIDENTIAL POWER—"PREROGATIVE TO GRANT PARDONS."

The constitutional prerogative of the President to grant reprieves and pardons includes the power to commute punishments.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. §§ 4-6½; Dec. Dig. § 4.*]

6. PARDON (§ 13*)—COMMUTED SENTENCE—EFFECT.

Where an original sentence is lawful, execution of the commuted sentence is not affected because the statutes do not permit courts in the first instance to inflict so short imprisonment.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. § 27; Dec. Dig. § 13.*]

7. GRAND JURY (§ 7*)—ORDER FOR DRAWING—EFFECT.

The making of an order for the drawing and attendance of a grand jury is the exercise of a judicial power, which pertains to both judge and court, and the order does not conclude public or private rights in any way, being nothing more than a mere administrative regulation of internal affairs relating to the organization of the court.

[Ed. Note.—For other cases, see Grand Jury, Dec. Dig. § 7.*]

8. GRAND JURY (§ 7*)—ORDER FOR DRAWING—EXECUTION—JUDGE'S PRESENCE UNNECESSARY.

A judge ordering a grand jury need not be present when the order is executed.

[Ed. Note.—For other cases, see Grand Jury, Dec. Dig. § 7.*]

9. INDICTMENT AND INFORMATION (§ 137*)—QUASHING—DRAWING GRAND JURY—RIGHTS OF ACCUSED PERSONS.

If an order for a grand jury is made by the proper authority, its source, whether the court or one of its judges, is of no concern to one afterwards indicted by the jury, but if the drawing is by unauthorized persons, or from persons not properly selected or qualified, the indictment may be quashed.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480-487; Dec. Dig. § 137.*]

10. JUDGES (§ 24*)—DUTIES—PREPARATORY ORDERS.

A federal Circuit Judge should, whenever occasion arises, make preparatory orders for the disposition of business which may come before the court at its next sitting.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 91-98; Dec. Dig. § 24.*]

11. JUDGES (§ 29*)—FEDERAL CIRCUIT JUDGES—POWERS.

A federal Circuit Judge can dispose of any administrative matter in any Circuit Court in his circuit properly ordered at chambers, without personally going into its territorial limits, if his chambers are held in the circuit.

[Ed. Note.—For other cases, see Judges, Dec. Dig. § 29.*]

12. GRAND JURY (§ 7*)—VALIDITY OF ORGANIZATION.

A grand jury drawn by the proper authority and composed of qualified persons is authorized to sit, unless the court of which it forms a part is holding a session at an unauthorized time or place.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 2, 16, 21; Dec. Dig. § 7.*]

13. GRAND JURY (§ 19*)—ORGANIZATION—IRREGULARITIES—WAIVER.

Any irregularity in the organization of a grand jury not affecting their authority to sit is waived by accused going to trial without raising it.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 53-55; Dec. Dig. § 19.*]

14. INDICTMENT AND INFORMATION (§ 10*)—SUPPORT BY EVIDENCE—BURDEN OF PROOF.

A grand jury is presumed to have acted on legal evidence in returning an indictment, until accused meets his burden to show the contrary.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 10.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

15. **INDICTMENT AND INFORMATION (§ 15*)—PROCEEDINGS IN FINDING—REGULARITY.**

On finding an indictment to cure supposed defects in earlier indictments on the same matter, it was unnecessary that the witnesses be recalled and their testimony retaken.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 83-88; Dec. Dig. § 15.*]

16. **INDICTMENT AND INFORMATION (§§ 10, 15*)—FINDING INDICTMENT—JURORS' ASSENT—SUFFICIENCY.**

No formal vote of grand jurors is essential to an indictment, and if one is taken it need not be recorded, an intelligent assent of the jurors being sufficient, and there was sufficient assent, where the foreman stated in the jury room that he would sign an indictment drawn to cure supposed defects in previous indictments, and the whole body returned the indictment with others found in open court.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 50-61, 83-88; Dec. Dig. §§ 10, 15.*]

17. **INDICTMENT AND INFORMATION (§ 196*)—OBJECTIONS—WAIVER.**

Accused waived an objection to the indictment on the ground that the grand jurors did not assent to it, by going to trial without raising the objection.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 628-635; Dec. Dig. § 196.*]

18. **HABEAS CORPUS (§ 27*)—SCOPE OF REVIEW—COLLATERAL ATTACK ON CONVICTION.**

Where on habeas corpus it appears that petitioners were convicted of an offense of which the trial court had jurisdiction, were in lawful custody, were tried on an indictment charging an offense in that district, were confronted with the witnesses, and given a jury trial, and the record does not show infringement of constitutional rights, the conviction cannot be attacked on the ground that the offense if committed at all was committed in another district.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 27.*]

19. **HABEAS CORPUS (§ 85*)—BILL OF EXCEPTIONS—EFFECT.**

A bill of exceptions can be treated as part of the record proper only in an appellate proceeding, being improperly used on habeas corpus to show error by the trial court, and especially on a point which has been affirmed by a higher court, and hence on habeas corpus the bill of exceptions will not be opened to determine from the evidence whether the offense was committed in another jurisdiction.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 85.*]

20. **HABEAS CORPUS (§ 27*)—CONVICTIONS—VALIDITY—IRREGULAR TERM OF COURT.**

An indictment, conviction, and sentence by a court sitting at an unauthorized time are void, the proceedings not being cured by a trial by an appellate court on the record, not de novo.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 27.*]

21. **CRIMINAL LAW (§ 1180*)—APPEAL—EFFECT OF FORMER JUDGMENT.**

A judgment of the Circuit Court of Appeals affirming a conviction does not preclude a subsequent reversal for want of the trial court's jurisdiction, where the question is not presented on the first appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3002-3004; Dec. Dig. § 1180.*]

22. **HABEAS CORPUS (§ 27*)—RIGHT TO RELIEF—VOID CONVICTION.**

If the record in habeas corpus shows that petitioner is detained under a conviction had at an unauthorized term of court, he is entitled to relief

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

on habeas corpus, as having been deprived of liberty without due process of law, in violation of Const. Amend. U. S. 5.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 27.*]

23. COURTS (§ 412*)—UNITED STATES CIRCUIT COURTS—TERMS.

Under Rev. St. § 658 (U. S. Comp. St. 1901, p. 530), providing for terms of the Circuit Court in the Northern district of Florida at Tallahassee on the first Monday in February and at Pensacola on the first Monday in March, the court has every day of the succeeding 12 months in which to sit at each place unless the right to hold court during that period is terminated by final adjournment or by nonattendance at the commencement of the term and failure to instruct the marshal to adjourn to a subsequent day in the term; and, after a term has been regularly opened, a judge's failure to open court on a day of the term to which a recess has been taken, or to appoint a time when court will be resumed does not forfeit the right to resume sittings at any time.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 412.*]

24. COURTS (§ 412*)—FEDERAL COURTS—TERMS.

Under Rev. St. § 658 (U. S. Comp. St. 1901, p. 530), fixing the terms of the Circuit Court in the Northern district of Florida, an order that, pending the absence of the judge, the court be opened and adjourned pursuant to a rule of the court did not constitute a final adjournment.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 412.*]

25. COURTS (§ 113*)—FEDERAL CIRCUIT COURTS—MINUTES—TIME FOR ENTERING.

The clerk of a federal Circuit Court has until the end of term in which to complete the minute entries for the term.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 113.*]

26. COURTS (§ 113*)—FEDERAL CIRCUIT COURTS—MINUTES—METHOD OF ENTRY.

Minute entries by a federal Circuit Court clerk in a record recognized by the court as its minutes are valid though made with a rubber stamp.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 113.*]

27. BAIL (§ 44*)—CRIMINAL CASES—JUDICIAL DISCRETION.

There is no constitutional right to bail after a conviction; it being properly granted or denied as best effects justice, determined in the light of the common law, as affected by acts of Congress.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 145; Dec. Dig. § 44.*]

Right to release on bail pending appeals or writ of error, see note to *Walsh v. United States*. 93 C. C. A. 135.]

Petition by W. S. Harlan, C. C. Hilton, and S. E. Huggins for a writ of habeas corpus. Writ discharged, and prisoners remanded.

The petitioners, W. S. Harlan, C. C. Hilton, and S. E. Huggins, were tried and convicted at the November sitting, 1903, of the Circuit Court at Pensacola, Fla., under an indictment which charged them with combining and conspiring within the Northern district of Florida, to hold, arrest, and return one Rudolf Lanninger to a condition of peonage, and that subsequently the defendants, with the exception of Harlan, committed an overt act, within the said district, for the purpose of effecting the object of the conspiracy. Harlan was sentenced to imprisonment at hard labor for 18 months in the federal penitentiary, at Atlanta, Ga., and to pay a fine of \$5,000, and the defendants Hilton and Huggins were sentenced to like imprisonment for a period of 13 months, and to pay a fine of \$1,000 each. Being in the custody of the marshal under warrants of commitment, issued in execution of the mandate of the Circuit Court of Appeals, to which they had unsuccessfully sued out a writ of error, to reverse their conviction, they petitioned for discharge on habeas corpus, alleging that they were illegally held in custody "without warrant or authority of law, in violation of the Constitution and laws of the United States," because (1) they were sentenced

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to hard labor in the United States penitentiary at Atlanta, whereas the statutes of the United States do not authorize such punishment for the offense of which they were convicted, and the sentences are in excess of the authority of the court, and void; (2) since the passing of the sentences, the President of the United States has commuted the punishment to six months' imprisonment, and there is, therefore, no authority now for the execution of such sentences in the penitentiary, even if otherwise valid; (3) the petitioners were convicted and sentenced for an offense, which if committed, was committed in the Middle district of Alabama, and not elsewhere, and the Circuit Court of the United States for the Northern district of Florida had no jurisdiction to try or sentence them; (4) the grand jury which returned the indictment was not organized as required by law, in that the court was ordered to be held on the 12th day of November, 1906, when in truth and in fact it was convened in the week preceding, to wit, November 7th, 1906; (5) the grand jury which indicted the petitioners had no authority to sit as a grand jury, and the court itself, at the time the convictions were had, was holding neither a special nor a regular term, lawfully authorized to be held; (6) no legal evidence was introduced before the grand jury, authorizing the finding of a true bill, or the indictment upon which the petitioners were convicted. In obedience to the writ the marshal produced the bodies of petitioners and certified as the cause of their detention the convictions and sentences heretofore recited. The United States moved to amend and correct the sentences and warrants of commitment by striking out the words "at hard labor," so that the sentences and commitments would simply be for imprisonment in the penitentiary. The petitioners denied the power of the court to grant the motion or make the correction at a subsequent term, and insisted that the inclusion of the words "at hard labor" in the sentences rendered them a nullity in their entirety, and that petitioners were entitled to an immediate discharge. Petitioners also offered in evidence the record of the trials in the circuit court, including the bill of exceptions reserved on the trial, and insisted it thus appeared on the face of the record, especially in the case of Harlan, that the offense of which the petitioners were convicted had been committed in the Middle district of Alabama and not in the Northern district of Florida. They also offered in evidence an original letter, admitted to be genuine, which read as follows:

"The White House,

"Washington, September 23, 1909.

"My dear Senator: I am in receipt of your letter of the 21st of September concerning the commutation of W. S. Harlan. The Attorney General recommended commutation of Harlan's sentence to six months' imprisonment, and the same as to Huggins and Hilton; and denial as to Gallagher and Grace. The President endorsed the case as follows: 'Commute Harlan's Huggins' and Hilton's sentences as recommended by the Attorney General—As to Gallagher and Grace application denied.'

"Very truly yours, Fred W. Carpenter, Secretary to the President.
 "Hon. James P. Taliaferro, U. S. S. Jacksonville, Fla."

Much evidence was offered touching the manner of making entries on the minutes. These minute entries showed that the Circuit Court had been opened by the presiding judge, the Hon. Charles Swayne, at the commencement of the regular term in March, 1906, and continued in session by adjournments from day to day to the 6th of June. On that day, the court met and made decrees in several cases, which were entered on the minutes, and then without adjourning to any particular day, ordered "pending the absence of the presiding judge of the court, that the same be opened and adjourned in pursuance of rule 13 of the rules of practice of the court." The rule read as follows: "During the temporary absence of the judge, the court shall be deemed opened daily at each of the clerk's offices in the district for the transaction of business on the equity side of the court, and also for the filing of papers and the transaction of business of a general character in the court, and the clerk shall be present in person or by a deputy, and a record of the same shall be entered upon the minutes of the

court upon each day." After the order, the court was adjourned by the clerk and marshal from day to day until the 6th day of November, 1906, when the judge returned and opened the court daily thereafter, until the trial, conviction, and sentences were had in these cases. It was shown that Judge Swayne was the only judge who held the United States courts for the Northern district of Florida during the year 1906, and that he held a Circuit Court at Tallahassee, as late as the 15th day of May, 1906. The civil and criminal minutes were kept in different books, the clerk testifying that some of the entries relating to these cases were completed as late as December 21, 1906, from the records and memoranda made during the trial, and that though these minutes had not been signed by the presiding judge, the bound books in which the minute entries were contained had been and were treated by the court as its minutes during the period covered by them.

The evidence further showed that the clerk used two india rubber stamps. One was used when the presiding judge was present and read as follows: "At a stated term of the Circuit Court of the United States held within and for the Northern District of Florida, begun and held at the City of Pensacola on the — day of —, A. D. 190— present the Honorable Charles Swayne, Judge." Among other proceedings had were the following, to wit: "It was ordered that the court adjourn until tomorrow morning at 10 o'clock." The other rubber stamp, used when the judge was not present, read as follows: "Court was opened pursuant to said order. Present the clerk and marshal. It was ordered that the court adjourn until tomorrow morning at 10 o'clock." The body of the entries was the impression of the stamp, and the interlineations were with pen and ink. The petitioners objected to these entries, insisting that they were mere narratives of past transactions, and were made with rubber stamps, and did not constitute the record of the court.

The minutes and testimony of the clerk show that the Honorable David D. Shelby, United States Circuit Judge, mailed from Huntsville, Ala., on October 23, 1906, the following orders, which were received by the clerk at Pensacola, Fla., on October 24, 1906, to wit:

"Ordered, that there be drawn from the jury box by the clerk and marshal of this court, in accordance with the rules and practice thereof, the names of thirty-six persons, competent and qualified to serve as petit jurors in said court, for whom a venire facias shall issue returnable on the 12th day of November, 1906. October 23, 1906.

"David D. Shelby, United States Circuit Judge.

"Ordered, in accordance with the rules of practice of this court, that a grand jury be impaneled therein on the 7th day of November, 1906, and that the clerk and marshal draw from the jury box the names of twenty-three competent and qualified persons who shall be summoned to serve as grand jurors in said court at said term. October 23, 1906.

"David D. Shelby, United States Circuit Judge."

At the time these orders were made, Judge Shelby was not in the state of Florida, but was in Alabama. In compliance with the orders so made, the clerk and marshal on October 24, 1906, drew the venire for the grand and petit juries, which were organized respectively at the time fixed in the orders, Judge Swayne himself having opened court on the 5th day of November, 1906.

The evidence showed that after the grand jury had found two indictments against the petitioners, it was supposed they were defective, and the United States attorney requested the grand jury to remain in session until he could draw and present a new or third indictment. This he did, explaining wherein the third indictment differed from the others, and that it required the action and consent of the grand jury before it could be presented. He then retired from the room. Several of the grand jurors were called as witnesses. Some of them testified they did not vote on the last indictment, while others testified they did not recollect whether they did or not. All who testified stated they heard no objection to the finding of the bill, and that there was a consultation between the foreman and members of the grand jury in the room when the indictment was read over to them. The

foreman testified: "I think we took no rising vote on the indictment, and I asked if it was consented to, and it was agreed that it was to be signed by the foreman. Probably we took no vote formally." He further testified: "I asked if there was any objection to the indictment, and a good many said no, and others remained silent, and I said, 'I will sign it.'" Immediately after the foreman signed the bill, the grand jurors went in a body into the courtroom, and delivered this indictment, with others found at that term, to the presiding judge in open court. Nothing was then done by any of the grand jurors regarding any of the indictments except the presentation of their formal report, giving among other things the number of "true bills," they had "returned," and asking to be discharged. Counsel for petitioners testified the first intimation he had that no vote had been taken on the indictment came to him on the 30th of October, 1909, as a result of his search a day or two prior to the issue of the writ of the minute entries and for the grand jury docket, and in consequence of answers of several of the grand jurors to his inquiries, and that the petitioners were not aware until then that no vote had been taken upon the finding of the indictment.

After hearing all the evidence, the court discharged the writ, and ordered the prisoners remanded to the custody of the marshal in execution of the sentences which were corrected *nunc pro tunc*, in accordance with the prayer of the motion of the government, but, for reasons stated in the opinion, allowed them to give bail, pending appeal to the Supreme Court, to answer its judgment in the premises.

W. W. Flournoy and J. F. Stallings, for petitioners.
R. P. Reese, Sp. Asst. Atty. Gen., contra.

JONES, District Judge¹ (after stating the facts as above). As the hearing on habeas corpus is summary, and before the court without a jury, and is not governed by technical rules of pleading or evidence, the court allowed petitioners to introduce such evidence as they deemed material to their contentions, without then passing upon their relevancy or legality, reserving decision as to these matters until it came to render judgment on the merits of petitioners' applications.

1. Section 5440 of the Revised Statutes (U. S. Comp. St. 1901, p. 3676) authorizes the court upon conviction of a violation of its provisions, to inflict a "penalty" within certain limits, and imprisonment in the penitentiary for not more than two years. The sentences conformed to the statute regarding the penalty, and the length of imprisonment, but instead of imposing imprisonment in the penitentiary, imposed imprisonment at hard labor in the penitentiary. It is insisted that the sentences, being in excess of the authority of the court, are nullities, and furnish no warrant for detaining the petitioners. Conceding that a sentence to hard labor is in excess of the jurisdiction, and void to the extent of such excess of jurisdiction, the question arises, What is the proper practice as to the issue of the writ of habeas corpus in a case like this? *United States v. Pridgeon*, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631, is much like this in principle, the only difference being that here the application for relief is to the court of original jurisdiction, while there, it was made to another court, in whose territorial jurisdiction *Pridgeon* was confined. The Supreme Court held in that case, that "where a court has jurisdiction of the person and offense, the imposition of a sentence in excess of what

¹ Specially designated, the judge of the district having been of counsel.

the law permits does not render the legal or authorized portion of the sentence void, but leaves only such part of it as may be in excess, open to question and attack." In the conclusion of its opinion, the court was particular to say, "It did not consider it necessary or proper to express any opinion as to what would have been the proper action of the Circuit Court in dealing with the petitioner's application," and refrained from intimating even whether the proper practice would be to deny the writ and leave the petitioner to his writ of error, or to issue the writ of habeas corpus, and commit the prisoner to the custody of the penitentiary officials, with directions to carry out and enforce only that part of the sentence imposing imprisonment according to the rules and regulations of the institution. In *Re Bonner*, 151 U. S. 242-259, 14 Sup. Ct. 323, 326 (38 L. Ed. 149), where the Supreme Court discusses the question at some length, Mr. Justice Field speaking of cases where the conviction itself is correct, and "the excess of jurisdiction on the part of the court being in enlarging the punishment or enforcing it in a different mode or place than that provided by law," says:

"In such case, there need not be any failure of justice, for where the conviction is correct, and the error or excess of jurisdiction has been as stated, there does not seem to be any good reason why the jurisdiction of the person shall not be reassumed by the court that imposed the sentence in order that its defects may be corrected. * * * In such case, the original court would only set aside what it had no authority to do, and substitute the direction required by law to be done upon the conviction of the offender."

The whole opinion is a strong admonition to the courts to conform strictly to the terms of the statutes in imposing sentences. Here, the application for the writ is to the court of original jurisdiction, and the court, the prisoners still being within its control, has full power to correct the sentences, or, if need be, resentence according to law, and for many obvious reasons, it is better for this court to issue the writ and bring up the prisoners and correct an unauthorized sentence than to leave that duty to be performed by other courts. *Reynolds v. United States*, 98 U. S. 145-167, 25 L. Ed. 244, opinion on rehearing.

The writ having issued, and the prisoners being in court, and having had due notice, the government moves to amend the sentences *nunc pro tunc* by expunging therefrom the part imposing "hard labor." These words can be expunged without affecting in any way the validity of that part of the sentence which already provides for imprisonment in the penitentiary. The words are not so interwoven and intermingled with the purpose of the rest of the sentence, or the language in which it is expressed, that they cannot be stricken out, and still leave the corrected sentence perfect, and capable of execution according to the command of the statute, and the judgment of the court in that respect. When statutes prescribe particular kinds or modes of punishment, the court has no power to inflict any other. The statute nowhere authorizes the court to impose hard labor on conviction for the offense, though it does authorize and require imprisonment in the penitentiary. When the court went further than imprisonment in the penitentiary, and prescribed hard labor, it cut loose from the authority of the statute, and exceeded its jurisdiction, and

to the extent of such excess, its action is a nullity. It is true that hard labor may be inflicted by the penitentiary authorities, where the sentence is to imprisonment in the penitentiary merely; but in that case, hard labor is inflicted, not in obedience to the command in the sentence, but because of the status of confinement in the penitentiary, under whose rules hard labor may be administered, if they so provide, whether included in the sentence or not. No law gives the court the power to determine what the rules and discipline of the penitentiary shall be. The citizen has the right to stand on the law as it is, and to insist that the court, by imposing modes of punishment which the statute does not provide for the offense, shall not determine questions which the law leaves solely to the prison authorities, under the statutes regulating federal penitentiaries. Plainly, that part of the sentence which imposed hard labor is without warrant in law, beyond the power of the court to inflict in any event on a conviction for this offense, and is invasive of the legal rights of petitioners. Manifestly, it is the duty of the trial court, when its attention is called to its unauthorized action, to correct the sentence *nunc pro tunc* in this particular.

2. While the writer does not doubt in view of the statement in the letter from the President's secretary to Senator Taliaferro, that the President has ordered the sentences in these cases to be commuted to six months' imprisonment, the court can take no action upon it. A pardon must be delivered to the prisoner, or some one for him, before it can become legally effective. Until then, it rests in the pleasure of the pardoning power to rescind and withdraw what, up to that time, is a mere promise to grant a favor in the future. It is not shown that any warrant of commutation has ever issued or been delivered. Had that been done, as the action of the executive must appear by matter of record, it could be shown only by the production of the warrant of commutation, or a certified copy thereof. These matters aside, had a warrant of commutation issued and been delivered to the prisoners, and exhibited to the court, it would not afford the slightest reason for interfering with the execution of the commuted sentence in the penitentiary. The constitutional prerogative of the President to grant reprieves and pardons includes the power to commute punishments. A common exercise of the power is where without changing the mode of punishment, less of that kind of punishment is exacted and substituted for the greater punishment of the same kind required by the original sentence. Here, the punishment fixed was imprisonment in the penitentiary for a certain time, and it is changed to imprisonment there for a less time. The original sentence to the penitentiary being lawful, and the President having the power to shorten the length of imprisonment without otherwise interfering with it, the execution of the commuted sentence in the penitentiary cannot be unlawful merely because the statutes do not authorize the courts, in fixing the punishment in the first instance, to inflict imprisonment in the penitentiary for so short a time. In *re William Wells*, 18 How. 307, 15 L. Ed. 421.

3. When the Circuit Court is in session, it necessarily makes the order to draw the grand jury to attend its sitting. At other times, the

order is properly made by any "one of the judges of such Circuit Court," in his discretion. Rev. St. § 810. Under our statutes, whatever may have been the case at the common law (*Curtis v. Commonwealth*, 87 Va. 589, 13 S. E. 73), the making of an order for the drawing and attendance of a grand jury is the exercise of judicial power, but the power pertains to the judge, as well as to the court. Such an order does not determine anything with reference to any adversary proceeding in the court, or conclude public or private rights in any way, and amounts to nothing more than a mere administrative regulation of internal affairs relating to the organization of the court. There is nothing in the nature of the order which calls for the presence of the judge when the court officers execute its command. So long as the order is made by the proper authority, its source, whether the court, or one of its judges, is of no concern to the defendant who is afterwards indicted by the grand jury; though if the grand jury be drawn by unauthorized persons, or from persons not properly selected or qualified and the like, he has his remedy by motion to quash the indictment when he is called to answer it. Judge Shelby was one of the judges of the Circuit Court for the Northern district of Florida, when he made his order of October 23, 1906, for the drawing of a grand jury to attend the Circuit Court for the Northern district of Florida, on the 7th of November following. As such, he had the right, and was under duty, whenever occasion arose, to make preparatory orders for the disposition of business which might come before the court at its next sitting. His general authority as to such matters is not questioned, but it is insisted in this instance, his order is a nullity, and, apart from another objection hereinafter considered, could not authorize the assembling of a grand jury, because Judge Shelby was in Alabama, and did not come personally into the territorial jurisdiction of the circuit court for this district, at the time of making the order. This contention is untenable both on reason and authority.

While Judge Shelby is "one of the judges" of this court, he is at the same time one of the judges of all the other circuit courts in this judicial circuit, which, at the time the order was made, were required to be held in as many as 56 different places in the six states constituting the Fifth judicial circuit. The necessity for the exercise of his administrative functions regarding these numerous courts is constantly arising, in such matters as the adjournment of a court, when the circuit or district judge who purposed to hold that court cannot attend, or postponing the day fixed for the sitting of a court to another day or drawing of juries in advance to be in readiness for the court when it convenes, and the like, yet, at that very time, he may be holding another circuit court himself, or sitting with the Court of Appeals. To require a circuit judge to abandon his duty in every other court, and to come personally into the territorial jurisdiction of a particular court, before he can lawfully exercise his administrative functions concerning it, would, in a large measure, prevent the exercise of his functions as to other courts at the same time, and for the time being, convert him, for all practical purposes, into a judge of only one of them, though the statutes, at least, while he is in the discharge of his judicial duties anywhere in the Fifth judicial circuit, make him

the judge of all of them at the same time. The operation of such a rule would inevitably hinder and clog the administration of justice, and undermine the purpose of Congress in the creation of the circuit judges and the duties conferred upon them. A circuit judge may rightfully dispose of any administrative matter in any circuit court in his judicial circuit, which may be properly ordered at chambers, without personally going into its territorial limits, wherever his chambers may be for the time being, so long as they are held at any place within his judicial circuit. In *re Parker*, 131 U. S. 221, 9 Sup. Ct. 708, 33 L. Ed. 123; *Horn v. Pere Marquette R. R. Co.* (C. C.) 151 Fed. 626; *Ex parte Steele* (C. C.) 161 Fed. 886. Apart from this, the persons summoned were qualified to serve as grand jurors, selected for that purpose by the officers provided by law, and drawn pursuant to an order of a judge and the rules of the court by officials to whom the law commits the duty. A grand jury so drawn certainly cannot be without "authority to sit as a grand jury," unless the court of which it formed a part was itself holding a session at a time or place not authorized by law. If in any other way, there was a want of strict conformity to law in their convening, it was a mere irregularity which was waived by the defendants' pleading not guilty and going to trial, without first calling the attention of the trial court to it in some appropriate way.

4. Waiving the question whether the objection that no "legal evidence was introduced before the grand jury authorizing the finding of the indictment" can be raised for the first time after plea and conviction, and whether a sentence can ever be attacked collaterally on such a ground, it suffices to say that neither the record of the trial, nor the evidence introduced on this hearing, supports that averment of the petition. The presumption, until the contrary appears, is that the grand jury acted upon legal evidence, and the burden rests on him who asserts that it did not to prove it. This indictment was evidently founded upon the testimony of witnesses on two previous days touching the offense upon which the grand jury at that session had already found two other indictments; and was preferred, to cure supposed defects in the earlier indictments touching the same matter. Under such circumstances, it was not necessary, or at all essential to the validity of the last indictment, that the witnesses be recalled before the grand jury and go over their former testimony. The attention of the grand jury was pointedly directed to this indictment, whose disposition was the only unfinished business before it. After it was discussed, the foreman said he would sign it, and the grand jurors made no objection. Immediately afterwards, they went in a body to the courtroom and made a report of the number of "true bills" they had found, which included this one, and delivered them to the presiding judge in open court. No formal vote of jurors is essential to the finding of a true bill, and the law requires no record of such a vote, if taken. The intelligent assent of the jurors to the making of the accusation is all that the law requires, and it provides the mode by which that assent must appear, by the requirement that the grand jury itself deliver the indictment to the judge in open court. When, as the record itself,

as well as the testimony shows, the grand jury went in a body before the court and returned these indictments with others found at that time, signed by the foreman and the United States attorney, and delivered them to the presiding judge in open court, that furnished evidence that the grand jury had found the bills, and assented to them as "true bills," and was proof in the most solemn form that it had regularly discharged its constitutional functions as an accuser regarding the particular matter. When the petitioners pleaded not guilty and went to trial without first raising the objection, it was an admission of record by them that the indictments had been properly found and constituted a genuine record of the court. The necessities of this case do not require the court to follow counsel in their elaborate argument as to the power of the court at a subsequent term to discharge a prisoner, who is still within its control, after conviction and sentence, when he has been tried on an indictment which was never in fact acted on by the grand jury, but got upon the court records by mistake, or was palmed off on the court by trickery or fraud. It may be in such a case that due regard for "truth and justice, and the preservation of the verity and dignity of its own records, and the protection of the citizen, and the preservation of the constitutional guaranty," in its integrity, would compel the court to expunge the indictment from its record as a spurious paper, and thereupon treat the conviction as though the prisoner had been tried without indictment at all, and, if the prisoner were still in its control, require the court to bring him up on habeas corpus and discharge him. *Sparrenberger v. State*, 53 Ala. 482, 25 Am. Rep. 643; *United States v. Coolidge*, 2 Gall. 367, Fed. Cas. No. 14,858; *Low's Case*, 4 Greenl. (Me.) 439, 16 Am. Dec. 271. This case clearly does not present that question.

5. It is insisted with much confidence that the application to the facts of these cases of the doctrine declared in *Re Bain*, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849, and *Hans Nielsen*, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118, as to the denial of constitutional rights in a criminal trial, requires the discharge of petitioners on grounds other than those hereinbefore mentioned, which it is urged appear on the face of the record. The first is that the court had no jurisdiction to try or detain the petitioners, because they were tried and convicted in violation of the sixth amendment, in the Northern district of Florida, for an offense, which, if committed at all, was committed in the Middle district of Alabama, and that, "under the authority of *Hyde v. Shine*, 199 U. S. 84 [25 Sup. Ct. 760, 50 L. Ed. 90], while this court upon habeas corpus may not weigh the evidence, yet, upon habeas corpus, this court should examine the evidence to see whether it shows, as claimed by the petitioners, affirmatively, conclusively and without contradiction, entire lack of evidence to support the accusation, and if so found, then this court should discharge the prisoner." This court had undoubted jurisdiction of the offense for which the petitioners were indicted. They were lawfully in the custody of the court, and were arraigned upon an indictment which charged that the offense was committed within the Northern district of Florida. They were confronted with the witnesses against them, and given a trial

by a jury, which, by its verdict affirmed the truth of the accusation made in the indictment, and were, thereupon, convicted and sentenced. The record itself does not show that any error intervened in the trial on account of the denial of any constitutional right or otherwise which invalidated the conviction, or that anything has happened subsequent thereto which puts an end to the power of the court over the prisoners. On such a state of the record, the Supreme Court has always held that a conviction cannot be collaterally attacked on habeas corpus. A bill of exceptions is no part of the record proper, and can be treated as a part of it only in an appellate proceeding. It cannot be used on habeas corpus, to put even the trial court in error, much less can its recitals be made the foundation for the lower court's reversing the ruling of the higher court, wherein the action of the trial court which is made the basis of the application for habeas corpus was distinctly urged as error, and held to be free from error. Petitioners' invitation to open the bill of exceptions and weigh the evidence therein recited, in order to determine that the offense was committed in another district, as it is contended the cases of *Hyde v. Shine*, 199 U. S. 84, 25 Sup. Ct. 760, 50 L. Ed. 90, and *Tinsley v. Treat*, 205 U. S. 20, 27 Sup. Ct. 430, 51 L. Ed. 689, require it to do, must, therefore, be declined; and this, although their contention were conceded that the formation of the conspiracy alone constituting the offense, it necessarily follows, under the sixth amendment, that the conspirators can be indicted only in the district wherein the conspiracy was formed, though an overt act be done by some of the conspirators, in the furtherance of its objects, in another district.

6. The next ground urged for discharge is that the petitioners were indicted, convicted, and sentenced by a court which was sitting at a time not authorized by law. If this be true, the proceeding from beginning to end would be *coram non iudice* and void, and the affirmance of the conviction, by an appellate court, in which the trial is on the record and not *de novo*, would not cure the infirmity of a want of jurisdiction in the court which pronounced the sentence. *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896. Besides, the minute entries relied on to show that the sitting of the court was at an unauthorized time, though distinctly appearing on the record presented on this hearing, were not fully certified in the record sent to the Court of Appeals on writ of error, and the question was not brought to its attention in any way, or even mentioned by the remotest inference in the *per curiam* opinion handed down on the affirmance. The Court of Appeals, under such circumstances, would not be bound by its judgment of affirmance in any subsequent proceeding, which might come before it, involving the want of jurisdiction in the lower court in this very matter. *Boyd v. Alabama*, 94 U. S. 645, 24 L. Ed. 302. If the record itself shows petitioners are detained, under a conviction and sentence of a court which was sitting at a time not authorized by law, a case is presented of a deprivation of liberty without due process of law in violation of the fifth amendment to the Constitution, and the Circuit Court never had or can require jurisdiction of the person, by virtue of the proceedings at such

a sitting, and, under the doctrine of the Bain and Nielsen Cases, the petitioners would be entitled to relief on habeas corpus.

7. The record shows that the regular March term of this court at Pensacola, for 1906, was opened by the district judge, at the time appointed by law; that the court continued in session, as its business required, until and including the 6th day of June, when, at the close of the sitting, it was ordered "pending the absence of the judge, the court be opened and adjourned pursuant to rule 13 of the rules of practice of this court," and that in pursuance of the order, the clerk and marshal, in the absence of the judge, opened and adjourned the Circuit Court daily, from the 6th day of June until the 7th day of November, when the presiding judge returned and presided over the court, until the convictions in these cases were had. Petitioners insist the term thereby lapsed, and the court was then sitting without authority of law. They argue the court should have made an order on the 6th day of June, fixing the day when the court would resume its sitting, and that not having done so, its action amounts to an adjournment sine die; that the clerk had no authority to open and adjourn the court, in the absence of the judge, except when the latter fails to appear at the commencement of the regular term; that the court was powerless to delegate such authority to the clerk; and that the order and everything done under it are void.

Section 658 of the Revised Statutes (U. S. Comp. St. 1901, p. 530), as amended by subsequent enactments, provides that the regular term of the Circuit Courts for the Northern district of Florida shall be held in each year at Tallahassee on the first Monday in February, and at Pensacola on the first Monday in March. It relates to the holding of courts already organized, with jurisdiction fully defined, and designs to fix not only the date when they must begin their regular sessions, but to prescribe the length of time thereafter in which these courts shall have opportunity and right to remain in session, at each regular term, to accomplish the purpose for which the courts were created. Bearing in mind the accepted meaning of the word "term," when used in this connection, the plain command of the statute is that the Circuit Court must commence to sit at Pensacola on the first Monday in March of each year, and have the succeeding 12 months in which to sit for the dispatch of business; unless the judges put an end to their right to hold the court during that period by final adjournment, or by nonattendance at the commencement of the regular term in any year and failure, in that event, to provide against a lapse of the term, by instructing the marshal, in the absence of the judges, to adjourn to some subsequent day of the term. This full 12 months, in which this court may dispatch its business, is contemplated here, notwithstanding the requirement of the regular session at Tallahassee each year. There are five judges who may sit in the Circuit Court aside from those who may be specially designated, and they are authorized to hold Circuit Courts at the same time in the same district. The requirement to hold the Circuit Court at Tallahassee does not, therefore, evince any legislative intention to interrupt the sittings of the court at Pensacola during the regular March

term. In the absence of a statute so providing, it is impossible on principle to hold, after the regular term has been opened in conformity to law, that the failure of a judge subsequently to open a court on a day of the term to which a recess has been taken, or the cessation by the court of a particular sitting without appointing the time when it will be resumed, can forfeit the right of the court to resume its sittings at any time during the remainder of the term. The court's authority to sit at Pensacola, for a period of 12 months in each regular term, having been conferred by statute and perfected by the prompt convening of the regular March term, the right to hold court exists in full vigor throughout every day of the whole 12 months, until the court puts an end to its authority by a final adjournment, or the right has been extinguished by operation of law, by the arrival of the day fixed by law for the commencement of the next regular term, or by legislation changing the time or place of holding the court. That there may not have been an unbroken chain of adjournments, from June to November, or that the court ceased an intermediate sitting, without announcing when it would resume the sitting, or failed to attend on a day to which the court adjourned a sitting, cannot alter the fact that November, in which the sitting here complained of was had, fell within the 12-month period during which the law authorized the court to sit at Pensacola.

There are cogent reasons, apart from the fact that there is no authority of law to begin a regular term except at the time the statute provides, why the courts in general have attached consequences to the failure to open a regular term at the time prescribed by law, which they do not visit upon the failure to open court at any subsequent period of the term. The day fixed by law for the beginning of a regular term determines when process shall be returned, bail produce their principal, judgments may be taken for want of appearance or plea, and cases tried or set down for disposition. To compel litigants, witnesses, and court officers to remain in attendance on a court after the day fixed for the beginning of the regular term, and wait indefinitely until such time as the judges may chance to appear and open court, would work grievous injustice to litigants and produce much public inconvenience. When the regular term has been opened on time, and the court recesses, persons then in attendance take notice when it will resume its sitting, and of its orders in relation to pending business. The only likelihood of injustice on the court's reconvening is that a litigant may be unprepared, or not have timely notice when his case is called for trial, and orders be taken in it—consequences which can generally be avoided by ordinary diligence, and inquiry of court officers about what was done at the first sitting of the term. There is certainly nothing in the law relating to the holding of the Circuit Court (sections 671, 672, Rev. St. [U. S. Comp. St. 1901, pp. 545, 546]), which indicates any intention to lapse the regular term, or to shorten any portion of it, after it has been regularly opened at the time appointed by law, for any of the reasons which it is here contended bring about that result. The statutes guard against lapses of regular terms by providing that the judge when he cannot be present

to open the court, at the commencement of the term, may still control the subsequent sittings at that term, by written order to certain officers of the court to adjourn "from time to time, as the case may require, to any time before the regular term." Congress was not unmindful of the vicissitudes to which human affairs are subject, or ignorant that numerous contingencies, such as the sudden illness of the judge, or a member of his family, the breaking out, at the place where the court is held, of a riot or civil commotion, the obstacles of a flood or an extraordinary fall of snow, the prevalence of an epidemic, or other unusual or providential occurrence, often cause the absence of the judge, and a consequent adjournment of a court during a term. The fact is, therefore, most significant, in this connection, that Congress provided for the lapse of the term only in the contingency of failure to open the court, in consequence of the absence of the judge, at the very time appointed by law for the commencement of the regular term. It seems clear, therefore, that Congress never intended that the period it gave the court in which to administer justice at any regular term, after the power of the court over the term had been rightfully put in motion, should be shortened or lapsed for the remainder of the time because of absence of the judge or irregular sittings. Neither the letter nor spirit of the statutes, nor the customs of our country, nor the conditions under which justice is administered here, nor any consideration of public necessity or convenience warrants us in attaching those consequences to the failure of a judge to open the court at other times, which the statute exacts only for failure to commence the holding of the regular term at the time the law fixes for its beginning. It is the particular time when the judge is absent, not his mere absence and failure to open court, which determines whether the failure to open court shall lapse the term. There are a few authorities, of which *Wight v. Wallbaum*, 39 Ill. 554-561, is an example, which hold that the failure of a judge to open the court, at the time to which a recess is taken, lapses the term. These authorities are not in harmony with the current of authority, and treat the question as though it were one of jurisdiction, when it really relates only to the regularity of the exercise of jurisdiction after it has attached.

The term here was regularly opened in March, and did not expire until the day fixed by law for the commencement of the next regular term, and the court, meanwhile, did no act which put an end to its right to sit in November. At the last sitting in June, it not only did not adjourn to any particular day, but made an order which, when considered in connection with the rule of the court to which it referred, is far from evincing any purpose to take a final adjournment for the term. It meant only to provide for the interval in the sittings, during the "temporary absence of the judge." The only just interpretation of the order is that the judge intended to return and resume the sitting of the court at some subsequent day during the term. Conceding that the clerk, unless specially authorized by statute, cannot open and adjourn court in the absence of the judge, so as to give validity to its sittings, we will treat the case as if the court had ter-

minated its sittings on June 6th, without making any order as to the time when it would resume its sessions, and did not afterwards reconvene until November following. Thus construing the record, the court was not sitting without authority of law when these convictions were had in November. The term not ending until the first Monday in March, 1907, the clerk had until that date to complete the minute entries of the court, and these entries having been made during the term, though with a rubber stamp, and entered upon a record which the court recognized as its minutes, must be accorded verity and accepted as its minutes for the term. The November sitting constituted neither a special term, nor an adjourned term, but was simply a continuation of the regular term, the court having merely suspended its sessions from June to November. *Schofield v. Horse Springs Cattle Co.* (C. C.) 65 Fed. 433; *People v. Sullivan*, 115 N. Y. 185, 21 N. E. 1039; *Freeman on Judgments*, § 90; *Hume v. Bowie*, 148 U. S. 245, 13 Sup. Ct. 582, 37 L. Ed. 438; *Union Pac. R. R. Co. v. Hand*, 7 Kan. 380; *E. T. I. & C. Co. v. Wiggin*, 68 Fed. 446, 15 C. C. A. 510; *Harrison v. German-American Fire Insurance Co.* (C. C.) 90 Fed. 758-762; *State ex rel. Barber v. McBain*, 102 Wis. 431-435, 78 N. W. 602; *State of Florida v. Charlotte Harbor Phosphate Co.*, 70 Fed. 883, 17 C. C. A. 472.

8. Supreme Court rule 34 (29 Sup. Ct. xxi) as to bail, when a writ of habeas corpus has issued and been discharged, leaves the bailing of the prisoner pending appeal entirely within the discretion of the court which issued the writ. It is needless to say that there is no constitutional right to bail in any case, after conviction. After all that has been said and written on the subject, the only rule which can be deduced from the authorities is that bail should be granted or denied as best effects exact justice between the government and the defendant according to the character and urgencies of the instant case, determined in the light of the principles of the common law as affected by the enactments of Congress. It is due to social order and proper regard for the majesty of the law, that a sentence, especially when affirmed by an appellate court, should be executed without undue delay, and courts should be careful not to give countenance to factious resistance to the orderly operation of the law by lightly admitting a convicted prisoner to bail. On the other hand, it is also to be borne in mind that the law is quick to afford opportunity and means to the citizens to redress wrongs at its hands, and delighting as it does, in the liberty of the citizen, will not, except in rare instances, compel the prisoner to undergo sentence before the final court has spoken, when he is honestly pursuing legal means to avoid a conviction. The general rule—though that case is not exactly like this in principle—is well stated in *Rose ex rel. Carter v. Roberts*, 99 Fed. 952, 40 C. C. A. 203, where it is said: "It is the right and privilege of a person deprived of liberty to review to the extent permitted by law the legality of his detention, even when it is pursuant to the judgment or sentence of a court, and the execution of the sentence should be stayed pending a final determination, unless very exceptional circumstances justify the court in refusing to do so."

The sentences, it is assumed, will be commuted to six months' imprisonment, as the President has so ordered. It appears from the record of the trial that the court deemed six months not an unreasonable time in which to enable petitioners to prepare the record and take their writ of error from the Circuit Court of Appeals. The same record, together with the additional matter adduced on this hearing, must be prepared and docketed in the Supreme Court on this appeal, and printed in accordance with the rules, and months would elapse before the petitioners would be in position to make any application for relief to the Supreme Court against the immediate execution of the sentence, or to advance the case, and if it were advanced, it could not be decided before the term of imprisonment in the penitentiary would expire. Some disposition must be made of the prisoners pending their appeal, and here the only disposition which can be made of them is to send them to the penitentiary to undergo sentence, or to detain them in jail, or to bail them, pending appeal. If bail be denied, and they are sent to the penitentiary, the illegality of their detention would become a moot question long before the case could be decided. If they are detained in jail, they would suffer jail imprisonment, for fully as long, if not for a longer term than the commuted sentence in the penitentiary, and still have to undergo punishment there, if they fail in their appeal; while on the other hand, if they succeed, they would, by the denial of bail, have been compelled to undergo an illegal term of imprisonment of several months, either in jail or in the penitentiary.

The prisoners, during the three years in which this prosecution has been pending, have shown no disposition to evade the process of the court. They appeared to abide the judgment of the Court of Appeals, and offer ample bail to secure their appearance to answer the judgment of the Supreme Court, if bail be allowed them, pending appeal to it. There is no reason to suspect they would not be forthcoming, if its decision should be adverse to them. The indictment charges the conspiracy was formed and executed in the Northern district of Florida, but petitioners earnestly insist that the proof shows that it was formed in the Middle district of Alabama, and that it is open to them to raise the constitutional question thus involved in the Supreme Court, on appeal from the judgment of this court on this application. While the court has no doubt that the issue cannot be raised, even under the doctrine of the Nielsen and Bain Cases, on such an appeal, where the conviction is upon an indictment which charges the offense was committed within the jurisdiction of the court which tried it, and is confident that the complaints so earnestly urged, of a denial of constitutional rights in other respects, are ill founded, yet it is mindful of the experience of many trial judges that judgments of whose correctness they are firmly convinced are often reversed, while those about whose correctness they entertain grave doubt are not infrequently affirmed. If this court be in error in remanding the prisoners, the refusal of bail, resulting as it would in the immediate execution of the sentence, or their detention in jail, would work a grievous wrong to them; while

on the other hand, if the order remanding them be affirmed, the prisoners being meanwhile on bail, no harm can come to the government or the defendants. It is not of as much importance to the general administration of justice, under the conditions governing these cases, that these prisoners begin to serve their sentences on any particular day or month, as that in individual cases the constitutional rights of citizens shall not be invaded, by compelling them to suffer execution of a sentence, under what may turn out to be an illegal conviction, pending an appeal from a judgment enforcing it.

The result is that the sentences will be corrected as prayed by the government, the writ will be discharged, and the prisoners ordered remanded to the custody of the marshal; but the execution of the order will be suspended, and petitioners allowed to give bail pending an appeal to the Supreme Court. Counsel may agree upon the amount and stipulations of the bail bond.

UNITED STATES v. AAKERVIK.

(District Court, D. Oregon. June 20, 1910.)

No. 5,085.

1. ALIENS (§ 62*)—NATURALIZATION—RESIDENCE.

While one's residence under Rev. St. § 2170 (U. S. Comp. St. 1901, p. 1333), which required an applicant for citizenship to have resided in the United States for five years next preceding his admission, depends largely on his intention, such intention is to be gathered from his acts rather than from his declarations.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 125; Dec. Dig. § 62.*]

2. ALIENS (§ 62*)—NATURALIZATION—RESIDENCE.

An alien who returned to and remained in his native country for more than four years, where his family always lived, he resuming his regular occupation there, cannot claim residence in the United States during that period under Rev. St. § 2170 (U. S. Comp. St. 1901, p. 1333), which required an applicant for citizenship to have resided in the United States for five years.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 125; Dec. Dig. § 62.*]

3. ALIENS (§ 71½,* New, Vol. 7, Key No. Series)—NATURALIZATION—VACATION OF CERTIFICATES.

A certificate of citizenship may be set aside for fraud or illegality in its procurement, comprehending false testimony under which the certificate was procured as well as error in rendering judgment on a given state of facts.

4. ALIENS (§ 67*)—JURISDICTION—NATURALIZATION.

For the purpose of the naturalization acts all courts having jurisdiction under the acts are federal courts, and a federal court can vacate a judgment of a state court or vice versa.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 131-137; Dec. Dig. § 67.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. ALIENS (§ 70*)—NATURALIZATION—NATURE OF ADJUDICATION.

An order admitting to citizenship, being a judgment with the ordinary attributes of a court of record importing verity, is as conclusive as such judgments.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 154-160; Dec. Dig. § 70.*]

6. JUDGMENT (§ 342*)—VACATION—JURISDICTION.

Courts generally have jurisdiction to reverse their own judgments and decrees during the term at which they are rendered, for error of law, fraud, mistake, or any injurious irregularity, but it can be done after the term only under statute or under proceedings taken in time.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 668-671; Dec. Dig. § 342.*]

7. JUDGMENT (§ 538*)—TIME OF TAKING EFFECT.

A judgment or decree becomes a finality as to the parties and their privies on failure to initiate proceedings for review within the term fixed by law.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 985; Dec. Dig. § 538.*]

8. JUDGMENT (§ 443*)—VACATION BY INDEPENDENT SUIT.

Suit lies to vacate a judgment or decree where the unsuccessful party has been prevented from exhibiting his case fully, by his adversary's fraud or deception, as by keeping him away from court, or making a false promise to compromise, or where an attorney fraudulently assumes to represent the unsuccessful party and connives at his defeat or where his attorney sells out to the adversary.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 785, 836, 838; Dec. Dig. § 443.*]

9. ALIENS (§ 71½,* New, vol. 7, Key No. Series)—NATURALIZATION—VACATION OF ORDERS.

The time for vacating an order admitting to citizenship, for an error of law of the court having expired before Naturalization Act June 29, 1906, c. 3592, § 15, 34 Stat. 601 (U. S. Comp. St. Supp. 1909, p. 486), suit does not now lie to vacate it, though that act authorizes suits to vacate certificates of citizenship.

Suit by the United States of America against Helmer Aakervik. Dismissed.

This is a suit instituted under the act of Congress of June 29, 1906 (Act June 29, 1906, c. 3592, § 15, 34 Stat. 601 [U. S. Comp. St. Supp. 1909, p. 486]), to cancel the certificate of citizenship issued to the respondent by a state court March 10, 1902. The respondent was a subject of Norway. He came to the United States on the steamer Germanic in March, 1888, landing at the city of New York, thence immediately to the state of Oregon. He left his family, consisting of a wife and minor children, in Norway, but remained continuously in Oregon from the time of his arrival until the fall of 1893. In the summer of that year he made declaration of his intention to become a citizen of the United States. In the fall, however, he returned to Norway. In May, 1898, he came back to the United States, but did not then bring his family, nor until in the year 1901. On March 10, 1902, he received his naturalization papers. The judgment of the court proceeded upon the hearing of witnesses produced by him. It is alleged by the government that, during all the times mentioned in the petition, the respondent was a married man and maintained a home in Tarven, Norway, where his wife and children resided continuously up to and including the time when he brought them to the United States, where he has since kept and maintained them, he residing with them, and that his certificate was illegally granted and issued to him, in violation of section 2165

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1329).

The respondent, by answer to the petition, wherein he prays for the same relief as if he had demurred thereto, assigns as cause of demurrer that the facts set forth in the petition do not entitle the United States to any relief, and further shows that the purpose of his coming to the United States in 1888 was to make a permanent home therein; that he left his family in Norway, being unable financially to bring them with him at that time; that in the fall of 1893 he returned to Norway by reason of the sickness of his wife, intending to come back to the United States, and ultimately to bring his family, when financially able to do so; that after the recovery of his wife, he learned that by reason of the financial depression in the year 1893, opportunities for work were not favorable and decided to remain temporarily in Norway, which he did, carrying on his occupation of carpentry, and occasionally sailing on some of the coastwise vessels plying along the coast of Norway; that when he returned to the United States, he did not immediately bring his family, being financially unable to do so; that he applied for his naturalization in good faith, and never supposed there was anything wrong with his citizenship papers until one of his sons applied for a license as engineer, and was refused it upon the claim that such papers were defective. By stipulation, the hearing of the cause was had upon the petition and answer.

John McCourt, U. S. Atty., and Andrew J. Balliet, Sp. Asst. U. S. Atty.

Snow & McCamant, for respondent.

WOLVERTON, District Judge (after stating the facts as above). The vital question propounded is whether the respondent's certificate of citizenship can be revoked and canceled by a proceeding of this nature on the ground that it was illegally issued. The act of Congress of June 29, 1906, authorizes the bringing of a suit on the part of the United States District Attorney, in any court having jurisdiction to naturalize aliens, in the judicial district in which the naturalized citizen may reside, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud, or because illegally procured. The petition here does not contain any pertinent allegations of fraud practiced in procuring the certificate in question, so that further inquiry on that branch of relief may be dismissed. There remains but the one inquiry, whether the certificate can be set aside because illegally issued. The question is one of great moment, for it involves the rights, privileges, and immunities of citizenship. A citizen by adoption is entitled, under the federal Constitution, to all the privileges and immunities of one native born, save the right to hold the office of President of the United States—the highest office within the gift of the people. He is further safeguarded by the declaration of the fourteenth amendment that he is a citizen of the United States and of the state wherein he resides. So that a person's citizenship in this country is a status that affects him vitally.

In the view I take of this controversy, it may be assumed that the respondent duly filed his declaration of intention, and we need not go behind the time when he departed from the United States in the fall of 1893, and returned to Norway. It is contended by counsel for respondent that, when respondent left for Norway, he left with the intention of returning to the United States, and that, adhering to such

intention, he changed neither his residence nor his domicile while sojourning abroad; that the true status of respondent while abroad was that of a resident here, and that such a status is within the intentment of section 2170 of the Revised Statutes (U. S. Comp. St. 1901, p. 1333) which was the law at the time the respondent was admitted to citizenship. The section reads as follows:

"No alien shall be admitted to become a citizen who has not for the continued term of five years next preceding his admission resided within the United States."

The section as it stood before revised, being the twelfth section of the act of March 3, 1813, c. 42, 2 Stat. 811, read as follows:

"No person who shall arrive in the United States, from and after the time when this act shall take effect, shall be admitted to become a citizen of the United States, who shall not, for the continued term of five years next preceding his admission as aforesaid, have resided within the United States without being at any time during the said five years out of the territory of the United States."

This latter statute has received construction at the hands of Betts, District Judge, Anonymous, Fed. Cas. No. 465, to the effect that by its terms it inhibits the grant of naturalization when the applicant has been during any part of the five years out of the territory of the United States. Previously the same learned judge, in passing upon a prior statute, that of Act April 14, 1802, c. 28, 2 Stat. 153, which required five years' residence in the United States, held that residence meant domicile, and that said act did not require that the alien remain constantly in this country for five years. In *re An Alien*, Fed. Cas. No. 201a. Thus much for the history and interpretation of the present statute. The sense of the present statute is the same as before its revision, except that the words "without being at any time during the said five years out of the territory of the United States" are eliminated. The elimination by the revision would seem to indicate that it was the purpose of Congress not to require that the petitioner remain continuously within the United States. But the law does require a continuous residence, and that for a period of five years, next preceding admission to citizenship.

From the facts stated, both in the petition herein and the answer, it appears that the respondent was, from the fall of 1893 to the spring of 1898, a period of four and one-half years, in Norway with his family, working at his trade and sailing on coastwise vessels, presumably those of Norway. It would take nearly one year of this period to make up five years of residence in this country next preceding his admission. While it may be true that residence depends largely upon intention, yet the intention is not always what the party says about it, but is to be gathered from his acts and demeanor, and the facts and circumstances attending his abiding place, wherever it may be. All the conditions disclosed by this record show unmistakably a residence in Norway during the four years and a half the respondent was absent from this country. He was not only living there, but his family was there with him, and he was pursuing his usual occupation. Against this evidence as to his place of residence is the dec-

laration that he claimed his residence in the United States all this time. If he acquired a residence in this country by living here absent from his family in the first instance, he surely acquired a new residence in Norway by returning to his family, and living with and supporting them there. The time spent there in that way is too long for him to say, as against that, that his residence was not there. It seems to me there can be no question as to this. A person cannot have a residence in two countries at one and the same time for the purpose of citizenship. The facts being admitted, as they are, the question becomes one of law merely as to whether the respondent was entitled to admission to citizenship. That question was evidently determined in his favor. In this there was error, and his certificate was illegally granted.

It is further contended, however, that it is not competent under the equity practice to impeach or set aside a judgment for intrinsic fraud in the procurement thereof, or for error of law committed in its rendition. But, whatever may be the rule under the general equity procedure and practice, the present statute has enlarged the remedy as it pertains to the granting of naturalization papers, and it would seem that the proper court is empowered to set aside the certificate of citizenship on the ground of fraud or illegality in its procurement. This would comprehend false swearing by means of which the certificate was procured to be issued, as well as error of the court in rendering judgment upon a given state of facts. *United States v. Mansour* (D. C.) 170 Fed. 671; *United States v. Simon* (C. C.) 170 Fed. 680.

But the more serious question urged is that the act of June 29, 1906, is unconstitutional in so far as it is made to apply to all certificates of citizenship which may have been issued prior to the passage of the act. This contention is based upon the proposition that the issuance of the certificate constitutes a judgment to all intents and purposes, and that Congress is without power to authorize the vacation or annulment of judgments retrospectively on the ground that such judgments were procured through false swearing, or that the court granted the same through error of law, and therefore illegally. The suggestion that it is not competent for a federal court to vacate the judgment of a state court and a state court that of a federal court is not persuasive, because the authority of state courts to naturalize aliens, as well as that of the federal courts, emanates from Congress. All are, for the purposes of the naturalization acts, federal courts, and one set of courts is not foreign to the other. So that relief in the particular matter may as readily be adjudged by a federal court against the judgment of a state court, and vice versa, as by a federal court against the judgment of a federal court or a state court against that of a state court.

As to whether the act of the court in admitting the alien to citizenship is a judgment, it has been held that the oath, when taken, confers upon the applicant the rights of a citizen, and amounts to a judgment of the court for his admission to those rights, and implies that all prerequisites have been complied with. *Campbell v. Gordon*, 6 Cranch, 176, 182, 3 L. Ed. 190. In this case the question as to the effect of the admission to citizenship came up collaterally. A like ruling was had in a similar case, the question arising as there. *Stark v. Chesapeake*

Insurance Co., 7 Cranch, 420, 3 L. Ed. 391. So again, in *Spratt v. Spratt*, 4 Pet. 393, 408, 7 L. Ed. 897, the question came up collaterally in the Supreme Court, as in these cases, and Chief Justice Marshall, in rendering the opinion of the court, says:

"The various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony to compare it with the law, and to judge on both law and fact. This judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry; and, like every other judgment, to be complete evidence of its own validity. The inconvenience which might arise from this principle has been pressed upon the court. But the inconvenience might be still greater, if the opposite opinion be established. It might be productive of great mischief, if, after the acquisition of property on the faith of his certificate, an individual might be exposed to the disabilities of an alien, on account of an error in the court, not apparent on the record of his admission."

To the same effect is *Charles Green's Son v. Salas* (C. C.) 31 Fed. 106. In other cases, namely, *In re An Alien*, 7 Hill (N. Y.) 137, cited in last case above, and *In re Bodek* (C. C.) 63 Fed. 813, it is said that the proceedings for admission to citizenship are "strictly judicial." The latter case was upon a petition for admission to citizenship. The question is not determined in the case of *United States v. Norsch* (C. C.) 42 Fed. 417, but it was taken as conceded that a decree of naturalization does not stand upon any different footing from judgments and decrees rendered in other judicial proceedings. It was upon this basis that the adjudication of the court in that case proceeded. In *United States v. Gleason* (C. C.) 78 Fed. 396, which was determined upon a bill to set aside and vacate a certificate of citizenship, it was held that the administration of the oath required by the naturalization act and the issuing of the certificate constitutes a judgment which is conclusive as to the necessary facts and the status of the petitioner. This case was affirmed in the Court of Appeals (90 Fed. 778, 33 C. C. A. 272), the court holding that a suit would not lie to vacate a judgment on the ground that it was procured by means of the perjured testimony of the party benefited. So in the case *In re McCoppin*, Fed. Cas. No. 8,713, Mr. Justice Field treats and speaks of the issuance of a certificate of naturalization as a judgment. This was a proceeding instituted for a readmission of the applicant to citizenship on account of irregularities supposed to exist in the certificate. The state courts also have regarded the orders of the courts admitting aliens to citizenship as judgments possessing the usual force and characteristics of other judgments of courts of record. In *re Tinn*, 148 Cal. 773, 84 Pac. 152, 113 Am. St. Rep. 354; *People v. McGowan*, 77 Ill. 644, 20 Am. Rep. 254. In the first of these cases it is said:

"It is settled by the authorities that an order admitting an alien to citizenship is a judgment of the same dignity as any other judgment of a court having jurisdiction."

Mr. Black, in his work on Judgments, § 804, indicates a like view, drawing his inferences from the adjudicated cases.

Being a judgment with the ordinary characteristics or attributes of a judgment of a court of record importing verity, it is not more vulnerable to attacks upon its validity and effectiveness as a final and

conclusive adjudication than any other judgment of a court of record having competent jurisdiction in the premises. Following this is the contention that a judgment of the kind, under the long-established and well-settled practice of the courts of equity, cannot be impeached by direct proceeding for fraud, consisting of perjury or false swearing in rendering testimony, whereby the court was induced to give the judgment, nor for errors of the court in its deduction from the testimony adduced from which the judgment proceeded. Courts generally, excepting some perhaps of the more limited, have jurisdiction to reverse their own judgments and decrees during the term at which they are rendered. In pursuance of such authority they may, for error of law, or for fraud, mistake, or any irregularity that might seem to them to have affected either of the parties to the controversy injuriously, set aside their judgments and decrees, and award a new trial or rehearing, and thus give opportunity for righting whatever wrong may have been engendered. After the term has ended, however, the authority of the courts to this purpose ceases, unless extended by statute, or by motion, or some appropriate procedure taken within the time. This rule applies as well to equity procedure as to procedure at law. Other means of relief for the errors of the court are usually afforded by writ of error or appeal, and in equity a bill of review will lie, within rules prescribed by law, for evidence discovered after the decree has become final. All such proceedings are taken and prosecuted in the same suit or action, and not by separate controversy. When, therefore, the term is at an end without the appropriate initiation of an available proceeding to revise or set aside the court's final judgment or decree, and no appeal or other means of review is prosecuted within the time afforded by authoritative regulation, such judgment or decree becomes an absolute finality, forever binding upon the parties and their privies, utterly without power of change, revision, revocation, or relief within the cause or proceeding in which it is rendered. There are many causes, however, for which a new and independent suit will lie to set aside or annul a judgment or decree. Some of them may be mentioned. Thus, where the unsuccessful party has been prevented from exhibiting his case fully, by fraud or deception practiced on him by his opponent, as by keeping him away from court, or a false promise of a compromise, or where the defendant never had knowledge of the suit, being kept in ignorance by act of the plaintiff, or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat, or where the attorney regularly employed sells out his client's interest to the other side—these and similar cases which go to indicate that there has never been any real contest in the trial or hearing of the case, afford grounds for impeachment by suit instituted directly for that purpose.

"On the other hand," says Mr. Justice Miller, in *United States v. Throckmorton*, 98 U. S. 61, 66 (25 L. Ed. 93), "the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed."

And, further, after a discussion of the authorities, he concludes:

"We think these decisions establish the doctrine on which we decide the present case, namely, that the acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered. That the mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases."

In a later case, *Vance v. Burbank*, 101 U. S. 514, 519, 25 L. Ed. 929, which was instituted to set aside a patent to a townsit entry, the court, speaking through Mr. Chief Justice Waite, says:

"It has also been settled that the fraud in respect to which relief will be granted in this class of cases must be such as has been practiced on the unsuccessful party, and prevented him from exhibiting his case fully to the department, so that it may properly be said there has never been a decision in a real contest about the subject-matter of inquiry. False testimony or forged documents even are not enough, if the disputed matter has actually been presented to or considered by the appropriate tribunal."

And such has become the settled doctrine of the Supreme Court. *Steel v. Smelting Co.*, 106 U. S. 447, 453, 1 Sup. Ct. 389, 27 L. Ed. 226; *Moffat v. United States*, 112 U. S. 24, 32, 5 Sup. Ct. 10, 28 L. Ed. 623; *United States v. Minor*, 114 U. S. 233, 242, 5 Sup. Ct. 836, 29 L. Ed. 110; *Hilton v. Guyot*, 159 U. S. 113, 207, 16 Sup. Ct. 139, 40 L. Ed. 95; *United States v. Beebe*, 180 U. S. 343, 21 Sup. Ct. 371, 45 L. Ed. 563.

It has been sometimes questioned whether the case of *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870, is not in conflict with the doctrine of the foregoing cases, but it seems latterly not to be so regarded. *Nelson v. Meehan*, 155 Fed. 1, 83 C. C. A. 597, 12 L. R. A. (N. S.) 374. The doctrine has been applied in cases to annul citizenship papers. *United States v. Norsch*, *supra*, was a case of this kind, and while holding that the court had jurisdiction to cancel the certificate on account of fraud, nevertheless the bill was dismissed, because, as the court says:

"It will not do, in a bill of this character, to show merely that the judgment assailed is erroneous, and ought not to have been entered; neither will it suffice to charge generally that it was fraudulently procured, or that the court was imposed upon."

And further on in the opinion the court concludes as follows:

"It (the bill) shows, indeed, that the decree was and is erroneous, and that it was likewise irregular, in that there was no such judicial inquiry into the case as the act of Congress contemplates shall be had in such cases; but these are defects in the decree which can neither be remedied by a bill of this character, nor by this court."

So in the case of *United States v. Gleason*, *supra*, the lower court, after determining that the issuance of a certificate of citizenship was tantamount to a judgment, held directly that such certificate cannot be set aside upon the ground that the facts were falsely represented to

the court. On the appeal to the Court of Appeals, the majority of the court, while not deciding directly that the issuance of the certificate was a judgment, did specifically determine that the certificate could not be annulled in equity on the ground that it was procured by means of the perjured testimony of the party whom it benefited.

This brings us to the last contention, namely, that the act of Congress, so far as it authorizes the impeachment of the court's judgment for fraud consisting of perjury in obtaining the judgment, or for error in the court in determining the cause upon the evidence before it, is unconstitutional as trenching upon the legitimate domain of the judiciary, and as unseating settled rights of individuals retrospectively. A judgment once rendered, if concerning property rights, settles them as between the litigants, or if touching the status of either property or the person, determines that, the court possessing proper jurisdiction, and is and ought to be the end of litigation and the law, unless set aside or revised by some authoritative method known also to the law. Now, it is insisted that, under the long-established and well-settled court practice, this judgment, declaring the respondent to be a citizen of the United States, had been fixed beyond the power of the court to change, or to modify or set it aside, and that the act of Congress authorizing the court again to review it is, in purpose and effect, authorizing a retrial, and thus to vacate the judgment, a thing that the court could not do previously. The Supreme Court has determined that an act of Congress cannot annul a judgment of the Supreme Court, or impair the rights determined thereby, as respects adjudications upon the private rights of parties, and applied the principle as it pertained to a matter of costs, while it was held that the principal controversy did not come within the rule. *State of Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How. 421, 15 L. Ed. 435. And in *United States v. Klein*, 13 Wall. 128, 20 L. Ed. 519, the Supreme Court declared that Congress was unauthorized to deny to pardons granted by the President the effect which the court had previously adjudged them to have. The case was pending on appeal from the Court of Claims, and the effect of the legislation was to require the court to dismiss the appeal and proceed no further in the case, and this although the Court of Claims had declared for the claimant upon the very evidence which Congress declared should have a certain contrary effect when brought to the attention of the appellate jurisdiction. Further than this, a previous case (*United States v. Padelford*, 9 Wall. 531, 19 L. Ed. 788), of like import, had been appealed to the Supreme Court, wherein the Court of Claims was affirmed, and thus the effect of the President's pardons had been judicially determined. After stating the facts of the case more fully than here, the court says:

"It is evident from this statement that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease, and it is required to dismiss the cause for want of jurisdiction."

The great weight of authority elsewhere seems to determine the matter in accord with the contention. Mr. Black states the doctrine sought to be invoked thus:

"The power to open or vacate judgments is essentially judicial. Therefore, on the great constitutional principle of the separation of the powers and functions of the three departments of government, it cannot be exercised by the Legislature. While a statute may indeed declare what judgment shall in future be subject to be vacated, or when or how or for what causes, it cannot apply retrospectively to judgment already rendered and which had become final and unalterable by the court before its passage. Such an act would be unconstitutional and void on two grounds: First, because it would unlawfully impair the fixed and vested rights of the successful litigant; and, second, because it would be an unwarranted invasion of the province of the judicial department." 1 Black on Judgments, § 298.

Mr. Cooley is as explicit. He says:

"It is always competent to change an existing law by a declaratory statute; and where the statute is only to operate upon future cases, it is no objection to its validity that it assumes the law to have been in the past what it is now declared that it shall be in the future. But the legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the Legislature would in effect sit as a court of review to which parties might appeal when dissatisfied with the rulings of the courts. Cooley's Constitutional Limitations (6th Ed.) p. 111.

In *De Chastellux v. Fairchild*, 15 Pa. 18, 20, 53 Am. Dec. 570, it is said:

"If anything is self-evident in the structure of our government, it is that the Legislature has no power to order a new trial, or to direct the court to order it either before or after judgment. The power to order new trials is judicial; but the power of the Legislature is not judicial. It is limited to the making of laws; not to the exposition or execution of them."

So again, in *State v. New York, N. H. & H. R. Co.*, 71 Conn. 43, 49, 40 Atl. 925, 928, the court says:

"The judgment is the final and supreme act of judicial power. The Legislature cannot overturn judgments, any more than the judiciary can make laws. A judgment is based upon established rules and principles administered by the judiciary."

In *Roche v. Waters*, 72 Md. 264, 19 Atl. 535, 7 L. R. A. 533, it is distinctly held that an act, so far as it authorizes a court to change the effect of decrees which before its passage had become final, is an exercise of judicial power by the Legislature, and is unconstitutional. This decision was given on a rehearing, and the question was exhaustively considered.

And again the court says in *Re Handley's Estate*, 15 Utah, 212, 220, 49 Pac. 829, 831 (62 Am. St. Rep. 926):

"The court, having tried the case, construed the law in force at the time; and, having applied it to the facts, and entered a final decree, the Legislature could not afterwards, by a declaratory or explanatory act as to that case, give to the law a different construction, requiring a different decree, and invent a new remedy or change the old one, and require the court to retry the case and enter a new decree according to its new construction, and new and changed remedy."

So in *Atkinson v. Dunlap*, 50 Me. 111, 116, the court says:

"That the Legislature has constitutional jurisdiction over remedies is a proposition not to be controverted; but, after all existing remedies have been exhausted and rights have become permanently vested, all further interference is prohibited."

So, also, it is said in *Martin v. South Salem Land Co.*, 94 Va. 28, 36, 26 S. E. 591, 592:

"The Legislature within certain limitations may alter and control remedies by which litigants assert their rights in the courts, but when the litigation has proceeded to judgment or decree upon the merits of the controversy, it has passed beyond its power."

See, also, to a like purpose, *Sparhawk v. Sparhawk*, 116 Mass. 315; *Griffin's Ex'r v. Cunningham*, 20 Grat. (Va.) 31; *Davis and another v. Village of Menasha and others*, 21 Wis. 497; *State v. Flint*, 61 Minn. 539, 63 N. W. 1113.

Now, to come to the present case. Prior to the recent act of Congress, the respondent's status as a naturalized citizen of the United States had, under the practice and rulings of the courts, become unalterably fixed and settled. The time had wholly elapsed in which the government could have applied in the same case for a rehearing or a new trial, and there was left no remedy by appeal so that the order admitting him to citizenship could be reviewed in that way. According to the adjudged cases, there was no equitable remedy left, the order being tantamount to a judgment, by which it might be vacated or annulled for fraud practiced upon the court by perjury or false swearing in procuring the order, nor for a revision of the court's action for error in passing upon the effect of the evidence. So that, but for the act in question, the government was wholly without a remedy for questioning the validity of respondent's citizenship. His status had become finally and effectually settled. It is only by prescribing a new and additional remedy that the government is enabled at all to attack this status, and this after the status had become judicially established. It seems clear that the effect of the legislation is to grant a new trial in a judicial proceeding which had otherwise become final and effective. That the result is destructive of a settled and most important and valuable right and privilege cannot be gainsaid. The respondent, it must be presumed, is not chargeable with any fraud in false swearing. The facts were, no doubt, stated to the court which admitted him, as they are here, but the court was in error in concluding that the facts stated warranted his admission. This was an error of judgment that could be corrected only under the practice and rules of law then authoritative, through a rehearing, new trial, or an appeal. But, the time having elapsed for resort to these remedies, the judgment became fixed and irrevocable. I hold, therefore, that the present suit does not lie to correct that error, and it will be dismissed.

In re DAVIS.

(District Court, N. D. New York. June 13, 1910.)

1. BUILDING AND LOAN ASSOCIATIONS (§ 11*)—DIVIDENDS—RIGHT TO SHARE IN.

Where building and loan shares were held under an agreement that the holder should be credited in December of each year, his proportionate share of the net profits, provided he remained in until his shares reached their ultimate value, and that a withdrawal forfeited interest in the profits for the current year, his bankrupt estate, not having kept the monthly payments up after June in a particular year, is not entitled to credit for any dividends in that year.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. § 13; Dec. Dig. § 11.*]

2. BUILDING AND LOAN ASSOCIATIONS (§ 35*)—FINES FOR NONPAYMENTS—BANKRUPTCY.

On involuntary bankruptcy of a borrowing member of a building and loan association, the association's right to impose fines for failure to make stipulated payments ceases.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. § 68; Dec. Dig. § 35.*]

3. BUILDING AND LOAN ASSOCIATIONS (§ 14*)—WITHDRAWAL—BANKRUPTCY OF MEMBER—PROFITS ACCRUED.

Involuntary bankruptcy of a building and loan shareholder is not equivalent to a withdrawal so as to entitle the association to retain profits actually earned and duly credited.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 16, 19; Dec. Dig. § 14.*]

4. BUILDING AND LOAN ASSOCIATIONS (§ 34*)—BANKRUPTCY OF MEMBER—RIGHTS OF HIS ESTATE.

On involuntary bankruptcy of a building and loan association member, his estate was not entitled to credit for profits or interest on the dues paid for the time between the last apportionment and credit of profits and bankruptcy.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 60, 62; Dec. Dig. § 34.*]

5. BUILDING AND LOAN ASSOCIATIONS (§ 39*)—MORTGAGES—FORECLOSURE—SALE BY TRUSTEE IN BANKRUPTCY.

A sale by a trustee in bankruptcy of property mortgaged to a building and loan association was, in effect, a foreclosure sale.

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. § 39.*]

6. BUILDING AND LOAN ASSOCIATIONS (§ 34*)—LOANS—BANKRUPTCY OF MEMBER.

On bankruptcy of a borrowing member of a building and loan association, the contract between him and the association governed the value of the shares and the application thereof on his mortgages.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 60, 62; Dec. Dig. § 34.*]

7. BUILDING AND LOAN ASSOCIATIONS (§ 34*)—BANKRUPTCY OF MEMBER—EFFECT.

A building and loan association borrowing member's bankruptcy did not accelerate the time when his estate was entitled to have applied the amount paid in on his shares.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 60, 62; Dec. Dig. § 34.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

8. BUILDING AND LOAN ASSOCIATIONS (§ 34*)—LOANS—PAYMENT—BANKRUPTCY OF MEMBER.

A building and loan association article permitting members to repay loans partly in cash and partly by credit for dues paid, on days when dues are payable, applies to the member's trustee in bankruptcy.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 60, 62; Dec. Dig. § 34.*]

9. BUILDING AND LOAN ASSOCIATIONS (§ 34*)—LOANS—PAYMENT—NOTICE.

Under a building and loan association article permitting members to repay loans partly in cash and partly by credit for dues paid, on bankruptcy of the member, the association was bound to take notice that the loan would be paid and that the dues paid would be applied to reduce the loan.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 60, 62; Dec. Dig. § 34.*]

In the matter of Henry A. Davis, bankrupt. On motions to confirm and set aside special master's report. Order directed.

Charles A. Talcott, for trustee.

Dunmore and Ferris, for Homestead Aid Ass'n.

RAY, District Judge. On the 18th day of July, 1908, an involuntary petition in bankruptcy was filed against Henry A. Davis, and July 31, 1908, he was duly adjudicated a bankrupt. Soon thereafter John H. Grant was duly appointed trustee of the estate of said bankrupt, and an application was made for an order of this court granting permission to foreclose two mortgages on the real property of said bankrupt. Pending the application the trustee sold the property free and clear of incumbrance; the sum realized on the sale being \$14,200. The proceeds of such sale were paid to said trustee, and pursuant to an order of this court \$10,180.43 thereof, with interest at 6 per cent. from June 15, 1909, was paid to said aid association, and the association released the premises; it being provided in the order that such release should in no way affect its rights in the balance of such proceeds. In July, 1909, the trustee paid \$840 to apply as interest on such mortgages.

The said Homestead Aid Association was incorporated under the act of the Legislature of the state of New York passed April 10, 1851 (Laws 1851, c. 122), "An act for the incorporation of building mutual loan and accumulating fund associations," and the acts amendatory thereof (Laws 1875, c. 564; Laws 1878, c. 96), and the purpose of the association, in its articles of association, is declared to be:

"The purpose of accumulating a fund to aid its members in acquiring real estate, making improvements thereon, and removing incumbrances therefrom; and for the further purpose of accumulating a fund to be returned to its members who do not obtain advances as above mentioned, when the funds of such association shall amount to a certain sum per share, to be specified in the articles of association, and to adopt these articles of association."

August 4 or 9, 1904, said Davis, he having become a member of such association and taken 60 shares of stock therein, made a loan of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

said association of \$12,000, and secured the payment of same by bond and mortgage on his real estate on which he was required to pay monthly as interest the sum of \$42 and also the sum of \$18 per month as premium on such loan. On the shares of stock he was required to pay as dues monthly the sum of \$1 per share. This made his monthly payments on loan and shares \$120. He paid from July, 1904, to and including June, 1908, or regularly and continuously up to his bankruptcy.

On the 16th or 30th day of April, 1907, he made a second loan of \$2,000, and taking out 10 additional shares secured the payment of such loan by his bond and mortgage on such real estate on which he was required to pay monthly as interest the sum of \$7 and also \$3 per month as premium and on the shares of stock monthly \$1 per share or \$10, making in all \$20 per month which he paid up to and including June, 1908. He was not in default up to the time of bankruptcy.

On the first mortgage of \$12,000 he had paid, as the special master or referee finds, \$2,774 as interest and premiums, and on the shares taken with or at the time of obtaining that loan he had paid \$2,880 as dues. All this had been paid under his contract made in becoming a member and obtaining the loan, and he was subject to the provisions of the articles of association of the said Homestead Aid Association, a copy of which was attached to his book of account with such association in his possession.

On the other mortgage of \$2,000 Davis had paid \$134.66 as interest and premiums, and on the shares taken with that loan he had paid dues to the amount of \$150.

Each mortgage was accompanied by a bond, signed by Davis, which contained an assignment of the shares as collateral security for the payment of the principal of the mortgage and interest, premium on loan, fines, insurance premiums, taxes, assessments, and other charges as provided therein. The \$12,000 mortgage recited and was conditional as follows:

"Whereas, by the terms and provisions of the articles of association of the Homestead Aid Association of Utica, of which the said Henry A. Davis is a member and shareholder, each shareholder therein is required to pay on each share held by him or her, as dues, the sum of one dollar monthly, on or before the third Monday of each month; and those taking loans therefrom are required, in addition to such monthly payments aforesaid, each to pay interest on such loans at the rate of four and one-fifth (4½) per cent. per annum, in monthly payments of seventy cents per month, on each and every two hundred dollars borrowed by them from said association, and also each at the same time to pay such monthly premium in addition to said interest on every loan purchased by him as he shall agree to pay at the time of making such loan, such payments of monthly dues, interest and premium, to be continued until the amount paid as dues in the series of which said Henry A. Davis is a member and shareholder shall, with the profits and income derived from investments, or other sources properly applicable to the shares in said series, be sufficient to divide and pay two hundred dollars for each share issued by the said association in said series, and then to cease; and whereas the said Henry A. Davis being a member and shareholder in said association on the 4th day of August, 1904, became entitled to receive from said association a loan of twelve thousand dollars, the amount of sixty (60) shares

held by him therein, upon furnishing proper securities, of which this obligation forms a part: Now, therefore, the condition of this obligation is such that if the above bounden Henry A. Davis, his heirs, executors or administrators, shall well and truly pay, or cause to be paid unto the Homestead Aid Association of Utica the said sum of twelve thousand dollars as follows: The sum of sixty dollars as dues, the sum of forty-two dollars as interest, and the sum of eighteen dollars as premium each and every month hereafter on or before the third Monday thereof. And such payment shall continue until the amount paid as dues on said sixty shares, together with the profits properly applicable to said sixty shares, shall amount to and equal said sum of twelve thousand dollars: and shall also pay all fines and other charges which said association shall or may impose on, or have against him, in accordance with the articles of association, and the by-laws of said association, now existing, to which reference is hereby made, or which may hereafter be adopted, and shall pay and perform all such other sums or things as may properly be required of him, under said articles and by-laws, or under this obligation, and the mortgage accompanying the same, then this obligation shall be void, otherwise to remain in full force and virtue."

There were also an interest, tax, and insurance claims not necessary to recite.

The bond accompanying the \$2,000 contained the same recitals and provisions except as to dates and amounts.

Section 3 of article 8 of the articles of association provides that each stockholder shall pay monthly on each share of stock held by him the sum of \$1 as dues to be paid on or before the third Monday of each month, and such payments are to continue until the value of the whole stock in the series of which the stockholder is a member shall be sufficient to divide to each share in such series the sum of \$200.

Section 5 of the same article provides that when the amount paid in as dues in any series, together with the share of profits belonging to each series, shall amount to \$200 for every share of stock in such series, such shares shall be said to have attained their ultimate value, and that the shareholders in such series shall then be paid off and their stock canceled.

Section 8 of the same article provides that:

"The value or present worth of each share of stock in this association, at any time, shall be the amount of dues actually paid in on the share of stock, with the proportionate share of net loss to that time deducted therefrom, or the proportionate share of net gain to that time added thereto."

Section 1 of article 9 provides that:

"Shareholders for neglecting to pay when due, either their monthly dues or monthly premium or loans, or interest, shall forfeit and pay as a fine the additional sum of ten per cent. thereof per month the first two months of such default and five per cent. thereof thereafter, until such dues, interest and premiums in arrears are paid, but no person shall be required to pay fines at any one time for a longer period than six months. Payments made by a shareholder, after he has become chargeable with any fines for his default shall first be applied to the liquidation of such fines."

No payments of dues were made after the bankruptcy of Davis.

Articles 10 and 11 provide as follows:

"Article 10.

"Gains and Losses.

"Section 1. At the close of each fiscal year of this association, which shall be within sixteen days after the third Monday in December, in each

year, the profits of the association during the year shall be determined by deducting the actual amount of dues paid in, together with the profits that have been apportioned and credited on the books of the association, and the outstanding indebtedness, if any, from the actual assets. Out of said profits, the board of trustees may reserve each year, as a guaranty fund, a sum not more than ten per cent. of the net profits for that year, until such fund amounts to five per cent. of the net assets of the association, and said funds shall be at all times available to meet losses in the business of the association from depreciation of its securities or otherwise, and for no other purpose, and when reduced below five per cent. of the assets, said fund may be increased as above until it again reaches five per cent. of the net assets. Out of the remainder of the profits, the board of trustees shall each year declare a dividend which shall not exceed the undivided profits of the association. Said dividend shall be credited to the shareholders on the books of the association and in the members' passbooks, in proportion to the amount of dues paid in on their respective shares of stock, together with the profits credited to such shares on the books of the association, and to the length of time such payments and credits have been at the use of the association; and such dividends shall remain in the association until such shares reach their ultimate value of two hundred dollars, except as hereinafter provided.

"Sec. 2. If at the close of any fiscal year it is shown that there is an actual net loss, it shall be determined and apportioned, and charged among all stockholders in the same manner as provided for determining and apportioning and crediting the profits.

"Article 11.

"Withdrawals.

"Section 1. Any shareholder who has taken no loans from the association, upon making request in writing of the trustees, through the secretary, for permission to withdraw from the association, shall be permitted to do so, and upon such withdrawal shall receive the amount paid as dues on his or her shares, less his or her proportion of losses, that may have occurred, and also less any fines that may have been charged, or chargeable to such shareholder prior to his or her making and filing such application, and shall also receive of the profits that have accrued upon his shares up to the close of the fiscal year next preceding the filing with the secretary of his application for withdrawal as follows, to wit: On shares which have run not more than four years, three-fourths thereof; on shares which have run over four years, and not more than eight years, seven-eighths thereof; and on shares which have run over eight years the full sum thereof. Persons thus withdrawing from the association shall be paid according to priority in the date of their filing of their application of withdrawal. However, all money contracted to be loaned to shareholders at the time of the filing of such application for withdrawal, shall be first paid. The certificate or certificates of shares, held by the members who shall so withdraw from the association, shall be surrendered by them to the secretary of the association, and by him canceled before they shall be entitled to receive payment as above provided."

Section 9 of article 13, relating to loans, provides as follows:

"Shareholders who have borrowed from the association, may pay the amount borrowed upon one or more shares, upon any day set for receiving dues, by giving notice in writing to the secretary, at least two months previously, of their intention, and paying to the association the full sum of the principal of the loan on such share or shares, with the interest and any fines and expenses due thereon, and if such person fails to pay such loan at the time specified in such notice, a fine shall be imposed for such failure of one-half of one per cent. upon the amount of such loan, and said notice shall thereupon become inoperative; and said payment may be wholly in cash, or partly, by applying upon the loan the amount paid in as dues upon the share or shares upon which the loan was made and upon any shares over the required number pledged as

security for such loan, and such a portion of the profits credited on the books of the association to such share or shares as he would be entitled to receive upon a withdrawal, less his or her share of any losses that may have occurred up to the time of such prepayment, as such share may be determined by the trustees, and the remainder in cash. But when such loan is paid by the proceeds of a new loan from this association, the trustees may, in their discretion, allow the member paying such loan all the profits credited to his said shares on the books of the association. If the payment is wholly in cash, the shares pledged as security for whatever part of the loan is paid, shall be returned to the borrower, and he shall be wholly free and clear of further charge on account of that loan or part of loan for interest or premium."

Section 10 of the same article provides that stockholders having taken a loan on more than one share of stock may repay the amount loaned upon one or more of such shares upon the terms mentioned in said section 9, and thereby reduce their monthly payment of dues, interest, and monthly premium on such loan proportionately.

Section 13 of the same article provides:

"Upon the foreclosure of any mortgage given to the association, as provided for in the preceding section, the amount of the loan as expressed in such mortgage, with the accrued interest, the expenses of the foreclosure, all monthly dues, premiums on loans, insurance premiums and fines in arrears, and all taxes and assessments paid by the association, less the amount paid as dues, and such a portion of the profits earned by such stock as the mortgagor not being a borrower, would be entitled to receive upon a withdrawal up to and as declared in the last preceding annual report, less his or her share of any losses that may have occurred, shall be considered the amount due to the association. If such foreclosure proceeding shall be continued to a sale of the property embraced in the mortgage, the proceeds of the property on such sale shall be first applied to the payment of the costs and expenses of such foreclosure proceedings, and secondly to the payment of the amount of said mortgage as hereinbefore stated and set forth, together with the fines, insurance premium, taxes and assessments paid by the association, monthly premium on loan and interest due thereon; and the balance, if any, shall be paid to the mortgagor, his legal representatives or assigns; and upon such sale and application of the proceeds as aforesaid, all rights or interests of the mortgagor, his legal representative or assigns, to or in the shares of stock upon which such loan was had, shall cease, and the certificate of such shares of stock shall thereupon be canceled."

The special master or referee in computing the amount due to the said association has declined to allow fines accruing or incurred after the bankruptcy, if any were incurred, and has allowed to the trustee credit for one-half of the dividends that would have accrued to Davis in December, 1908, and to which he would then have been entitled as a credit had the payments been kept up regularly to that time. That is, if Davis had not gone into bankruptcy and ceased payments, but had kept them up, or if the trustee succeeding to his rights and ownership of the real estate and shares of stock, subject to such mortgages and to such assignment of such shares, had kept up such payments, in December, 1908, when the profits, etc., are figured and apportioned as provided by article 10, there would have been a credit of \$195.98 for that year. As payments had been kept up for the first half of the year, the special master gave Davis or his trustee in bankruptcy credit for one-half of what that dividend to Davis would have been, viz.,

\$97.99, less interest at 6 per cent. on the amount paid in, or \$7.35, leaving the credit \$90.64. He gets at it in this way:

Dues paid on both mortgages.....	\$3,030 00
Dividends credited prior to 1908.....	271 20

Dues and dividends credited.....	\$3,301 20
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The referee as special master then says:

"Then, the said Davis had to his credit with said association at the time of his bankruptcy the sum of \$3,301.20. This amount cannot be questioned; but I think a further credit as dividends should be made. From the testimony given by Sherwood S. Curran and on page 7 of his testimony he states that the bankrupt would have been entitled to receive a dividend of \$195.98 for the year 1908. These figures are based on the supposition that payments had been made for each and every month of that year, when in fact only one-half of the yearly payments had been actually made. Now, it is my opinion that, if the yearly dividend for 1908 would have been \$195.98, the bankrupt's estate should receive credit for one-half that sum, which is \$97.99, less interest at the rate of 6 per cent. on the amount not paid in, which interest is \$7.35. This would make the amount for which the bankrupt's estate should be credited by way of dividend for the year of 1908 the sum of \$90.64. In deducting from one-half the dividend for 1908 the sum of \$7.35, I have deducted a little more than the actual amount which should be deducted; but I have purposely done this in order to give the Homestead Aid Association of Utica all the credit that it can consistently ask. It is thus to be seen that the bankrupt's estate is to be credited with the amount of \$3,301.20 plus \$90.64, making the total credit which said association should give said estate as payment on these mortgages made by said Davis prior to the filing of his petition in bankruptcy \$3,391.84."

The amount of the two mortgages July 1st was.....	\$14,000 00
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The referee credits the said sum of.....	3,391 84
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Leaving balance due July 1, 1908.....	\$10,608 16
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He adds interest on this amount at 6 per cent. to January 17, 1910, at which date pursuant to an order of this court \$10,540.14 was paid by the trustee, amounting to \$984.77, less \$840 interest paid by the trustee in July, 1909, or \$144.77, making a balance of principal and interest January 17, 1910, of \$10,752.93, from which he deducts such payment of that date \$10,540.14—

Leaving a balance unpaid January 17, 1910, of.....	\$212 79
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He adds a recording tax.....	10 00
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Also premium on insurance.....	15 08
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Total	\$237 87
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To this he says interest should be added from January 17, 1910.

The association challenges the allowance of said credit of \$90.64, and says the bankrupt estate is not entitled thereto for the reason that no such dividend was ever declared, and that, not having kept up the payments after June, 1908, and the articles of association declaring that "dividends shall remain in the association until such shares reach their ultimate value of \$200, except as hereinafter provided," and limiting a withdrawal of dividends or of any part thereof to those who have not made loans of the association, and, in such cases, to dividends accrued and credited for the preceding fiscal year, and providing that in case of foreclosure the "amount of the loan as expressed in such mortgage, with the accrued interest, the expenses of the foreclosure,

all monthly dues, premiums on loans, insurance premiums and fines on arrears, and all taxes and assessments paid by the association, less the amount paid as dues, and such portion of the profits earned by such stock as the mortgagor, not being a borrower, would be entitled to receive upon a withdrawal up to and as declared in the last preceding annual report less his or her share of any losses that may have occurred, shall be considered the amount due to the association," the allowance of such a credit for profits is not only inadmissible, but absolutely excluded.

If Davis had withdrawn in July, 1908, instead of going into bankruptcy, clearly he would not have been entitled to any share of the profits for 1908, subsequently computed and allowed to those who remained in the association. This is a provision of the contract. In case of a foreclosure the articles of association provide that only such dividends or profits shall be credited as "the mortgagor not being a borrower would be entitled to receive upon a withdrawal up to and as declared in the last preceding annual report" less, etc. I do not see on what theory we can ignore the contract when a member of the association goes into, or is forced into, bankruptcy, and the trustee, succeeding to the rights of the bankrupt, does not perform but makes a sale of the property. How can it be said that any profit for the six months of the year 1908 was earned July 1, 1908? Clearly no profit had become due to Davis, and the trustee did not keep up the payments, and the events on which an apportionment of profits to Davis depended never happened; the conditions of such an apportionment of profit to him were never performed. The profits actually apportioned as dividends in December, 1908, may have been earned largely during the last half of that year. Can the bankruptcy of the mortgagor and stockholder, Davis, be said to have changed the conditions in any way material here? I do not think it can be questioned that, had it been beneficial to the estate so to do, the trustee, on order of the court, could have continued the payments and reaped the benefits of so doing. It is apparent that there was a substantial equity in the mortgaged property, as it sold for about \$2,000 over and above the amount due on the mortgages. The shares and the property might have been sold subject to the lien of the mortgages. In such event the purchaser could have continued payments reaping all the benefits, if any, of so doing. The property and shares might have been sold free and clear of all liens, and the mortgages paid from the proceeds. But this was not done, and after six months of default, and early in 1910, the property was sold by the trustee. The bond provides that after a default of six months the whole principal sum may be declared due. Foreclosure may be had, also, if there is default in the payment of any part of the sums agreed to be paid.

The only argument presented by the attorney for the trustee in defense of the allowance of this credit of one-half the profits that would have been apportioned to these shares of Davis in December, 1908, had he or his trustee continued the payments according to the

terms of the bonds and mortgages and articles of association, is as follows:

"Was it not just and equitable to make a credit to the estate for that period, if not by apportioning the dividend for 1908, then by an allowance of interest for the first six months of 1908 on the total amount credited to the bankrupt at the close of the previous year, \$3,301.20? But this allowance of interest would exceed the amount of dividend as apportioned by the master. The report of the master is fair to the association. The mortgagee obtains the full amount of the mortgage debt with interest at the rate of 6 per cent. If the value of the bankrupt's interest were taken at the close of the year 1907, still the computation by the special master is somewhat more favorable to the association, because, as already stated, the amount of the dividend apportioned for the first six months of 1907 is less than the interest on the total amount to the credit of the bankrupt at the close of the year 1907."

I am not impressed with this reasoning. The contract, so far as it bound the mortgagor, and so far as it binds the trustee, must govern. It cannot be varied to meet the notions of the court as to what seems equitable or just. It was a condition of the loans to Davis that he become the owner of these shares, which he did. On the strength of such ownership the loans were made. The premiums to be paid on the loan of \$1,200 with the interest amounted to \$60 per month or 6 per cent. Then the dues, \$60 per month, were paid on the shares and, so to speak, constituted a sinking fund, and the interest of the borrower—member—in these shares increased from month to month. His interest in these shares stood as collateral security for the loan and became more valuable as such with each payment. True, the association had the use and benefit of the money so paid in on the shares, but under a valid agreement, binding on both parties, that the shareholder should be credited in December each year his proportionate share of the net profits for such year provided he remained in until his shares reached their ultimate value. He had the right to withdraw, and in case he did he lost all right to share in the profits for the year in which the withdrawal took place, and also a certain part of the profits credited to him in previous years. See article 11, § 1, and article 13, § 9. This was a part of the contract deliberately made and made to encourage savings and payments. In no sense is it a forfeiture or a penalty for not remaining in or continuing to make payments of anything actually earned and to which the shareholder has become absolutely entitled. His right to share at all in the profits of a given year depends on his remaining in and making his payments to the end of that year. If he does remain and makes all his payments, he is credited his proportional share of such profits, otherwise not, and he has so agreed. But this credit is subject to a condition, viz., if he withdraws before his shares reach their ultimate value, his account is charged a certain per cent. of the profits before credited on the assumption he will remain in.

The referee or special master erred, I think, in allowing this credit of profits for 1908.

Did he err in rejecting the claim for fines and a so-called withdrawal fee? I think not. The fines are personal and imposed in the nature of a penalty for not making payments on the assumption they can be

made. When a person, being a shareholder, is forced into bankruptcy as Davis was, he loses control of his property, including the shares. They pass from him by operation of law. Can the fines be continued in case of bankruptcy in effect against the trustee and the property in his possession? I think not. He may not have property to make payments. The court might not permit it. The true reason for the imposition of fines has ceased to exist. Bankruptcy, a contingency not provided for, has occurred. By delaying foreclosure the fines would be increased, piled up. Clearly the trustee, an officer of the court, succeeding to the property by operation of law, cannot be fined, and I do not think the property which has passed to the custody and control of the bankruptcy court can be fined or depleted by fines imposed for defaults in payments occurring after bankruptcy—those of the trustee, an officer of the court, and who acts under the law and the orders of the court. Can they be regarded as stipulated damages in such a case for nonperformance of the contract and charged against the estate? I think not. It is beyond the power of the bankrupt to perform. The trustee cannot except by order of the court. I do not think it within the purview of the contract that fines, even if considered as damages, shall continue to be imposed in case of and after bankruptcy. I do not think that bankruptcy is the equivalent of a withdrawal, or that in event it occurs any deduction is to be made from profits earned and credited for previous years. Bankruptcy in this case was not a voluntary act. It was a misfortune and should not work to the advantage of the association or to the detriment of the estate in bankruptcy.

Bankruptcy does not vary the contract, but it presents a situation for which no special provision is made in the bond and mortgage or in the articles of association. Article 15 does provide for the death of a member; but I do not think that we can treat that article as applicable in case of bankruptcy. Still it shows the policy of the association in the case of death which creates a situation very similar to that of bankruptcy. In case of death the imposition of fines is not continued, and, as I construe that article, no deduction can be made from profits earned and credited for previous years.

I think it fair and just and within the terms of the contract and general rules of law applicable to say that, on the involuntary bankruptcy of a borrowing member of the Homestead Aid Association of Utica and the failure of the trustee to continue the payments: (1) The right to impose and collect fines ceases; (2) such bankruptcy does not operate as a voluntary withdrawal and gives to the association no right to retain profits theretofore actually earned and duly credited; and (3) the trustee of the bankrupt's estate has no claim and is not entitled to credit for profits or interest on the dues paid for the time between the last apportionment and credit of profits and the bankruptcy.

One other question is presented by the association on this motion, viz., it claims that the amount paid in on the shares with profits credited thereto cannot be deducted from the mortgage debt so as to stop interest until some notice has been given of an intention to withdraw or have such amount so applied, and that 60 days' notice is required, and,

even bankruptcy is the equivalent of notice, the application of such sum could not be made until September 1, 1908. But I think that, while this was not in fact a foreclosure sale, it was one in effect. When the property of the bankrupt came into the hands of the trustee charged with the lien of these mortgages, it became his duty to convert it into cash by a sale thereof in the mode pointed out by the bankruptcy act, the sale being within the control of the court, and to apply the proceeds to the payment of expenses of administration and dividends to the creditors. The mortgages were a lien thereon, and the shares of stock held as collateral were to be applied in reduction of the indebtedness at a value fixed by the contract between the parties, or to be ascertained in the manner prescribed by the contract between the parties, if any, or, if none, then in such manner as the court should determine. The association had a secured claim against the estate of the bankrupt, one secured by a mortgage and an assignment of the shares. In this case it is clear that the contract between the parties fixes the mode of ascertaining the value of the shares and provides for the application thereof on the mortgages. The amount paid in on the shares was not a debt due and owing from the association to Davis which he could demand and recover at any time he saw fit, and his bankruptcy had no effect to accelerate the time when his estate or trustee was entitled to have it applied. That was regulated by the agreement of which the articles of association formed a part. Article 14 provides that, on the death of a member who has made no loans:

"His or her legal representative shall upon surrendering his or her certificate of stock, be entitled by giving six months' notice in writing, to withdraw from the funds of the association, the full value of his or her stock at the time of his or her death, less his or her portion of losses or expenses incurred, and any fines chargeable to such member at his or her death."

And:

"Upon the death of any member who has made any loans from said association, his heirs or legal representatives by paying such loans, shall be entitled, upon like notice and upon the same terms as herein provided for nonborrowers, to withdraw the full value of his or her stock at his or her death. Notice must be given to the association within six months from such death or no accrued profits on said stock will be allowed. Such legal representatives may continue such membership by complying with the articles of association."

Section 9 of article 13, as quoted, provides that shareholders who have borrowed from the association may repay the amount borrowed on shares on any day set for receiving dues by giving notice in writing two months previously of their intention so to do and paying at the date fixed in the notice the whole principal with the interest and any fines or expenses due thereon, and such payment may be wholly in cash or partly by applying on the loan the amount paid in as dues on the shares on which the loan was made, etc. I think this section applies to trustees in bankruptcy, except that fines cannot be continued as I have stated. If the filing of a petition in bankruptcy is notice to all the world of such fact, and if also such notice of bankruptcy operates as notice of intention to pay, then, in such a case as this, the association had notice, a sufficient notice that the loan would be paid

and the shares applied in part payment in 60 days or thereabouts. The whole scheme and plan of the association seems to be that 60 days' notice is to be given when the amount paid in on shares is to be applied to the payment of the mortgage debt. I do not see how courts can inject into this contract by interpretation or judicial legislation a provision that in case of the bankruptcy of the borrower the trustee may wait so long as it pleases him for an opportunity to sell the property, then sell free and clear of the mortgages, and, having discontinued the payment of dues and being free from fines, have the amount paid in as dues and profits actually apportioned and credited to the borrower, the now bankrupt, applied in reduction of the mortgage debt as of the date of the bankruptcy on the theory, it must be, that the same then became due and payable to the trustee or the estate represented by him, not because of the terms of the contract, but by operation of law.

Now take the first mortgage: It shows on its face that it was executed August 9, 1904, and recorded August 10th. Davis paid \$14 interest and premium that month, which paid to and including the 16th day of August, 1904; that is, for seven days. He had paid dues on the 60 shares in July and paid in August. He paid dues, interest, and premiums regularly according to the bond thereafter up to and including his June, 1908, payment. This paid interest and premiums to and including June 16, 1908. July 18, 1908, just before the payments of dues and interest and premiums for that month became due and payable, the petition in bankruptcy was filed. Sixty days from that date carries us to September 18, 1908, and I think that the association was bound to take notice that the loan would be paid and that the dues paid and credited to Davis would be applied to the reduction of the loan. This was a fair inference from the whole contract and the situation.

Amount of mortgage.....	\$12,000 00
Interest and premiums to September 18th.....	184 00
Amount September 19, 1908.....	\$12,184 00
Dues paid and profits credited.....	3,149 40
Balance first mortgage September 18, 1908.....	\$ 9,034 60

Second Mortgage.

This mortgage was dated April 16th, but shows on its face that it was executed April 30, and was recorded May 6, 1907. Davis paid and was credited his dues for April and each and every month thereafter up to and including June, 1908, or \$150. He was credited a dividend of profits in December, 1907, of \$1.80, which makes \$151.80 paid and credited on the 10 shares. In May, 1907, he paid the interest and premium for 14 days, \$4.66, that is, to May 20, 1907, and he paid regularly thereafter up to the third Monday of June, which paid interest and premiums to June 20, or 21, 1908. The petition was filed July 18, 1908, and the July interest and premiums were not paid. Interest and premiums accumulated thereafter, of course.

Amount of second mortgage.....	\$ 2,000 00
Interest and premiums to September 18th.....	29 33
Amount September 18, 1908.....	\$ 2,029 33
Dues paid and profit credited.....	151 80
Balance second mortgage September 18, 1908.....	\$ 1,877 53
Amount of both mortgages September 18, 1908.....	\$10,912 13
Add interest and premiums to July 20, 1909, when trustee paid \$840.....	549 24
	\$11,461 37
Deduct payment July 20, 1909.....	840 00
Balance July 20, 1909.....	\$10,621 37
Interest and premiums to January 17, 1910.....	313 29
Amount January 17, 1910.....	\$10,934 66
Deduct payment.....	10,540 14
Balance due January 17, 1910.....	\$ 394 52
Add insurance premium, \$15, and interest.....	15 08
Add recording tax.....	10 00
Balance due January 17, 1910.....	\$ 419 60

The report of the referee or special master is disapproved and vacated; but I am not sure that the interest commenced to run at the dates I have mentioned, or that the payment of \$840 was made July 20, 1909. The report says it was made during July, and the referee is evidently mistaken as to the date of the execution of the mortgages. The referee will make a new computation and report on the lines indicated by the above figures. In the absence of something to the contrary in the evidence, interest and premiums would commence with the actual execution of the mortgage. Still it may be that the \$14 credited for August on the passbook paid to September 1, 1904, on the \$12,000 mortgage, or some other date, and that the \$4.66 credited on the passbook paid to June 1, 1907, on the \$2,000 mortgage or some other date. The report should state the facts and show the dates when the loans were made, when interest and premiums commenced to run, and the dates when payments were made. The court should not be left to grope in the dark as to such matters.

There will be an order accordingly.

WARE-KRAMER TOBACCO CO. et al. v. AMERICAN TOBACCO CO. et al.

(Circuit Court, E. D. North Carolina, Raleigh Division. June 16, 1910.)

No. 558.

1. EQUITY (§ 153*)—PLEADING—REQUISITES.

A bill in equity should be construed to mean what it fairly conveys by a fairly exact use of English speech.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 386; Dec. Dig. § 153.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. ACTION (§ 5*)—VIOLATION OF STATUTES—RIGHT TO RECOVER.

By violating a criminal or penal statute one does not render himself liable to a private citizen unless the unlawful conduct is the proximate cause of, or results in, some special injury to such citizen's business or property.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 5.*]

3. MONOPOLIES (§ 12*)—ANTI-TRUST LAW—PURPOSE.

The prohibitory provisions of Anti-Trust Law July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), apply to all contracts in restraint of interstate or foreign trade or commerce, without exception or limitation, and are not confined to those in which the restraint is unreasonable.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

4. MONOPOLIES (§ 23*)—ANTI-TRUST LAW—PRIVATE SUITS FOR VIOLATION.

Under the express terms of Anti-Trust Law July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), one injured in business or property by another through a combination or conspiracy to restrain or monopolize interstate trade may sue for his damage.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 23.*]

5. MONOPOLIES (§ 28*)—ANTI-TRUST LAW—PRIVATE SUIT FOR VIOLATION—PLEADING—SUFFICIENCY.

A complaint, under Anti-Trust Law July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), for damages, is not insufficient as failing to show a violation of the law or injury to plaintiff, where it sets out the origin and history of one of defendant companies in absorbing competing companies engaged in manufacturing tobacco; a history of the formation, growth, etc., of the other defendant company; absorption of the latter by the former, under an agreement to keep the purchase secret, all done in furtherance of the first company's purpose to monopolize the business of manufacturing tobacco and cigarettes in violation of such law; a conspiracy between the two companies to monopolize the supply of manufactured tobacco throughout the country; that in furtherance of a general plan to restrain interstate trade in tobacco, and monopolize its manufacture and sale, defendants first resorted to unfair and oppressive means, fully set out, to prevent plaintiff company's organization; that plaintiff's stockholders and prospective stockholders were threatened with injury in business if they pressed the plaintiff's business; that one of plaintiff's incorporators was offered inducements to abandon plaintiff; that false and unjust statements were circulated concerning plaintiff; that plaintiff established a prosperous interstate business and would have grown but for defendants' unlawful acts; that plaintiff's customers were unlawfully taken away by defendants' threats and inducements; that cigarettes were sold below cost; that jobbers and dealers in plaintiff's territory were given free goods and extra discounts to press sales as against plaintiff's goods; that defendants' employé obtained employment as plaintiff's sales manager to injure and did injure plaintiff's business in a specified way, as part of defendants' scheme; that defendants conspired to destroy plaintiff's business, etc.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 28.*]

6. PLEADING (§ 68*)—SUFFICIENCY—ALLEGATIONS ON BELIEF.

An allegation that plaintiff has "reason to believe," and therefore "alleges," etc., is sufficient under Revisal N. C. 1905, § 489, requiring matter to be alleged as of plaintiff's knowledge or upon "information and belief."

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 140; Dec. Dig. § 68.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
180 F.—11

Suit by Ware-Kramer Tobacco Company and another against the American Tobacco Company and others. On demurrer to the amended complaint. Demurrers overruled.

F. A. Daniels, C. C. Daniels, F. A. Woodard, and N. T. Green, for plaintiffs.

Aycock & Winston, Junius Parker, and F. L. Fuller, for defendants.

CONNOR, District Judge. The plaintiff, in accordance with the opinion filed herein, May 8, 1910 (178 Fed. 117), upon the motion made by defendant to strike out certain portions of the complaint, has filed an amended complaint, containing all of the material averments in the original. Defendants join in a demurrer, the specific grounds of which are:

(1) That the complaint does not state any facts showing that defendants, or either of them, have violated the federal anti-trust law—have monopolized, or attempted to monopolize, or have contracted, combined, or conspired to restrain interstate or foreign trade or commerce, or that such has been the effect of the acts and facts therein alleged.

(2) That it does not state any facts showing that plaintiff has been injured by any violation of the anti-trust law, or any acts monopolizing, or attempting to monopolize, any contracts, combinations, or conspiracies to restrain interstate or foreign trade or commerce, as injuriously affecting the plaintiff.

(3) That it does state facts showing that the acts complained of are only such as have always been permissible in competition, and only such as are not only not forbidden, but are specially encouraged, by the federal anti-trust law.

It is neither necessary, nor desirable, at this time, and in the present condition of the record, to do more than ascertain whether, in view of such decisions as have been made throwing light upon the interpretation of the statute, the facts alleged, with the inferences to be drawn therefrom, most favorable to plaintiff, the action can be maintained. It is conceded that, before an affirmative answer can be given to this question, it must appear from allegations in the complaint:

(1) That defendants, the American Tobacco Company and the Wells-Whitehead Tobacco Company, have entered into "a contract, or combination, in the form of a trust, or otherwise," or conspiracy in restraint of interstate trade or commerce; or "that defendants have monopolized, or attempted to monopolize, or have combined or conspired to monopolize a part of the trade or commerce among the several states, or with some foreign nation." These, and each of them, are "the things forbidden and declared to be unlawful" by the act.

(2) That plaintiff has been injured, as alleged, in its "business or property" by reason of the unlawful acts of defendants.

These are the essential elements, upon the existence of which the plaintiff's action is founded. Act July 2, 1890, c. 647, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202).

The complaint, at considerable length, with fullness of detail, and in substantial respects corresponding to declarations, petitions, and bills in equity, held sufficient by the federal courts, sets out the origin, history, growth, and conduct of the defendant American Tobacco Company in absorbing competing companies, or companies engaged in the manufacture of tobacco in all of its forms. The complaint proceeds to set forth a history of the formation, growth, etc., of the defendant Wells-Whitehead Tobacco Company, and, after describing the various attempts of the American Tobacco Company to destroy its business, sets forth the manner in which it acquired a controlling interest in the stock of said Wells-Whitehead Company, alleging an agreement between the officers of both companies that the purchase should be kept secret, etc. All of this, it is alleged, was in furtherance of the purpose of the American Tobacco Company to monopolize the business of manufacturing tobacco and cigarettes in violation of the provisions of the federal anti-trust law. The complaint, in this respect, is drawn upon the lines, and in substantial accordance with the petition, or bill, in *People's Tobacco Co. v. Am. Tobacco Co.*, 170 Fed. 406, 95 C. C. A. 566, and sustained by the Circuit Court of Appeals of the Fifth Circuit.

In *Swift v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, Mr. Justice Holmes, discussing a demurrer to the bill in equity filed by the government for the purpose of enjoining the "meat trust," for alleged violation of the statute, says:

"The scheme, as a whole, seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give the scheme a body and, for all that we can say, accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as parts of a single plan. The plan may make the parts unlawful. The statute gives this proceeding against combinations in restraint of trade among the states and attempts to monopolize the same."

In *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, at page 244, 20 Sup. Ct. 96, at page 108 (44 L. Ed. 136), Mr. Justice Peckham says:

"We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made. Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded. All the facts and circumstances are, however, to be considered in order to determine the fundamental question whether the necessary effect of the combination is to restrain interstate commerce."

The learned justice, after an exhaustive and careful analysis of the allegations in the bill, writing for the unanimous court, overrules the demurrer. In the complaint herein is found, "after all the specific

charges, a general allegation that the defendants have conspired with one another to monopolize the supply of manufactured tobacco, cigars, and cigarettes throughout the United States," and, as said by Judge Holmes:

"This general allegation of intent colors and applies to all the specific charges in the bill. Whatever may be thought concerning the proper construction of the statute, a bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago; but it is to be taken to mean what it fairly conveys to a dispassionate reader, by a fairly exact use of English speech."

In *People's Tobacco Co. v. A. T. Co.*, supra, Judge Shelby, discussing the demurrer to the complaint, says:

"At great length, and with minute details, the petition alleges and describes this combination or conspiracy in restraint of interstate trade, or commerce, showing that it is such as is condemned by the first section of the act. With equal fullness, there are allegations of an attempt by defendants, with other conspirators, to monopolize the trade or commerce in tobacco among the several states—such an attempt and conspiracy as is condemned by the second section of the act." *Montague v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608.

In *United States v. MacAndrews & Forbes Co.* (C. C.) 149 Fed. 823, an indictment drawn under the anti-trust act was considered upon demurrer by District Judge Hough. He says:

"The criterion as to whether any given business scheme falls within the prohibition of the statute is its effect upon interstate commerce, which need not be a total suppression of trade or a complete monopoly; it is enough if its necessary operation tends to restrain interstate commerce and to deprive the public of the advantage flowing from free competition."

The learned judge, after reciting the acts charged to have been committed by the defendant, says:

"Not only do the facts alleged show a combination producing a result detrimental to interstate commerce, but they also show concerted action to bring about that result, and the result, as shown, constitutes that 'virtual' monopoly in the interstate distribution of the substance manufactured by the corporate defendants which brings the matter within the decisions differentiating the modern use of the word 'monopoly' from that grant by royal patent which was the origin of the phrase."

This language is appropriate to the description given, in the complaint, of defendants' relation to the manufacture of tobacco and cigarettes.

It is, however, strongly and earnestly insisted that plaintiff fails to set forth any facts from which the court can see that it has been injured in its business or property by the character and conduct of defendants. The learned counsel says that if it be conceded, for the purpose of the argument, that defendant American Tobacco Company is a monopoly, and that, in securing the controlling interest in the stock of its codefendant, the Wells-Whitehead Tobacco Company, in the manner and under the circumstances set forth, it formed an unlawful combination, within the meaning of the act, subjecting both corporations to indictment or other proceedings by the government, yet that plaintiff shows no cause of action under the provisions of the

seventh section of the act, because in neither nor all of the acts alleged did it exceed what is recognized by the law as fair competition, and this the statute does not prohibit. It is undoubtedly true, as said by counsel, that by violating a criminal or penal statute a person, either natural or corporate, does not render itself liable to be sued by a private citizen unless the unlawful conduct is the proximate cause of, or results in, some special injury to the business or property of the person bringing the action. Counsel ask: May not defendants, although violators of the public law, until called to account by the sovereign, prosecute their business in a lawful way? May they not engage in fair competition with others engaged in the same business? May they not advertise their wares, undersell their competitors in open market, send their agents into the markets of the country and, by fair and well-recognized rules of competition, offer their goods for sale? How, he asks, does this injure the public or "raise prices"—restrain or interfere with trade or commerce? In construing the statute it must be kept in view that:

"Its prohibitory provisions apply to all contracts in restraint of interstate, or foreign, trade or commerce, without exception or limitation; and are not confined to those in which the restraint is unreasonable."

Hence, as said by Mr. Justice Peckham, in regard to a combination to establish rates:

"The claim that the company has the right to charge reasonable rates, and that, therefore, it has the right to enter into a combination with competing roads to maintain such rates, cannot be admitted. The conclusion does not follow from the premise. What one company may do, in the way of charging reasonable rates, is radically different from entering into an agreement with other and competing roads to keep up the rates to that point." *United States v. Freight Ass'n*, 166 U. S. 290, at page 339, 17 Sup. Ct. 540, at page 558, 41 L. Ed. 1007; *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259.

It is the combination, or conspiracy, to restrain or to monopolize interstate trade, which is condemned, and if this is established an injury "done to the business or property" of "any person," by reason thereof, constitutes a cause of action. Whether, under the language of the statute, the members of the illegal combination, or the conspiracy, may, in the prosecution of their business, resort to the legal methods open to those who are living in obedience to the law, with immunity from an action for injuries inflicted upon the business or property of others—that is, resort to fair competition—has not, so far as the industry of counsel has revealed, been decided. The position of the plaintiff is that the unlawful combination and its members are "outlaws" and not within the pale of the protection conferred upon those who pursue a lawful calling in a lawful way. The language of the statute (seventh section) is:

"Any person who shall be injured, in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue," etc.

Chief Justice Fuller, in *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, overruling a demurrer to the petition, says:

"It is charged that defendants formed a combination to directly restrain plaintiff's trade; that the trade to be restrained was interstate; that certain means to attain such restraint were contrived to be used and employed by defendants; and that thereby they injured plaintiff's property and business."

This was held sufficient. Judge Shelby, in *People's Tobacco Co. v. American Tobacco Co.*, supra, discussing a demurrer to the petition substantially like the one before the court, says:

"It is plain that the petition need only aver, and state facts to show, that the defendants have committed one or more of the offenses condemned by the first and second sections of the act, that the plaintiff is a person injured within the meaning of the seventh section, and the amount of damages it has sustained by such injury."

In the light of these decisions, it would seem that the complaint sufficiently alleges facts bringing its grievance within the provisions of the act. It is not charged that the combination between the defendants was formed for the purpose of restraining plaintiff's interstate trade; this, of course, it could not do because the final act of forming a conspiracy or combination—the purchase of a controlling interest in the stock of the Wells-Whitehead Tobacco Company, by the American Tobacco Company—was during the month of July, 1904, whereas the Ware-Kramer Tobacco Company was not organized until October, 1904. The theory upon which the complaint is drawn is: That defendants, being an unlawful combination within the terms of the statute, in furtherance of its general plan, scheme, or purpose to restrain all interstate trade in manufactured tobacco and cigarettes, and to monopolize the manufacture and sale of tobacco, first resorted to unfair and oppressive means, fully set out, to prevent its organization. That one of their managing officers threatened the persons proposing to form and organize plaintiff corporation. That defendant "by fair means or foul" would destroy the proposed corporation. That threats were made by the officers of defendants to stockholders or prospective stockholders of plaintiff company, after it was organized, that, if they (some of them being directors and managing officers of plaintiff company) "continued to press the business of the Ware-Kramer Tobacco Company, the American Tobacco Company would take from such persons the sale of its products, particularly snuff, which such persons were, at that time, selling in large quantities." That, to another large stockholder, an officer in a bank, threats were made by an officer of the Wells-Whitehead Tobacco Company:

"That if he persisted in his efforts to make effective the organization, and to make prosperous the business of the Ware-Kramer Tobacco Company, he would find that his interests in enterprises in the business would be made to suffer."

That, to another person engaged in the tobacco warehouse business, in the town of Wilson, N. C., at which the American Tobacco Company and one of its allied companies bought large quantities of leaf tobacco, threats were made calculated to injure his business. That, to another person, one of the incorporators of the plaintiff company, a proposal was made that if plaintiff would surrender its charter all of the expenses incurred would be paid; that the machinery and supplies contracted for, or purchased, would be paid for and taken by defend-

ants, even if the same were worthless and had to be destroyed, and "that if such person would not proceed further with the Ware-Kramer Tobacco Company defendants would give him a place, the income of which would exceed \$10,000 a year." That false and unjust statements were circulated by defendants, in regard to plaintiff, its business and goods, among others "that defendant American Tobacco Company had failed to kill the Wells-Whitehead Tobacco Company, and that, as a last resort, it had organized the Ware-Kramer Tobacco Company, with which to fight the Wells-Whitehead Tobacco Company." That, notwithstanding these, and other, wrongful acts of the defendants, the Ware-Kramer Tobacco Company organized, and that by reason of the large sums of money and the great amount of energy expended by plaintiff in advertising, introducing, and establishing a market for the sale of "White Roll" cigarettes, coupled with the superior quality of the same, and that they were in favor with the consumers of cigarettes, that the brand of "White Roll" cigarettes was on the 1st day of January, 1907, of large value, to wit, the sum of \$150,000. That the business of plaintiff in its southern territory, by reason of the large and well-established reputation and demand for certain of its brands, its business connection with jobbers, merchants, and others, the thorough way in which its goods were advertised and established, was valuable as property and was worth in the market \$250,000. "That by reason of its energy and business judgment, the superior quality of its goods, etc., the demand for plaintiff's goods increased until the summer of 1907 and, but for the unfair and unlawful methods adopted by defendants, and the unfair and unlawful acts of their officers' agents and employes, plaintiff's business would have grown and increased from year to year." That in 1906 plaintiff's business increased largely over that of the preceding year, and that plaintiff was shipping its goods into a number of states of the Union.

Plaintiff alleges: That, during the years named, defendants, by the means aforesaid and other means, such as maintaining a close watch and espionage upon plaintiff's shipments, maintaining a system of spies upon such shipments from the depot at Wilson, N. C., and communicating same to the defendant's officers, both in New York and Wilson, sending their representatives to different customers of plaintiff, and by threats, promises, and inducements, many of plaintiff's customers were unlawfully and unfairly taken from them. That this systematic espionage upon and interference with plaintiff's business continued until it was compelled to move to Norfolk, Va., to escape the same.

Plaintiff sets forth, among others, the following means resorted to by defendants to interfere with and restrain their trade: Using coupons in an unfair manner; selling cigarettes at, and below, the cost of production; paying jobbers extra discounts in territory where plaintiff's cigarettes were selling well; giving jobbers and dealers free goods to induce them to press the sale of their goods, as against plaintiff's goods, and by requiring dealers not to handle plaintiff's goods; by interfering with the labor of independent manufacturers; by making jobbers and dealers afraid to keep exposed to view or on their shelves,

where they could be seen, the goods of plaintiff for fear the American Tobacco Company would injure the business of such dealer or jobber; by making jobbers and dealers afraid to advertise plaintiff's goods; by the refusal of the American Tobacco Company to sell to and by purposely delaying the shipment and delivery of goods ordered by jobbers and dealers who sold, or advertised, the goods of plaintiff.

Plaintiff, in addition to the foregoing, alleges specifically: That, during the year 1905, it received a proposition from a cigarette dealer in China to manufacture, for him, a large number of cigarettes for the Chinese trade. That plaintiff made for said customer a large order for cigarettes, which were shipped as directed, accepted, and paid for. That said order promised to furnish a market for at least 7,000,000 cigarettes a month. That the vice president of defendant, by means of the espionage aforesaid, ascertained that plaintiff had received said order and made said shipment and immediately communicated with one of its employes, giving him directions to "ascertain to what port these goods were shipped and the name of the consignee. If you cannot learn the name, perhaps you can find out the markings on the case"—concluding: "A car load means to us about five million cigarettes. If we get this information I think we can shut off their market." That this information was obtained and the market was "shut off" to plaintiff's great damage. Finally, plaintiff alleges: That defendant W. M. Carter was in the employment of defendant American Tobacco Company for some time prior to the year 1909. That during the year 1908 he proposed to take a block of stock in plaintiff company, representing that he was an expert salesman and was thoroughly familiar with the cigarette trade and could sell large quantities of plaintiff's goods. That plaintiff's officers accepted the proposition of defendant Carter, and he took 30 shares of its stock and was made manager of plaintiff's sales department and entered upon his duties during the month of February, 1909, and continued to draw his salary until October 1, 1909. That, after becoming manager of plaintiff's sales department, "he purposely and willfully so managed the sales department of said business as to greatly decrease and injure the business of said company. He transferred salesmen from territory in which they were acquainted and were selling goods to other territory in which they were strangers," etc. Plaintiff alleges many other wrongful and injurious acts of defendant W. M. Carter, all of which it avers injured its business. "That from various facts and circumstances, plaintiffs have reason to believe, and therefore allege, that the said W. M. Carter was working in the interest of and carrying out the plans and scheme of the defendant the American Tobacco Company, while he was drawing a salary from the Ware-Kramer Tobacco Company, and that his conduct and work, as alleged in the complaint herein, was the work and acts of the defendants, and had for their purpose the injury and destruction of Ware-Kramer Tobacco Company and its elimination as a competitor of the defendant.

* * * That the various acts and doings of the said W. M. Carter, as set forth in the complaint herein, were done and performed in pursuance of an agreement and conspiracy entered into by all the de-

defendants herein for the purpose of injuring and destroying the business of the plaintiff Ware-Kramer Tobacco Company."

Before proceeding to assign this allegation to its place in the list of plaintiff's grievances, it is proper to note defendants' contention that the matter is not sufficiently alleged in accordance with the provisions of the Code of Civil Procedure in this state. The Code (Revisal 1905, § 489) prescribes that matter must be alleged either as of the plaintiff's knowledge, or "upon information and belief," and the form of verification makes the distinction between matter alleged of his own knowledge which he avers to be true and matter alleged upon "information and belief" which he avers that "he believes to be true." While the language used is not so clear as it should be, it would seem that the plaintiff intends to allege that it has information—"it has reason to believe," and therefore "alleges." This, reasonably interpreted, means that the allegation is upon "information and belief." If, however, this paragraph be eliminated, the next succeeding one has no limitation, but expressly alleges that defendants were in a conspiracy to injure and destroy plaintiff's business by the means set out. It is doubtful whether the first paragraph contains any allegation affecting any of the defendants other than W. M. Carter. There is no ambiguity in the language of the next. Conceding all that is claimed by defendants, in regard to what is fair competition in business, the limits of which have not been very definitely fixed, it is clear that, eliminating all doubtful averments, sufficient allegation remains, admitted by the demurrer, to place the acts of the defendants beyond the limits of fair competition. It would seem that the language of Judge Shelby in *People's Tobacco Co. v. American Tobacco Co.*, supra, in this connection, is appropriate:

"It is alleged that plaintiff was engaged in interstate trade, or business, such as that engaged in by the defendant companies, and that the described acts of the defendants were done for the purpose of obtaining a monopoly and destroying the business of the plaintiff. It is further alleged that, by such conspiracies and combinations of the defendants, and by their effort to obtain a monopoly, the business of the plaintiff was injured greatly, and that the plaintiff was damaged (in a large amount). * * * If the averments are true—and the exception of no cause of action admits them to be true—the defendants are guilty of the misdemeanors charged in the first and second section of the act, and the plaintiff has been injured in its business or property within the meaning of the second section."

Here the plaintiff alleges that, by the means set out, it had built up a valuable business, interstate trade, and that this business has been destroyed, and its property is in the hands of a trustee in bankruptcy. Certainly, if these allegations are established to the satisfaction of a jury, it would be difficult to avoid the conclusion that the plaintiff Ware-Kramer Tobacco Company has been injured in its "business and property." It requires no argument to show that the course of conduct pursued by defendants towards the Ware-Kramer Tobacco Company from the moment its projectors conceived the idea of bringing it into corporate existence, through its struggle to take upon itself the form and features of organic life, and while, in defiance of the efforts of defendants to throttle its activities, it maintained an existence with

promise of success, were calculated and intended not only to restrain but to destroy it. While it may be that some one or more of the "things done," as set out in the complaint, were in and of themselves within the limits of "fair competition," they are, as said by Mr. Justice Holmes, "bound together as the parts of a single whole. The plan may make the parts unlawful." No argument is required to show that the scheme was intended to restrain the interstate trade of plaintiff, and that it "brought that result to pass." While it is true that "fair competition is the life of trade," it is equally true that "unfair and excessive competition" is death to trade—of all competition—followed by the establishment of "monopoly," which my Lord Coke defines to be:

"An institution or allowance to any person or persons, bodies politic or incorporate, of or for the sole buying, selling, making, working or using anything, whereby any person, or persons, bodies politic or corporate are sought to be constrained of any freedom or liberty that they had before, or hindered in their lawful trade."

And which our Constitution, from 1776 to the present day, declares to be "contrary to the genius of a free state and ought not to be allowed." Const. N. C. art. 1, § 31.

The demurrer must be overruled, and defendants allowed 60 days from June 15, 1910, to file answers.

In re DEVLIN.

(District Court, D. Kansas, First Division. March 19, 1910.)

No. 809.

1. BANKRUPTCY (§ 402*)—DISTRIBUTION OF ESTATE—DEATH OF BANKRUPT—WHAT LAW GOVERNS—PREFERRED CLAIMS.

Where, pending bankruptcy proceedings, the bankrupt died, his estate was distributable according to the bankruptcy law, and not according to the state statutes of distribution, so that the state was not entitled to a preference in the payment of its claims by virtue of such statute.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 402.*]

2. BANKRUPTCY (§ 402*)—PREFERRED CLAIMS—CLAIMS OF STATE—STATUTES.

Provisions of a state statute, requiring all debts due the state to be paid as a claim of the third class out of the estate of a deceased person, was not such a law of a general nature of the state as would entitle the state to a preference in the payment of its claims out of the estate of the bankrupt under Bankruptcy Act July 1, 1898, c. 541, § 64b (5), 30 Stat. 563 (U. S. Comp. St. 1901, p. 3448), providing for payment in full of debts owing to any person, and by the laws of the state is entitled to priority.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 492.*]

3. BANKRUPTCY (§ 350*)—CLAIMS—PRIORITY OF PAYMENT—CLAIMS OF STATE—COMMON LAW.

Gen. St. Kan. 1901, § 8014, provides that the common law is modified by constitutional and statutory law, judicial decisions, and the conditions and wants of the people, shall remain in force in aid of the general statutes of the state, but that the rule of the common law, that statutes in derogation thereof shall be strictly construed, shall be inapplicable to any general statute, but that all such statutes shall be liberally construed to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

promote their object. At the same session of the Legislature, the state's only insolvency law was passed relating to voluntary assignments for the benefit of creditors, which provided that the act should be for the benefit of all creditors of the assignor in proportion to their respective claims. *Held*, that such insolvency act comprised a comprehensive scheme for the conservation and disposition of the estates of persons assigning their property for the benefit of creditor and superseded the common-law rule that debts due the crown were entitled to priority of payment as against general creditors of an insolvent, if such rule ever was in force in Kansas, and hence in bankruptcy proceedings claims of the state were not entitled to priority under Bankruptcy Act July 1, 1898, c. 541, § 64b (5), 30 Stat. 563 (U. S. Comp. St. 1901, p. 3448), preferring debts owing to any person who by the laws of the state is entitled to priority.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 350.*]

In the matter of Charles J. Devlin, bankrupt. On petition of the State of Kansas for preferential payment of defendant's demands out of the bankrupt's estate. Denied.

F. S. Jackson, Atty. Gen., C. C. Coleman, F. L. Williams, Mulvane & Gault, and D. R. Hite, for the State.

John S. Dean, for bankrupt estate.

Mulvane & Gault and D. R. Hite, amici curiæ.

POLLOCK, District Judge. The state of Kansas presents two claims against the estate of the bankrupt. The first arising on a certain bond or obligation made and entered into between the state and Thomas T. Kelly, Treasurer of the State of Kansas, as principal, executed by the bankrupt as surety, January 9, 1905; the bond being in the penal sum of \$500,000. The second arising on a certain bond or obligation entered into between the state and the First National Bank of Topeka, principal, as a depository of state moneys, executed by the bankrupt and others as sureties, January 27, 1903; this bond being in the penal sum of \$100,000.

The extent of the obligation so incurred by the bankrupt to the state by the execution of the above-mentioned bonds is in no wise involved herein. The single question here presented for decision is: Has the state the right to be preferred in payment of whatever amounts may be determined due it on the foregoing obligations, on account of the default of the principals therein, over other simple contract creditors of the bankrupt, under the provisions of the bankruptcy act, arising out of the nature and character of the state as a claimant?

In this regard the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]), in section 64b, provides as follows:

"The debts to have priority except as herein provided and to be paid in full out of bankrupt estates and the order of payment shall be: * * * (5) Debts owing to any person who by the laws of the states or the United States is entitled to priority."

It is thus apparent the question presented for decision must be ruled by a consideration of the laws of the state, for, if the state be found by its laws to have reserved to itself the right of priority of payment of its demands over other claimants to the estate of an insolvent debtor, it is clear it was the object, intent, and purpose of the above-quoted provision of the bankruptcy act to preserve and enforce such right.

In *Re Western Implement Co.* (D. C.) 166 Fed. 576, affirmed and approved by the Circuit Court of Appeals for this Circuit (171 Fed. 81, 96 C. C. A. 185), the claim to priority of payment was based on the provisions of the insolvency laws of the state of Minnesota. In this state the insolvency laws of the state do not make specific provision for the preferential payment of debts due the state. It is therefore contended by the trustees the state in this case is entitled only to the rights accorded a general creditor for the payment of its demands, as they may be ascertained on the obligations in question. On the contrary, it is the contention of the state its right of priority of payment must be accorded for two reasons: (1) That by the course of the common law in force in this state preferential payment of the demands of the state must be allowed. (2) As in this case the bankrupt deceased within a short period of time after the institution of this proceeding in bankruptcy and during its pendency, and as the statutory law of the state for the settlement of the estates of deceased persons provides for priority of payment of debts due the state out of the estates of deceased persons, therefore while, as the jurisdiction of this court of bankruptcy had attached prior to the death of the bankrupt, this proceeding in bankruptcy will not abate because of the death, yet the estate will be here administered in the bankruptcy court and distributed in pursuance of the laws of the state for the settlement of the estates of deceased persons, and not in pursuance of the provisions of the bankruptcy act, in which event the state would be entitled to the priority of payment asserted.

In so far as the latter contention is concerned, it is not thought to be difficult of solution. While, as contended by solicitors for the state, were this estate of the bankrupt, now deceased, in process of administration in a probate court of the state instead of this court of bankruptcy, the claims of the state on the foregoing obligations would be by that court ordered paid as a third-class claim in preference to all other demands except funeral expenses, the expense of the last sickness of deceased, and that incurred in the administration of the estate, and the wages of servants, for, in such order, the statute law of the state for the purpose of payment out of the estate of a deceased person classifies and commands payment of demands to be made. But, in the present case, this court of bankruptcy, by the act of the bankrupt, and during his life, was applied to, and acquired jurisdiction over his person and estate, to administer it in accordance with the provisions of the bankruptcy act then and now in force as the supreme law of the land. Hence the mandate of that act, and not the laws of the state enacted for the purpose of controlling the disposition of the estates of deceased persons, must be followed by

this court to the end, and the classification and order of payment prescribed in the act must be followed.

Again, it is not thought that provision of the statutes of the state which requires all debts due the state to be paid as a claim of the third class out of the estate of a deceased person is a law of such a general nature or so related to the subject in hand that it can be given weight here in determining the right of the state to priority of payment of its demands arising under the provisions of clause 5, § 64b, of the bankruptcy act above quoted. This question was expressly ruled by the Circuit Court of Appeals for the First Circuit in *Re Worcester County*, 102 Fed. 808, 42 C. C. A. 637, where Judge Putnam, delivering the opinion of the court, said:

"We are unable to conceive of any priority to which any one may be entitled by the laws of a state, under section 64 of the bankruptcy act, unless it be a priority created by insolvent laws of that character. It is true that priorities are often created by state statutes relating to the administration of estate of deceased persons, and also to proceedings for winding up corporations; but such laws are not of that general character which can be supposed to be within the purview of the provision of the bankruptcy act which is concerned here. Of course statutes touching assignments for the benefit of creditors must be classed with insolvency laws, strictly so called. It is settled that state insolvency laws are not annulled by the enactment of a bankruptcy act, and that the only effect of such enactment is to suspend their operation, so that they became operative again, without re-enactment, when the bankruptcy act is repealed. *Butler v. Goreley*, 146 U. S. 303 [13 Sup. Ct. 84, 36 L. Ed. 981]."

The important and more difficult question remains: Is the state entitled to its asserted right of priority payment of its demands arising on the foregoing obligations of the bankrupt by reason of the rule of the common law, as in force in this state in aid of its statutes?

Section 8014, Gen. St. Kan. 1901, provides:

"The common law as modified by constitutional and statutory law, judicial decisions, and the conditions and wants of the people, shall remain in force in aid of the general statutes of this state; but the rule of the common law, that statutes in derogation thereof shall be strictly construed, shall not be applicable to any general statute of this state, but all such statutes shall be liberally construed to promote their object." Gen. St. 1868, c. 119, § 3.

By force of this statute the common-law rule as modified by constitutional and statutory provisions, judicial decisions, the conditions and wants of the people, is the law of this state. It therefore becomes important to inquire: (1) What the rule of the common law is as to the right of the state to receive priority of payment of its demands from out the estate of insolvent debtors; (2) whether this rule is modified by the conditions on which it was adopted by the statute as the law of this state.

In so far as the right of the general government to priority of payment of its demands is concerned, such right is not based on the rule of the common law, but on express statutory provision. *United States v. State Bank of North Carolina*, 6 Pet. 29, 8 L. Ed. 308. Hence the decisions arising on the right of the government based on

such statutory provision are not controlling and afford little light here.

The statutory enactments of many states reserve to such states the same prior right of payment of demand on behalf of the state out of the assets of insolvent debtors. For this reason such cases are not in point here.

There can be no doubt but that at the common law in the mother country debts due the crown were entitled to priority of payment in preference to the rights of other general creditors of the estate, and this whether the debtor was solvent or insolvent. This right of the crown was preserved and enforced by what was styled a "writ of protection" and a "writ of extent," and this right was a prerogative right of the crown. A full discussion of such right and method of its enforcement will be found in *Freeholders of Middlesex Co. v. State Bank at New Brunswick*, 29 N. J. Eq. 268, affirmed 30 N. J. Eq. 311; *State v. Foster*, 5 Wyo. 210, 38 Pac. 926, 29 L. R. A. 226, 63 Am. St. Rep. 47; *Robinson v. Bank of Darien*, 18 Ga. 65.

The courts of last resort in many of the states have held the state succeeded to this common-law right of the crown to priority of payment of its demands. Maryland, in *State v. Bank of Maryland*, 6 Gill & J. 205, 26 Am. Dec. 561; *Jones v. Jones*, 1 Bland, 444, 18 Am. Dec. 327; *Orem v. Wrightson*, 51 Md. 34, 34 Am. Rep. 286. New York, in *Wendell v. Jackson*, 8 Wend. 183, 22 Am. Dec. 635; *Lansing v. Smith*, 4 Wend. 9, 21 Am. Dec. 89; *People v. Herkimer*, 4 Cow. 345, 15 Am. Dec. 379. Pennsylvania, in *Com. v. Lewis*, 6 Bin. 266. Georgia, in *Robinson v. Bank of Darien*, supra; *Seay v. Bank of Rome*, 66 Ga. 615.

On the contrary, it has been the uniform holding of the highest judicial tribunals of many states that the states in their sovereign capacities have not succeeded to this prerogative of the crown, and hence the state is not entitled to priority of payment of its demands out of the estate of insolvent debtors unless so declared by the statutes of the state. *Freeholders of Middlesex County v. Bank at New Brunswick*, supra. South Carolina, in *State v. Cleary*, 2 Hill, 600; *Klinck v. Keckley*, 2 Hill, Eq. 250; *State v. Harris*, 2 Bailey, 598; *State v. Foster*, supra.

While it has been held by the Supreme Court of this state, in accordance with the general rule, that statutes of limitation do not run against demands of the state unless the state is expressly named in such acts (*State v. School District*, 34 Kan. 237, 8 Pac. 208; *State ex rel. v. Stock*, 38 Kan. 154, 16 Pac. 106; *Whitney v. Morton County*, 73 Kan. 502, 85 Pac. 530), yet the precise question here presented has not been ruled by the courts of this state, but remains an open one.

Turning now to a consideration of the law applicable to the demands presented by the state in this matter, and conceding, for the purpose of argument, although not so deciding, by the rule of the common law in force in this state, aside from the matters presently to be noticed, the state would be entitled to demand priority of payment of its claims against the estate of the bankrupt, yet the ques-

tion remains: Can such priority of payment be accorded the state in this present matter by reason of the laws of the state, as that language is employed in clause 5, § 64b, of the bankruptcy act? The language there employed, "debts owing to any person who by the laws of the states is entitled to priority," was construed in *Re Worcester County*, supra, to mean such debts as are entitled to priority of payment under the insolvency laws of the state. Accepting this, as I think must be done, as the true interpretation of the language of the act, and construing the word "person" as used in this clause to be inclusive of the state, as was held by the Court of Appeals for this Circuit in *Re Western Implement Co.*, supra, the meaning of the clause as applied to the facts of this particular matter must be held to be: The state is entitled to priority of payment of its demands here presented if it would be entitled to such priority of payment under the provisions of the insolvency laws of this state. The only insolvency law of this state is that in relation to voluntary assignments for the benefit of creditors. This act expressly provides all such assignments "shall be for the benefit of all creditors of the assignor in proportion to their respective claims." This act was passed at the same session of the Legislature at which was adopted the rule of the common law in aid of the statutes, as provided by section 8014, Gen. St. 1901, above quoted.

The question therefore is: Does this act modify the rule of the common law? From an examination of the act it will be found to comprise a general, complete, and comprehensive scheme for the conservation and disposition of the estates of those who assign their property for the benefit of creditors and for the distribution of the proceeds of such estates among all creditors in proportion to their proven demands. That such is the nature and effect of the act is settled by the decisions of the Supreme Court of this state. *Hardware Company v. Implement Company*, 47 Kan. 423, 28 Pac. 171. While it is the general rule, as contended by counsel for the state, that the rights of the sovereign state remain unaffected by an act unless the sovereign be expressly named therein, yet I am persuaded the necessary and inevitable effect of the act in question was to exclude the sovereign state from demanding that debts owing it by one who makes an assignment in accordance with its provision should receive priority in payment over general creditors of such estates, and that the rule of the common law in this respect, if conceded to be in effect in this state as modified by statute, would not entitle the state to such preferential payment for two reasons: (1) The provision of the act that the assignment "shall be for the benefit of all creditors of the assignor in proportion to their respective claims" is repugnant to the common-law rule contended for by the state in this case; hence that rule must yield to the statute, not alone from the force of necessity, but from the very language of the act adopting it, not in its entirety, but only in aid of the statutes. (2) Because if it should be held the state in its sovereign capacity succeeded to the common-law rule of the prerogative right of the crown to priority of payment over other creditors, even then the effect of such assign-

ment for the benefit of creditors, as is contemplated by the act, has ever been held to cut off and destroy the prerogative right of the crown to priority of payment; hence it was unnecessary to make express mention of the state to reduce its demands against the estate of the assignor to the rank of other creditors.

In *Cook County National Bank v. United States*, 107 U. S. 445, 2 Sup. Ct. 561, 27 L. Ed. 537, there was presented to the Supreme Court the question whether section 3466, Rev. St. (U. S. Comp. St. 1901, p. 2314), which grants to the United States the right of priority of payment of debts due it, is applicable to its demands against an insolvent national bank in view of the provisions of the national banking act which commands that all creditors of such insolvent bank shall be paid pro rata. Mr. Justice Field, delivering the opinion of the court in that case, said:

"The question is whether, under this broad and general language (section 3466, Rev. St.), the United States, having demands against an insolvent national bank, are entitled to priority of payment out of its assets over other creditors."

After quoting section 5236, Rev. St. (U. S. Comp. St. 1901, p. 3508), the opinion proceeds:

"This section provides for the distribution of the entire assets of the bank, giving no preference to any claim except for moneys to reimburse the United States for advances in redeeming the notes. When this reimbursement is fully provided for, the balance of the assets, as the proceeds are received, is subject to a ratable dividend on all claims proved to the satisfaction of the receiver, or adjudicated by a court of competent jurisdiction. Any sum remaining after the payment of all these claims is to be handed over to the stockholders in proportion to their respective shares. These provisions could not be carried out if the United States were entitled to priority in the payment of a demand not arising from advances to redeem the circulating notes. The balance, after reimbursement of the advances, could not be distributed, as directed, by a ratable dividend to all holders of claims; that is, to all creditors.

"These provisions must be deemed, therefore, to withdraw national banks, which have failed, from the class of insolvent persons out of whose estates demands of the United States are to be paid in preference to the claims of other creditors. The law of 1797, re-enacted in the Revised Statutes, giving priority to the demands of the United States against insolvents, cannot be applied to demands against those institutions. The provisions of that law and of the national banking law being, as applied to demands against national banks, inconsistent and repugnant, the former law must yield to the latter, and is, to the extent of the repugnancy, superseded by it. The doctrine as to repugnant provisions of different laws is well settled, and has often been stated in decisions of this court. A law embracing an entire subject, dealing with it in all its phases, may thus withdraw the subject from the operation of a general law as effectually as though, as to such subject, the general law were in terms repealed. The question is one respecting the intention of the Legislature. And although as a general rule the United States are not bound by the provisions of a law in which they are not expressly mentioned, yet, if a particular statute is clearly designed to prescribe the only rules which should govern the subject to which it relates, it will repeal any former one as to that subject. *Davies v. Fairborn*, 3 How. 636 [11 L. Ed. 760]; *United States v. Tynen*, 11 Wall. 88 [20 L. Ed. 153]."

In that case it was held as Congress had provided a full, complete, and comprehensive scheme for the organization, regulation, and con-

duct of national banks, and the method by which in case of insolvency the affairs of such bank should be settled, and all creditors paid pro rata out of the assets, and as the manner of distribution therein commanded was repugnant to the claimed right of priority asserted by the United States by virtue of the broad and comprehensive language of section 3466, Rev. St., the provision found in the national banking act for the distribution of assets pro rata to all creditors should prevail, although the sovereign was not expressly named in that act. Therefore, following the reasoning there employed in this case, I think it must be held inasmuch as the rule of the common law in its entirety has never been in effect in this state, but that rule only as modified by Constitution, statutes, or judicial decisions has been adopted, and when in aid and not when repugnant to the statutes, and as the Legislature has expressly ordained, in its scheme for the settlement of the estates of insolvent debtors who shall make general assignment for the benefit of creditors, that all creditors shall be paid pro rata, it must be held the common-law rule in this respect, if conceded to be in force in this state, to have been modified by the provision of such act.

Again, while it was undoubtedly within the power of the Legislature to have provided in the act relating to assignments for the benefit of creditors that all demands of the state should be accorded priority of payment out of the proceeds of the estate in the hands of the assignee, as the United States has done by section 3466, Rev. St., yet it must be remembered the common-law right of the state to priority of payment here asserted is not based on any claim of lien reserved by the state on the property of the bankrupt, but is based on the state's succession to the common-law prerogative right of the crown to priority of payment of its demands out of the assets of the estate of the bankrupt in the hands of his trustees in bankruptcy, and that, as the insolvent bankrupt made an assignment of his property for the benefit of creditors under the provisions of the laws of this state in that regard, such assignment and its acceptance by the assignee would have effected such a valid transfer of the bankrupt's property as would have cut off and destroyed any right of the state to priority of payment based on the rule of the common law. For it has ever been held an assignment for the benefit of creditors where the title to the property assigned passed to the assignee, as it does under the assignment laws of this state, such assignment operated to cut off and destroy all rights of creditors to demand priority of payment from out the assets of such estate, including the prerogative right of the crown or sovereign to priority of payment. 2 Tidd's Pr. 1098, 1099; Chitty's Prerogative of the Crown, 281, 284, 285; King (aid of Braddick) v. Watson et al., 3 Price's Exch. Rep. 6; Giles v. Grover et al., 1 Clark & Finley, 72; State v. Bank of Maryland, 6 Gill & J. (Md.) 228, 26 Am. Dec. 561; Middlesex Co. v. State Bank at New Brunswick, *supra*; State v. Foster, *supra*.

Therefore, laying aside for future decision by the Supreme Court of the state, or other tribunal, the extremely doubtful and difficult

question whether this state in its sovereign capacity has succeeded to the prerogative right of the crown to demand priority of payment of its claims out of the estates of insolvent debtors within her borders in the absence of some modifying statute, but conceding for the purpose of decision of the present matter the fact that the state, in the absence of any statute to the contrary, would succeed to such prerogative right by virtue of the common law, yet in the very form of its adoption the common law obtains in this state, not to its full extent, but only in aid of the statutes and when not repugnant thereto. Therefore, as the provisions of the act in relation to assignments for the benefit of creditors is the only insolvency law of this state to which resort may be had to determine what persons are entitled under the laws of the state to priority of payment of their demands out of the estate of the bankrupt, and as that act is repugnant to the common-law rule contended for by the state, it must be held the common law in this respect is modified by statute, and the right of the state to priority of payment of its demands in this case is not found by the laws of the state to be reserved to it and enforceable under the provisions of section 64b of the bankruptcy act.

It is therefore ordered the application of the state for an order entitling it to priority of payment of its demands arising on the foregoing obligations be disallowed and denied.

It is further ordered, if the state be so advised by its solicitors, it shall be entitled to prove its demands arising on such obligations as general claims against the estate of the bankrupt in the hands of the trustees.

GULDEN v. CHANCE et al.

(Circuit Court, E. D. Pennsylvania. January 28, 1910.)

No. 8, October Sessions, 1907.

1. TRADE-MARKS AND TRADE-NAMES (§ 67*)—UNFAIR COMPETITION IN TRADE—LIMITATION OF PACKAGES.

One dealer is not altogether prohibited from copying the style or dress of package gotten up by another under the penalty of a suit for unfair trade. It is only where such special marks have become identified in the mind of the public with a certain party's goods, and are manifestly imitated for the purpose of getting away his trade, that this is the case. Not every appropriation, in other words, of the ideas of another, amounts to unfair trade competition. There must be an established right in that which is taken, as well as a practiced deception, before this ensues.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 78; Dec. Dig. § 67.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 70*)—UNFAIR COMPETITION—IMITATION OF PACKAGES—USE OF COLORS AND DESIGNS COMMON TO THE TRADE.

This is not to say that, notwithstanding the use of colors and designs common and appropriate to the particular article, a combination of color

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and style of package may not be so distinct and have become so identified with the goods of some one dealer that a manifestly purposed imitation of them will not be regarded as fraudulent; but only that, before that result is reached, the combination must be so unusual and the imitation so clear that the similarity cannot be other than designed.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 70*)—UNFAIR COMPETITION—SIMILARITY OF PACKAGES.

The adoption and use by defendants, who were packers of olives, of bottles, labels, and caps somewhat similar to those used by complainant, *held* not to constitute unfair competition, nor to evidence any intention of deceiving purchasers, in view of the fact that defendants had been in the business for 30 years, that other packers used bottles of the same or similar design and labels and caps more or less similar in appearance and style, and that those used by defendants had many distinguishing features and did not resemble complainant's so closely as to indicate an intentional imitation.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*]

Unfair competition, see note to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

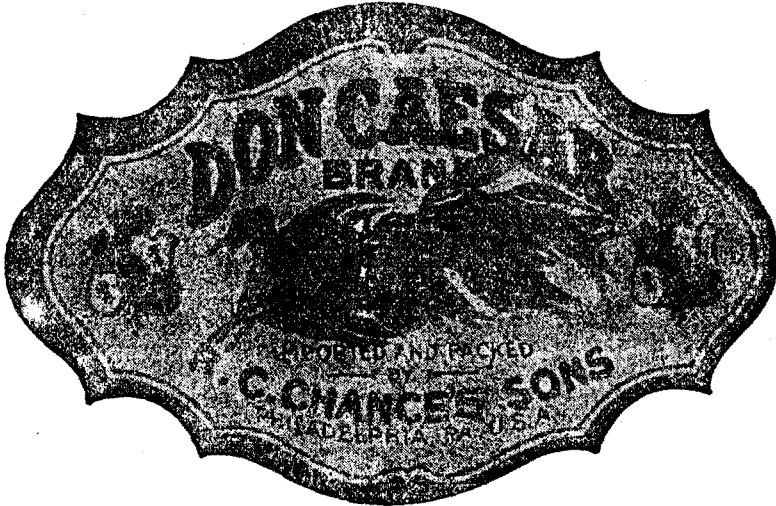
In Equity. Suit by Charles Gulden against R. C. Chance's Sons. On final hearing. Bill dismissed.

The following is the label of complainant:

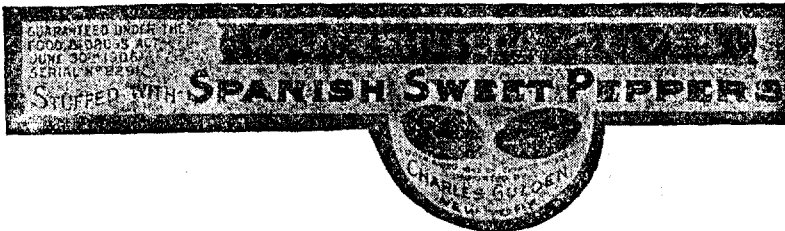


*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The following is the label of defendants:



The following is the neck label of complainant:



The following is the neck label of defendants:



See, also, 163 Fed. 447, and 165 Fed. 624, 92 C. C. A. 53.

Timothy D. Merwin, for complainant.

John K. Andre and Frank P. Prichard, for defendants.

ARCHBALD, District Judge (specially assigned). The charge of infringement of complainant's trade-mark "Don Carlos" was eliminated by the decision of the Court of Appeals (165 Fed. 624), and the

question of unfair competition therefore alone remains. To make this out, a clear purpose on the part of the defendants must be shown to palm off their goods as those of the complainant, by imitative and misleading dress, and thus divert to themselves a portion of his trade. That there was any intention of that kind, or that anything more than a general, if not an unavoidable, correspondence in the make-up of the defendants' packages with those of the complainant, has been shown, cannot, under the evidence, be successfully maintained. The defendants are reputable dealers in Philadelphia; the house (father and sons) having been in business there for upwards of 60 years, and having packed olives for 30 years, and having an equal standing in the trade with the complainant, who has been in business in New York for 40 years, and packed olives for 33 years. The temptation which sometimes prompts one man to try and steal the trade of another was therefore wanting. And while it must be confessed that, in these days of keen business competition, the same scruples, as once, do not always obtain, there was not thus, at least, the same occasion for such dishonest attempts as there might otherwise have been. Neither are the defendants shown to have cheapened on the complainant, putting out an inferior quality of goods at a lower price, which is one of the most frequent incidents of unfair trade; and the defendants are therefore relieved from unfavorable imputation to the extent that these circumstances are not present.

Without resting the case upon these features of it, however, and upon a full consideration of all the evidence, the charge of unfair competition cannot be regarded as made out. It centers about the adoption by the defendants of the name "Don Caesar" as one of their brands, and the selection, in that connection, of a display label, on which, in company with it, a branch of olives in natural colors was shown, this being designedly imitative, as it is said, of the complainant's "Don Carlos" label, similarly embellished and colored, a red wax cap at the same time being substituted by the defendants for a green cap previously used, thus completely copying the distinctive marks of the complainant's goods. This change took place, as it is pointed out, just about the time that an experienced salesman, named Weed, went over from the complainant to the defendants' employ, and was made at his suggestion, the better to enable him to divert and control the trade which he had worked up for the complainant. And as further proof that the imitation was designed, it is claimed that cuts of the complainant's "Don Carlos" labels were submitted to the manufacturer, by whom the "Don Caesar" labels were gotten out, with instructions to take them as a guide. Previous to this, also, the defendants had changed over from the bulb bottles, in which they packed stuffed olives, to ring bottles, which the complainant was the first to introduce for that purpose, if not to design. And just about the time that the "Don Caesar" labels were adopted, the neck labels on these ring bottles were also changed; a form having a depending ear being chosen the same as that of the complainant, and a plate of stuffed olives with similar colors and lettering, in place of two halves of a split olive on the complainant's label, being shown. These imitative changes,

as it is claimed, are too many and too marked to be accidental, and are of cumulative force, establishing a determined purpose to unfairly appropriate the complainant's trade. As so put, a case of some seriousness may seem to be made out. But it disappears when the full facts are known.

The complainant has 12 shapes and styles of packages, and 6 different brands, all except the large King brand covering identically the same character and quality of berry, no particular kind of olives being thus associated and identified with any special brand or style of dress. In this respect he is like most other packers, who pack and label their goods in much the same shaped bottles, branded, of course, with different names, and marked with special labels, but otherwise closely approaching each other in design and color; those appropriate to the packing of olives being necessarily few. No packer therefore has a monopoly of any particular style of bottle, or color or character of seal. He may, of the labels which he gets up, and of the names or brands which he adopts, but even here the names, colors, and symbols unavoidably run together and have to be dealt with accordingly. Olives being largely of Spanish origin, Spanish names for brands naturally suggest themselves, and we therefore have "Isabella," "Alfonzo," and "Don Carlos," among those of the complainant, as we have "Don Caesar" among the defendants'; and "Senor Juan," of another packer; to say nothing of "Manzanilla," "King," "Queen," "Spanish Queen," "Amaranth, Queen," "Regine," "Crown," and "Monte Christo;" all of which are made use of. So in color, form, and design of labels; olives in clusters, surrounded by leaves, depending from branches, more or less naturally colored, with red and gold lettering for contrast, and displayed on oval labels, must be expected to figure; while the style of bottles, whether large or small, or vase or cylinder or jar; and the caps which close them, whether red or green or gold, or wax or metal, may vary without danger of infringement, according to the taste of the party. These are the conditions which surround the subject, and are not to be lost sight of in considering it; no exclusive rights being possible in that which is thus common property. This is not to say that a combination of color and style of packing may not be distinctive, and have become so identified with the goods of some one dealer that a manifestly purposed imitation of them will not be regarded as fraudulent. But before that result is reached, in view of the innocent possibilities, in the present instance the combination must be so unusual and the imitation so clear that the similarity could not be other than designed. And the question is whether there is anything of that kind here.

The cause of the present complaint, while centering around the adoption of the "Don Caesar" labels, as already stated, goes back as the initial cause to the use by the defendants of the so-called "ring bottle," which occurred in the latter part of 1905. The "Don Caesar" body labels and the employment of the salesman Weed, as well as the use on the ring bottles of an alleged infringing neck label, came afterwards. The defendants had previously been putting up stuffed olives in bottles with bulbous protuberances into which the olives fitted;

while the complainant had been putting them up in somewhat similar bottles, with bulging rings; and the defendants, at the time mentioned, added the ring to the bulb bottles, as a new style. There can be little doubt that in so adopting the ring bottle the defendants patterned after that of the complainant; a Gulden bottle being submitted by Mr. Chance to the manufacturer who was to make them. But while the complainant was the first to employ this style for the packing of olives, he secured no exclusive monopoly thereby. Not only was there a French bottle of similar form which had long been in use, but it had also been introduced into this country by F. H. Leggett & Co., and it was after this latter bottle that the defendants' bottle was in fact fashioned, although there is little, if any, difference from the complainant's, except in the number of rings.

Nor is one dealer altogether prohibited from copying the style or dress of package gotten up by another, under penalty of a suit for unfair trade. It is only where such special marks have become identified, in the mind of the public, with a certain party's goods, and are manifestly imitated for the purpose of getting away his trade, that this is the case. Not every appropriation, in other words, of the ideas of another, amounts to unfair trade competition. There must be an established right in that which is taken, as well as a practiced deception in doing so, before this ensues. And it is just there that the present case falls. Even if it be conceded, therefore, that the use by the complainant of the ring bottle for stuffed olives demonstrated its availability and attractiveness, and thus prompted the defendants' use, no right was invaded, the form being open to all, and there being no proof that by association it had come to stand for the complainant's goods. I do not lose sight of the fact that this was followed by the adoption of a neck label which is claimed to be imitative, and that this part of the case does not rest on the use of the ring bottle alone. But that came later, and will be best considered in that connection. All that we need to know now is that, in the use of this form of bottle, without more, there was no just cause for complaint.

The adoption of the "Don Caesar" label is directly attributed by the complainant to the employment of the salesman Weed, to which allusion has been already made. Weed sold on commission, and controlled his own trade, and was under engagement to the complainant by a three years' contract, which expired January 1, 1907. Owing to differences between them, negotiations for a renewal seemed likely to fail, and Weed applied in consequence to the defendants, by whom he was engaged to come to them at the end of his current term. And at his request, in view of this, the defendants undertook to get up some new brands. Three names were selected for this purpose, "Regine," "Don Caesar," and "Penn Club"; that of "Don Caesar" being suggested by the well-known opera, "Don Caesar de Bazan." It may be that Weed had something directly to do with the choosing of this particular name, and that he wanted it because of its resemblance to "Don Carlos," so as the better to keep his trade. But that is not material. The trade was his own, and there is nothing to show that his customers were particularly tied up to the complainant's goods. Besides that,

the defendants are answerable for their own misdoings and not for Weed's, except as they had knowledge and participated therein. Designs for labels to correspond with the brands selected were solicited from leading manufacturers; Price Bros. & Co. of New York, being first applied to by letter, which is in evidence. This letter inclosed three sizes of labels, with request for a sketch having the words "Don Caesar" as a brand name, with an olive spray in the center, and the name of defendants' firm underneath; the die to be of the same outline as the defendants' "Crown" brand label, and the lettering to be in gold and red, shaded with black, with the olive spray in natural colors.

It is charged that accompanying this was a vignette of a spray of olives cut from the complainant's "Don Carlos" label. But the evidence to sustain this is forced and cannot be accepted. This letter, moreover, resulted in nothing. The real labels which are complained of were made by the United States Printing Company; the order for them being placed through B. F. Cake, their Philadelphia agent. In submitting this latter order, there can be no question but that the complainant's "Don Carlos" labels which had been previously obtained from Weed were exhibited to Cake, not to copy, however, but merely to equal; Mr. Chance emphasizing that he desired to avoid any resemblance. Cake wanted to take these labels away with him, to which Chance demurred, but finally consented, and they were sent to the United States Printing Company in consequence. The letter forwarding them and submitting the order is important. It requests an original sketch for an embossed fancy label, as fine in quality as the Gulden label inclosed. Attention is particularly called to the coloring of the olives, which, as it is said, is usually too green, and is nearer right in the Gulden label, although even there perhaps a little too light. And a handsome sample of the fruit is promised by express to show the exact natural shade. It is out of this that was evolved the "Don Caesar" label, and the present lawsuit.

There are one or two other circumstances, however, of more or less importance. In the first letter from Cake to his principals, a few days after the other one, the name of the brand was "Alphonso," which, as we have seen, was a brand in use at the time by the complainant. And this was countermanded the next day, and "Don Caesar" substituted. To the complainant this is a matter of great significance. The intent of the defendants to appropriate one of his brand names, it is said, is manifest; the change from "Alphonso" to "Don Caesar" being made so that it would not be so flagrant. But that is not the way that it seems to me. Just how the name "Alphonso" came to be adopted and then abandoned is not, I believe, explained. But it may well have been because the defendants were not aware at first of its use by the complainant, and, when they were, chose "Don Caesar" instead, to avoid, and not to imitate. At all events, it is clear that the label as adopted, taken as a whole, outside of the name, is not open to question. As already intimated, the complainant could not monopolize so common a design as a spray of olives, and the same is true of the other things which go to make up the label. Nor are they, indeed,

imitative. The die not only is a stock form, but is entirely different; that of the complainant being almost circular, with scalloped edges, while the defendants' is an elongated and irregular oval, somewhat difficult to describe. The olives, also, both berries and branches, vary in color from those of the complainant's label, being of a much more natural shade; while the brand name "Don Caesar" is in bright red, flanked on either side by the Spanish coat of arms, which is quite distinctive. The gold of the edging is a much brighter yellow in the one than the other, and the edge is broader and milled prominently. The points of difference are thus marked and significant, as much so as could be expected from the nature of the commodity, which it is designed to display, and the things appropriate thereto. The name is the only thing to cause any confusion, and, rightly considered, that is not serious; the other features being enough to offset it. Outside of that, the case certainly presents nothing more than the not unnatural and by no means reprehensible ambition of one dealer to equal the attractive way in which the same character of goods have been put up by a business rival; and that to my mind is the whole significance of the adoption of this label and brand.

It is said, however, that, at the same time that the defendants got out their "Don Caesar" labels, they also changed over from a green to a red wax cap, and there is some attempt to show that a red wax cap was identified in the trade, with Gulden's "Don Carlos" olives. But red wax caps, as already intimated, were too common and too generally in use on olives as well as other bottles, for any one to appropriate them exclusively. And it would require much more convincing testimony than has been given, in consequence, to justify the conclusion that the trade had so accepted them. Their use by the defendants, it may be, is a circumstance to be considered, with the other evidence. But it amounts to very little by itself, and the case is otherwise so inconclusive that nothing is to be made out of all of it combined.

It is further said that, along with the adoption of the "Don Caesar" labels, the defendants also got out a new neck label for their ring bottles, with a depending ear, similar in both form and feature to that used by the complainant on the same style of bottle, showing a plate of olives, stuffed with red peppers, where the complainant has two halves of a split stuffed olive; the words, "Manzanilla Olives, Stuffed with Spanish Sweet Peppers," being the lettering on each. But whatever imitation, as so stated, there may seem to be, there is none in fact, when the two are put side by side and compared, which is the guide. The coloring and the arrangement dispel any such idea. The controlling feature of the defendants' label is a circular medallion of the size of a quarter dollar, distinctly outlined in gold, with a plate of half a dozen small stuffed olives in the center, and the words "Manzanilla" in red above, and the word "Olives" in blue and gold below, and on either side the words "Stuffed with Spanish Sweet Peppers," in red, and the name of the defendants as importers and packers in blue; while the complainant displays the words "Manzanilla Olives" in yellow on a red ground, along the top of the label, with the words "Spanish

Sweet Peppers" in gold letters, just below, while in the lower part, on the ear of the label, are shown the two halves of a split olive in natural colors with the complainant's name. To the casual and unconcerned observer, there may be points of resemblance between the two. But in general effect, to say nothing of critical examination, they are as wide apart as could be expected or as is required. The complainant lays stress on the particular form of his label, unlike anything, as it is said, elsewhere employed, as well as on the special olive design displayed. But except that it also extends below the rest of the label, the defendants' medallion is entirely unlike this, and is markedly distinctive, while the show of olives on the two by no means corresponds. If there is any confusion in the minds of customers, it cannot be laid to the labels, whatever may be said of the bottles, of which, as we have seen, the complainant can claim no monopoly, and, in all probability, results as much as anything from the olives themselves, with their red spots showing through the glass, and dominating the package, with which we have no concern.

Sight is not, however, to be lost of the fact, as it is said, that the adoption of the "Don Caesar" brand, and the change of labels, large and small, were at the instigation of Weed, and were made use of by him to supplant the goods of the complainant in territory before that exclusively the complainant's. There is no doubt that through Weed the defendants' goods were introduced where the complainant's had previously prevailed, and it may be that the way they were put up helped this on. And it is this loss of territory beyond question which is the real cause of bitterness in the case, except for which the present charge would never have been made. But Weed's customers, as already stated, were his own, and, if the complainant made a mistake in letting him go, the defendants are not to blame for it, nor for taking him over after he was free. Nor is there anything whatever to show that the resemblances in brand or dress, which are complained of, were made use of by him to deceive parties to whom he had previously sold the complainant's goods; without which the other things go for naught. The nearest to a case, all things considered, that is made out, is in the use by the defendants of the name "Don Caesar" as a brand, in breach of the complainant's trade-mark, "Don Carlos." But that, as already stated, did not in the judgment of the Court of Appeals amount to an infringement, and not having been fraudulently made use of by Weed, or any one, to divert the complainant's trade, the whole case falls. It has also now been abandoned by the defendants, removing all possible cause for complaint.

The bill must therefore be dismissed, with costs.

WHITNEY V. WHITNEY ELEVATOR & WAREHOUSE CO. et al.

(Circuit Court, W. D. New York. June 7, 1910.)

1. COURTS (§ 366*)—FEDERAL COURTS—RULES OF DECISION—STATE STATUTES—DECISION IN HIGH STATE COURT.

A decision of the New York Court of Appeals that a mortgage given to secure payment of alimony by a husband during the life of his wife, awarded by an ordinary divorce decree, could not be enforced as to alimony accruing after the husband's death in the absence of an agreement by the husband to pay alimony during the wife's life, involved construction of the state divorce statutes, and was binding on federal courts sitting in such state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 957; Dec. Dig. § 366.*]

State laws as rules of decisions in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

2. HUSBAND AND WIFE (§ 280*)—SEPARATION AGREEMENT—SUBSEQUENT DIVORCE—ALIMONY—MORTGAGES.

A separation agreement between husband and wife provided that he should pay her \$250 per month during her life if she should not marry until after the husband's death. Thereafter, she sued for and was granted a divorce, the form of the decree being agreed on between attorneys for both, and provided that except for the substitution of a mortgage on different property for a mortgage previously executed to secure payment of the amount previously agreed on, the decree should not affect such prior agreement which should remain in full force. *Held*, that the decree did not affect the prior agreement as to the payments to be made by the husband for the benefit of the wife, and that she was entitled by reason of such agreement to enforce the mortgage for installments accruing after the husband's death.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1055; Dec. Dig. § 280.*]

Separation agreements, see note to *Daniels v. Benedict*, 38 C. C. A. 608.]

3. DIVORCE (§ 244*)—ALIMONY—SECURITY—MORTGAGES—FORECLOSURES.

Where an agreement between husband and wife for a separate maintenance contained in a divorce decree provided for payment of installments of alimony monthly, and also declared that in case of default for more than 10 days the trustee might elect to declare the whole transfer secured by the mortgage due, and foreclose on such default, the wife was entitled to foreclose for such sum as would equal the amount she would probably receive during the probable continuance of her life computed in accordance with her expectancy under the Northampton tables.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. 244.*]

4. DIVORCE (§ 244*)—ALIMONY—SECURITY—COMPROMISE.

Where a husband executed a mortgage on certain real property to secure installments of alimony to accrue monthly during the life of his wife, and thereafter conveyed the property to a corporation subject to the mortgage, but the corporation did not assume the mortgage, and after the death of the trustee appointed to enforce the security for the wife's benefit, and while no successor had been appointed, the wife, being informed that her husband could not longer afford to pay the amount of the installments specified, agreed to accept a lesser sum in full satisfaction thereof to be paid by the corporation, such settlement was based on a sufficient consideration, and barred the wife's right to recover the difference in subsequent foreclosure proceedings.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 244.*]

5. MORTGAGES (§ 417*)—TRUSTEE—RIGHT OF BENEFICIARY TO SUE.

Where a substituted trustee under a mortgage securing installments of alimony refused at the request of the beneficiary to sue to foreclose, the beneficiary could sue in her own name, joining the trustee as a defendant.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1235; Dec. Dig. § 417.*]

6. MORTGAGES (§ 492*)—FORECLOSURE—LIENS—DETERMINATION.

In a suit to foreclose a mortgage, which was a subsequent lien on certain real property, the court would not fix the amount due under the prior liens.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1438; Dec. Dig. § 492.*]

7. COURTS (§ 352*)—FEDERAL COURTS—PROCEDURE—TRIAL—FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Findings of fact and conclusions of law are not made in equity suits in the federal courts.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 352.*]

In Equity. Bill by Belle N. Whitney against the Whitney Elevator & Warehouse Company and others. Decree for complainant.

Tracy, Chapman & Tracy (William G. Tracy, of counsel), for complainant.

Perkins, Duffy & McLean (John Desmond, of counsel), for defendant Whitney Elevator & Warehouse Company.

Harris, Havens, Beach & Harris (Edward Harris, of counsel), for defendant Rochester Savings Bank.

HOLT, District Judge. The plaintiff, a citizen of Connecticut, brings this suit against citizens of New York to foreclose a mortgage given as security for the payment of certain amounts directed, by a decree of divorce, to be paid periodically by the husband to the wife during her natural life. The question involved is whether the liability to make such payments and the mortgage given to secure them continued in force after the husband's death.

In 1880, the plaintiff, Belle N. Whitney, was married to James W. Whitney. In 1889, Mr. and Mrs. Whitney, together with William J. Ashley, as trustee for Mrs. Whitney, entered into an agreement of separation. By this agreement, Mr. and Mrs. Whitney agreed to live apart, and Mr. Whitney agreed to pay to Mrs. Whitney, during the time she should "remain the wife or widow of the party of the first part" (James W. Whitney), "or during her life, if she shall not marry until after the death of the party of the first part," \$3,000 a year, in equal monthly payments in advance. The agreement also provided for the payment to Ashley, as trustee for Mrs. Whitney, of a certain sum with which to provide her a residence. It also provided that, as security for the payment of the annuity of \$3,000, Mr. Whitney was to execute and deliver to Ashley, as trustee for Mrs. Whitney, a mortgage on certain land in the city of Rochester. The agreement also contained a covenant by Mrs. Whitney that she would, at any time, upon request, release her inchoate right of dower in any of the property of Mr. Whitney, by joining with him in any mortgage or convey-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

ance thereof, or in such other manner as would effectually release the same. The provisions contained in this agreement of separation were duly complied with. Mr. Whitney executed the mortgage to secure the payment of the annuity, and the sum of \$250 a month was for some years thereafter duly paid to Mrs. Whitney. In 1893, Mrs. Whitney brought an action against her husband for an absolute divorce. The defendant appeared by attorneys, but did not answer. The case was referred to a referee to take proof. Proofs were taken, and on such hearing counsel appeared for the defendant and cross-examined some of the witnesses. The referee reported in favor of an absolute divorce. After such report was made, the counsel for the parties came together and agreed upon the details and form of a decree, and such decree was presented to the judge and signed by him. This decree, among other things, provided that the "said defendant James W. Whitney pay to the plaintiff Belle N. Whitney the sum of three thousand dollars per year from the first day of March, 1893, for and during her natural life, as a suitable allowance to said Belle N. Whitney, the plaintiff, for her maintenance and support"; and the decree further provided that the said sum of \$250 monthly be paid to William J. Ashley, as trustee for the plaintiff, and be paid by him to Mrs. Whitney for her support and maintenance. The decree further provided, in substance, that the mortgage previously given, pursuant to the provisions of the agreement of separation, should be canceled and discharged, and that Mr. Whitney should give another bond and mortgage, on other real estate, as security for the payment of the \$3,000 awarded by the decree for the support of Mrs. Whitney. The decree further provided that "except as hereinbefore specifically provided this decree shall not in any wise affect said agreement of May 13, 1889" (the separation agreement), "between the parties to this action, which said agreement shall remain unimpaired and in full force, except the provision in the second subdivision thereof for an allowance of \$3,000 annually to the plaintiff in this action, and also excepting the fifth subdivision thereof" (the provision for the mortgage on certain specific property, for which the new mortgage was substituted), "all of which subdivision is hereby abrogated and annulled; and the plaintiff and said trustee shall discharge the mortgage therein mentioned" (that is, the mortgage given under the separation agreement).

At the time of the entry of the decree, the mortgage held by Ashley under the separation agreement was canceled, and Mr. Whitney gave a new bond, secured by a mortgage upon different real estate in Rochester, as provided by the decree. The bond was in the penal sum of \$100,000, conditioned for the payment by Mr. Whitney to Mr. Ashley, as trustee for Mrs. Whitney, of the sum of \$250 a month, during the natural life of said Belle N. Whitney, and the bond and the accompanying mortgage recite that they are given pursuant to the judgment of divorce. This is the mortgage which this suit is brought to foreclose. In 1895, the property described in this mortgage was conveyed by Mr. Whitney to the defendant the Whitney Elevator & Warehouse Company by a conveyance which was made subject to said mortgage, but in which the Whitney Elevator & Warehouse Company did not

assume the payment of said mortgage. In 1897, Ashley, the trustee of the bond and mortgage, died. No successor was appointed in his place until October, 1909. The payments of \$250 a month provided for by the decree were made until June 1, 1898. In October, 1898, a written agreement was executed between Mr. and Mrs. Whitney and the Whitney Elevator & Warehouse Company, which recited that Mr. Whitney was no longer able to pay the installments of \$250 a month, as fixed by the decree, and by which the Whitney Elevator & Warehouse Company agreed to pay to Mrs. Whitney, and Mrs. Whitney agreed to accept in full discharge of the payments under the decree, the sum of \$150 a month until June 1, 1900. On June 1, 1900, the same parties made another agreement, by which the Whitney Elevator Company agreed to pay to Mrs. Whitney, and Mrs. Whitney agreed to accept in full settlement, \$166.66 a month from June 1, 1900, to June 1, 1903. On June 1, 1903, and on August 1, 1906, similar agreements were made, the last agreement expiring July 1, 1909. Under these agreements, the amounts provided to be paid in them were paid by the Whitney Elevator Company to Mrs. Whitney monthly until July 1, 1909. On October 1, 1907, James W. Whitney died. After July 1, 1909, the Whitney Elevator Company, as well as the representative of the estate of James W. Whitney, took the position that the death of James W. Whitney had terminated his obligation under the divorce decree to pay any further amount to Mrs. Whitney for her support, and that therefore the mortgage given as security for such payments was no longer operative. The mortgage contained a provision that if there was a default for 10 days in the payment of any monthly installment the mortgagee could elect to have the whole amount secured by the mortgage immediately payable. In October, 1909, John L. Standart was duly appointed trustee in place of said Ashley, and on October 16, 1909, Standart notified the Whitney Elevator Company of his appointment as trustee, and demanded payment of the sums of \$250 falling due on the first days of June, July, August, September, and October, 1909. Such demand was not complied with, and more than 10 days thereafter Standart, as such trustee, exercised the option contained in such mortgage, declared the whole amount secured thereby due and payable, and so notified the Whitney Elevator Company. The plaintiff is 61 years of age, and her probable duration of life is 8.161 years, during which time the sum of \$24,483 would become due, by the terms of the bond and mortgage, and complainant claims that such amount is now due under the bond and mortgage. After Standart made such demand, Mrs. Whitney requested him, as such trustee, to bring a suit to foreclose the mortgage, but he declined to do so in a letter in which he stated that he so declined "on account of the adverse decision of the New York Court of Appeals in a similar case." Thereupon Mrs. Whitney brought this suit to foreclose the mortgage, joining Standart, as such trustee, as a defendant.

The New York Court of Appeals has decided, in the case of *Wilson v. Hinman*, 182 N. Y. 408, 75 N. E. 236, 2 L. R. A. (N. S.) 232, 108 Am. St. Rep. 820, that a mortgage given to secure the payment of alimony by the husband during the life of the wife, awarded by an

ordinary decree of divorce, could not be enforced as to alimony accruing after his death. This decision appears to be based on the reasoning that as an undivorced wife is not legally entitled to any provision for her support out of her husband's estate after his death except her right of dower, there is no reason why a divorced wife should have a more favorable provision for her support. In the case of *Wilson v. Hinman* it did not affirmatively appear that there had been any agreement between the parties that the amount allowed to the wife should continue to be paid to her after the death of her husband, if she survived him, other than the usual expression in the decree that the alimony should be paid to her during her life. Chief Justice Cullen, in his opinion in that case, substantially admits that if there was a specific agreement between the husband and wife that the allowance made to her should continue after the husband's death such agreement would be valid. He says:

"It may very well be that by the agreement of the parties alimony might be awarded in a different form from that provided by statute; that is to say, the parties might agree * * * that an allowance should be made to the wife that would be binding upon the husband's estate after his death. An agreement of that character would in no way contravene public policy, and the performance of it would doubtless be enforceable by the court. It is on this ground that the decree in *Storey v. Storey* (125 Ill. 608 [18 N. E. 329, 1 L. R. A. 320, 8 Am. St. Rep. 417]) proceeded. The present case is barren of any such feature."

The complainant's counsel has argued that the decision in *Wilson v. Hinman* was erroneous, and that the contrary rule, as it had existed in the state for many years under the decision in *Burr v. Burr*, 10 Paige (N. Y.) 20, affirmed in the Court of Errors, in 7 Hill (N. Y.) 207, is in principle correct, and should be followed by the federal courts. But I think it clear that on such a question, involving the construction of the statutes of divorce of the state of New York, the federal courts are bound to follow the decisions of the state courts, and that, as the case of *Wilson v. Hinman* appears to be the latest decision of the Court of Appeals upon the question, it must be assumed that the case of *Burr v. Burr* is no longer authority.

The real question in this case is whether this decree was a simple decree of divorce, fixing alimony, or whether there is sufficient evidence of an agreement between the parties that the provision which was made for Mrs. Whitney was to continue during her natural life. Upon that question the evidence in this case seems to me to be satisfactory and decisive in favor of the claim of Mrs. Whitney. The original agreement of separation was a simple contract. In making such a contract, the parties to it, as in the case of any other contract, were free to insert such stipulations as they saw fit. By the express provisions of that agreement, Mr. Whitney agreed to pay to his wife, "during the time the party of the second part" (Mrs. Whitney) "shall remain the wife or widow of the party of the first part" (Mr. Whitney), "or during her life, if she shall not marry until after the death of the party of the first part, the annual sum of \$3,000." It seems to me that there could not be more explicit language to show an agreement that the annual payment of \$3,000 should continue during the

natural life of Mrs. Whitney, unless she should marry again before the death of Mr. Whitney. It implies that even if she does marry again after his death the payment shall continue during her life. In consideration of such provision for her support she agreed, by one of the clauses of the contract of separation, at any time, upon request, to release her inchoate right of dower in any of the property of Mr. Whitney by joining with him in any conveyance or mortgage thereof, or in such other manner as would effectually release it. Such an agreement was a perfect consideration for Mr. Whitney's agreement to pay her \$250 a month during her life, for a divorce in New York, when the action is brought by the wife, does not affect the wife's inchoate right of dower. Code Civ. Proc. N. Y. § 1759.

The defendant claims that the bond and mortgage in suit were given pursuant only to the directions in the decree of divorce, and relies upon those provisions in the bond and mortgage which recite that they are given pursuant to the provisions of the decree. But, in my opinion, the decree of divorce shows upon its face that the details in regard to the support of the wife were agreed upon by the consent of the parties. It makes the same provision for the wife's support as contained in the agreement of separation, but provides that the former mortgage is to be released and discharged, and a bond secured by another mortgage on other property is to be substituted in its place—an obvious matter of agreement between the parties. Moreover, the decree expressly provides that "except as hereinbefore specifically provided" (that is, the provision that one mortgage shall be substituted for the other) "this decree shall in no wise affect said agreement of May 13, 1889, between the parties to this action, which said agreement shall remain unimpaired and in full force, except the provision in the second subdivision thereof for an allowance of \$3,000 annually to the plaintiff in this action," which had been introduced into the decree itself, and except as to the provision for the giving of the mortgage, for which a new one was being substituted. These provisions show upon their face that the parties had agreed upon certain modifications of the contract of separation. If they had not agreed upon such modifications, the court could not have inserted such provisions in the decree. The court, in a suit for divorce, cannot abrogate or change provisions in a previous valid contract of separation without the consent of the parties. *Galusha v. Galusha*, 116 N. Y. 638, 22 N. E. 1114, 6 L. R. A. 487, 15 Am. St. Rep. 453. No court can abrogate the provisions of any valid contract except in a direct suit for that purpose, based on facts alleged and proved sufficient to authorize a court of equity to annul a contract. Moreover, the evidence of the attorney for Mrs. Whitney in the divorce suit shows that there were such negotiations between the respective counsel for the husband and wife, resulting in the arrangement of the details of the decree in reference to the support of Mrs. Whitney. The referee had decided in favor of an absolute divorce, and it was obvious that the court would grant a decree of absolute divorce. That being the situation, it was natural that the parties should get together, and, if possible, agree upon the provisions for the support of the wife. The defendant's counsel objected to the introduction of this testimony, and has argued strenu-

ously that no evidence can be given other than the decree itself in reference to its own construction. But the evidence offered does not tend to contradict or vary the decree; it simply tends to explain the circumstances under which it was prepared and entered, and to show that the various provisions made in reference to the support of Mrs. Whitney were made by the consent of the parties. I think such evidence is competent for that purpose, although, in my opinion, it was strictly unnecessary in this case, for it sufficiently appears on the face of the decree itself that the parties had consented to having the same provision made for the support of the wife in the decree as had previously been made in the agreement of separation, with the exception that, for the convenience of Mr. Whitney, the mortgage which he had given should be discharged, and a new mortgage given on other real estate to secure the payment of the alimony. In my opinion, therefore, the case of *Wilson v. Hinman* does not govern the decision of this case, and Mrs. Whitney's right to payment during her life was not affected by the death of Mr. Whitney, and the mortgage in suit is valid security for the amount due under it.

The complainant claims that, default having been made in the payment of the monthly installments for more than 10 days, and the trustee having elected to declare the whole principal secured by the mortgage to be due, in accordance with its terms, there is now due under the mortgage a sum equal to what she would receive during the term of the probable continuance of her life, computed by the Northampton tables, after any monthly payments to her ceased. I think that this claim is correct.

The complainant also claims the right to recover the difference between the amounts actually paid her, during the period in which a diminished amount was paid her monthly, and \$250 a month, on the ground that the agreement of separation and the decree of divorce having provided that \$250 a month should be paid to a trustee for her benefit, and no trustee having been a party to the agreements reducing the amount of such payments, made with Mr. Whitney and the Whitney Elevator Company, the original provisions of the separation agreement and the decree of divorce remain in full force. But there was no trustee living at the time those agreements were made. Ashley, the first trustee, died in 1897. The payments of \$250 a month were made to Mrs. Whitney until June 1, 1898. No trustee was subsequently appointed in the place of Ashley until October, 1909, after all payments had ceased. All the parties dealt with Mrs. Whitney as the substantial beneficiary, and by the terms of each of the agreements made between Mr. and Mrs. Whitney and the Whitney Elevator Company, it was recited that Mr. Whitney was unable to continue to pay the sum of \$250 a month, and Mrs. Whitney agreed, in consideration of the agreement by the Whitney Elevator Company to pay \$166 monthly, to accept it in full satisfaction. The Whitney Elevator Company did not assume the mortgage on the purchase of the property covered by it, and was under no legal obligation to pay to Mrs. Whitney the \$250 a month, or any portion of it, and I think that its agreement to pay the \$166 a month was sufficient consideration for an

agreement by Mrs. Whitney to accept that in full settlement. There was strictly no necessity originally, under the New York married women's acts, to have a trustee to act for the wife under the separation agreement or the decree of divorce; and, the trustee having died before the reduced payments were made, I think it was perfectly competent for Mrs. Whitney, the beneficiary, to make a valid agreement for the reduction of the payments, in view of the admitted facts that her husband was unable to continue to pay the amounts agreed upon in full, and that the Whitney Elevator Company obligated itself to pay the smaller amount agreed on.

There can be no doubt, in my opinion, of the right of Mrs. Whitney to bring this suit, after a request to the substituted trustee to bring it, and his refusal; the substituted trustee being joined as a party defendant in the action.

The Rochester Savings Bank holds two mortgages, one of which is a prior lien to the lien of the complainant on a portion of the premises mortgaged, and the other of which is a subsequent lien. Counsel for the bank asks to have the decree fix the amount due under its prior mortgage, to which the counsel for the complainant objects. In the face of such objection, I doubt the propriety of making any such adjudication in the decree in this case. This suit is not brought to determine the amount due under liens admittedly prior to the complainant's mortgage, but simply to foreclose subsequent liens.

Complainant's counsel has submitted some proposed findings of fact and conclusions of law, and requests the court to make such findings in the form submitted. I am glad to say that there is no such practice in equity cases in the federal courts.

My conclusion is that the complainant is entitled to a decree of foreclosure for an amount to be computed in accordance with this opinion. The form of the decree, if not consented to, should be settled on notice.

BARREDA Y OSMA v. BROWN et al.

(Circuit Court, D. Maryland. May 12, 1910.)

CORPORATIONS (§ 121*)—SALES OF STOCK—SUFFICIENCY.

Evidence *held* to show that the agents of the owner of stock in a railroad acted in good faith, and made an open and fair disclosure to him of all facts within their knowledge when they offered to buy the stock at a price fixed by himself.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 121.*]

In Equity. Suit by Felipe Barreda y Osma against Alexander Brown and another. Bill dismissed.

S. S. Field, James H. Preston, and Ferdinand C. Dugan, for complainant.

Gans & Haman, for defendants.

MORRIS, District Judge. This is a suit in equity to recover the difference between the price paid the complainant for 703 shares of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the stock of the Baltimore & Annapolis Short Line Railroad Company and the price which the complainant alleges he could have realized if the respondents, as his agents, had fully disclosed to him facts within their knowledge at the time when they bought his stock from him. The complainant is a banker of Lima, Peru, who was a business correspondent of Alexander Brown & Sons, the respondents, whose banking house has been for many years established in Baltimore, Md. The complainant had inherited from his father 703 shares of the stock of the Annapolis Short Line Railroad Company, which owned and operated a steam railroad line 25 miles in length from Annapolis to within a short distance of Baltimore and by contract with the Baltimore & Ohio Railroad Company the Short Line had the privilege of entering Baltimore over its tracks, and delivering its passengers at the Baltimore & Ohio Railroad's Camden Station. It was capitalized at \$358,000, being 3,580 shares at \$100 each. It was unincumbered, and was declaring dividends at the rate of 8 per cent. a year, and really earning somewhat more. Of the shares of its stock the firm of Messrs. Alexander Brown & Sons, the respondents, and the partners in that firm, owned about 1,000 and Mr. Barreda 703, so that while their united holdings did not constitute a majority of the shares, those holdings were enough to give control. The shares of this stock held by both parties to this suit were acquired in the reorganization of a prior railroad corporation. The certificates for the 703 shares of the Short Line stock belonging to the complainant had been left in the hands of the respondents. Under date of May 15, 1897, nearly nine years before the transaction now in question, Mr. Barreda had written the respondents requesting them to have the shares of stock registered in the name of respondents' firm, so that upon the order of Mr. Barreda, or of his brother, the stock could be disposed of. In October, 1901, the Browns wrote Mr. Barreda that overtures had been made looking to the purchase of a majority of the stock, and desiring to know if Barreda would authorize a sale of his holdings at the same price the Browns obtained, not less than \$100 per share. Barreda replied by cable and also by letter authorizing a sale at not less than par. Under date of April 16, 1902, the Browns wrote Barreda that the negotiations were abandoned, but that another party had offered \$75 per share for a limited amount of the stock. To this Barreda replied that as he understood the Browns had not accepted the offer of \$75 he would not accept it. Two years later, in May, 1904, the Browns wrote that there were occasional inquiries for the stock, the last quotation being \$85 to \$90, and they desired to know if Barreda wished to sell if the opportunity offered. In reply Barreda wrote:

"I beg to say that I request you to sell at par."

In October, 1904, Barreda wrote requesting to be informed at what price the stock was then selling. To this the Browns replied that the last sale was \$108, and said:

"If it is your desire to sell the stock you hold it could probably be marketed at between 100 and 108. Such a large block could hardly be sold at a higher price. The next meeting of the stockholders of the railroad company will be held on Wednesday next, the 14th instant, at which we are

informed it is expected a semi-annual dividend of 4% for the past six months will be declared."

About a year later, October 25, 1905, after referring to their previous correspondence, the Browns wrote:

"We now beg to say we have recently heard of the sale of a small block of this stock at \$130. One hundred and ten is now bid for the stock, and we thought that with a firm order on hand to sell we could probably dispose of your stock at between 110 and 125, and if you would care to dispose of your entire holdings of 703 shares we would thank you to cable us at once the price at which you would authorize us to sell."

In answer to this Barreda cabled:

"Sell at one hundred and twenty-five."

To this the Browns replied, November 29, 1905:

"We will keep the order open, but the best price obtainable at the moment is \$110. The stock, as you know is very inactive, and there has been no quotations of it since we wrote. The Pennsylvania Railroad Company has just put on a fast through service between Baltimore and Annapolis in competition with the Short Line Railroad, but whether or not it will materially affect the passenger earnings of the Short Line we cannot, of course, tell. The contract between the Short Line and Baltimore & Ohio Railroad Company expires in 1907 and we do not yet know if it can be renewed on as favorable terms as heretofore."

Under date January 5, 1906, the Browns wrote Barreda advising him of having remitted the 4 per cent. semiannual dividend on his stock, and added:

"We duly received your favor of the 29th of November, but have not been able to dispose of your stock at \$125. We shall keep the order open until canceled by you, and will advise you promptly in case a sale is effected. There have been no transactions in it since we wrote you."

In a letter dated Lima, January 25, 1906, Mr. Barreda wrote the Browns:

"In case you sell this stock you may advise me from 1st March to the 1st of July next at address on foot." (28 Avenue Hoche, Paris.) "Prior and after those dates you may address me as usual."

On May 28, 1906, the Browns wrote Mr. Barreda the letter on which this suit hinges, and which Mr. Barreda in this suit complains of as not giving to him the full information of facts alleged to have been within the knowledge of the Browns, and which as his agents they were bound to have communicated:

"May 28th, 1906.

"Mr. F. Barreda y Osmá, 28 Avenue Hoche, Paris, France.

"Dear Sir: Referring to correspondence regarding the sale of your Baltimore & Annapolis Short Line Railroad Company stock, we beg to say that if agreeable to you we ourselves will be glad to purchase your holdings at \$125 per share, the price at which you instructed us to sell; although the only sale we have heard of in this market this year has been one of 40 shares at 120.

"In view of the relations that have existed between us for so many years, we feel that it is but right for us to say in confidence, that if we can procure your stock at the price named it will give us so substantial interest in the property as to offer a sufficient inducement to us to work out a plan for the electrification of the road, and, possibly, its combination with some other road. Only in this way, we believe can the Short Line be put in a position to meet

the very strong competition which it will have upon the completion of the Washington, Baltimore & Annapolis Electric Railway now under construction, as well as the competition of the Pennsylvania Railroad Company which has recently established a through service between Baltimore and Annapolis.

"In order to accomplish anything it will be necessary to take up this matter promptly, and we shall be greatly obliged if you will advise us upon receipt of this letter whether or not our offer is acceptable to you. If so, kindly instruct us regarding the remittance of the proceeds.

"Very truly yours,

Alexander Brown & Sons."

On June 9th, following, the Browns not feeling certain that Barreda was in Paris cabled him:

"Have you received our letter of May 28th?"

To this cablegram Barreda replied by cable:

"Will answer favorably."

On June 11, 1906, the Browns wrote Barreda as follows:

"June 11, 1906.

"Mr. F. Barreda y Osma, 28 Avenue Hoche, Paris, France.

"Dear Sir: We beg to confirm our telegram to you of the 9th instant, reading, 'Have you received our letter of May twenty-eighth?' and to acknowledge receipt of your reply thereto reading, 'Will answer favorably.'

"We thank you for your prompt reply, and await your instructions as to the disposition of the proceeds. If you contemplate making any investments in American securities, we shall be glad to have you avail of our facilities for their purchase. We take the liberty of inclosing herewith some memoranda regarding securities which we are recommending to our friends.

"Very truly yours,

Alexander Brown & Sons."

Finally Barreda wrote the Browns as follows:

"28 Avenue Hoche,

"Paris, 12 June, 1906.

"Messrs. Alexander Brown & Sons, Baltimore.

"Dear Sirs: I have received your favor of the 28th May. I accept your offer of \$125, for my Baltimore & Annapolis Short Line Railway Company stock. I understand that this price does not include the dividends already earned for the first half year of 1906, and that it will be collected for my account. With the proceeds of this sale please buy \$50,000 Atchison Topeka & Santa Fé 4% Convertible Bonds and remit the rest to Messrs. J. S. Morgan & Company, London, for my account.

"Yours truly,

F. Barreda y Osma.

There being no other letters on the subject of the sale of Barreda's Short Line stock, and there being no personal interviews whatever, this correspondence puts before us all that passed between the parties up to the date of the sale. It is proven by the testimony that at the date when the several letters were written every fact stated in each and every letter addressed by the Browns to Barreda was strictly and literally true, and it only remains to consider whether it is shown by the proof that there were other facts known to the Browns which they ought to have communicated to Barreda before they could, being Barreda's agent, contract to buy for themselves the stock in question at the price named by Mr. Barreda. It is to be noticed that in their letter of May 28, 1906, offering Barreda \$125 per share for his stock, they state that their purpose is to buy the stock for themselves. They further say their purpose in purchasing is to acquire such a substan-

tial interest in the property as to make it worth their while to work out a plan for changing the Short Line into an electric road, and possibly combining it with some other road. They further state the competition which is impending from a parallel electric road then approaching completion and from through service established by the competing steam road of the Pennsylvania Railroad Company, requires that the Short Line shall be put in a position to meet it. This competition did become effective, and that of a parallel electric road became and is to-day a most serious factor to be taken into account in estimating the real value of the Short Line property. Barreda asked no questions whatever about the situation, but accepted the offer of \$125 per share, stipulating that he was to receive also the current dividend. The complainant rests his case for equitable relief upon the contention that at the time when the Browns offered to buy his stock at \$125 they had formulated and were reasonably assured of the success of a plan which would increase the value of the complainant's stock; that they did not disclose the plan to him and allow him the opportunity of deciding whether or not he would sell under the circumstances.

Let us see what the proofs show was then known to the Browns. They knew, or were reasonable persuaded, that the impending competition seriously jeopardized the earnings of this little steam road. They knew that in order to convert it into an electric road about \$1,000,000 would have to be expended, and that it would run its whole length parallel with another electric road from Baltimore to Annapolis. They knew that for its entrance into Baltimore it was dependent on the Baltimore & Ohio Railroad Company renewing a contract which then had only about a year to run, and about which there were unsettled questions to be adjusted. They knew that the road was earning something more than enough to pay \$28,000 a year in dividends, but that if \$1,000,000 was borrowed to change the road to an electric one there would be an additional \$50,000 a year of interest to be met. If they could by any possibility have had foreknowledge of the year 1909 they would have known that the operation of the road for that year would result in a large deficit in consequence of the competition of the parallel electric road. It is convincingly shown by the testimony of Mr. Griswold, of the firm of Alexander Brown & Sons, of Mr. France, the general counsel, and of Mr. Baetjer, special counsel, for the United Railways & Electric Company, employed to advise with respect to the difficult problem of financing that corporation, that there was no definite plan at all for using the control of the Short Line stock when the letter of May 28, 1906, was sent to Barreda. It was known that if any plan was devised by the Browns for using the Short Line Railroad in any combination it was essential that the Browns should have a large ownership of the stock of that railroad, and that was fully expressed in the letter of May 28, 1906. By the letter was also conveyed the idea that the larger the Browns' ownership of the stock of the Short Line became the more profitable to themselves would be any plan they might work out, and the more inducement there would be to them to work out such a plan. By the letter, Barreda, who was himself a banker, was certainly put

upon notice that the Browns were offering to buy his stock for purposes of their own. The real reason that the Short Line stock became desirable to the Browns was that they were very largely interested in the United Railways & Electric Company, operating all the street railways of Baltimore city, and there was a possibility of using the Short Line Railroad in connection with some plan not then formulated for the benefit of the United Railways Company. The United Railways & Electric Company in consequence of the great fire of 1904 had become straightened in its finances. As one of the effects of the great fire it had failed to pay interest on its fourteen million of income bonds, and it was without credit to borrow money, and was threatened with legal proceedings by the income bondholders. It needed improved equipment and more effective power plant and certain extensions were demanded by the public. There had been procured by persons hostile to it a charter for the Maryland Electric Railway which gave large powers in Baltimore city, and which was a menace to the United Railways, and for the protection of the United against hostile attacks the Browns had bought that charter. It was a mere paper charter and nothing had been done under it. At the time the Browns made the offer for the Barreda stock it had been suggested that in some way by combining the Short Line, which was not then incumbered, with the United a new mortgage could be financed sufficient to supply the money for the needed improvements, terminals, car barns, and extensions of the United. The idea was indefinite and without form, but at the first suggestion of it, Mr. France, counsel for the United, said it could not be considered at all unless the Browns had a controlling interest in the Short Line stock, and could give assurance that it would continue in friendly hands. It was upon this requirement being presented to the Browns that they offered 125 for the Barreda stock. The testimony is conclusive that if they had not procured it no plan involving the Short Line would have been considered at all. After the Browns had procured the Barreda stock many plans were suggested, modified, and rejected, and it was not until July 7th that a plan was finally worked out as the result of many conferences, concessions, and modifications, and in the face of difficulties and differences which at times seemed insurmountable. The final plan was ingenious and that it was successful is evidence of the ability of those who devised it and whose persistent work made it effective.

Very briefly the plan was that the Short Line should first raise \$1,000,000 on a first mortgage to be used in converting it into an electric road; that it should then be merged into the Maryland Electric Railroad Company which should give six shares of its stock of the par value of \$50 for each share of the Short Line stock of the par value of \$100; that the Maryland Electric should then execute a mortgage for \$8,000,000, of which \$4,000,000 should be sold and the proceeds invested in real estate, extensions, car barns, and terminals for the use of the United, which should lease them, covenanting to pay a rental equal to 6 per cent. of the cost. It was calculated that the money borrowed by the Maryland Electric on its bonds would cost the Maryland Electric 5 per cent., while it would get 6 per cent. from the United.

This plan as finally perfected, and of which is here given the merest skeleton, was approved by the parties in interest and by the bankers who were to furnish the \$4,000,000 for the Maryland Electric bonds, about the middle of September. The Browns for the Short Line stock held by them received for each share 6 shares of Maryland Electric stock, and they still hold it, having never sold a share. It cannot be said to have a market value. At a time when the plan was dependent upon the sale of the newly created four million Maryland Electric bonds, and it was important that nothing should create any distrust as to their legality, certain stockholders who knew the situation threatened by legal proceedings to interfere and had had prepared an application to a court of equity for that purpose, were bought off at \$250 for a small number of shares, and about the same time certain other small lots were bought at \$200 a share, but there was not an established market price, and there is no reason to believe, either that if Barreda had continued to hold his 703 shares the plan would have been worked out at all, or that if it had been Barreda could have sold either his shares of the Short Line or their equivalent in shares of the Maryland Electric so as to have realized more than he did by the sale to the Browns.

There is no dispute as to the law applicable in this case. It has been frankly conceded from the first that the Browns' relation to Mr. Barreda was such that they were bound in offering to buy his stock for themselves to disclose fully and truthfully all the facts and circumstances within their knowledge which would have enabled Barreda to determine whether he would adhere to his standing offer to sell at \$125. The testimony leaves no doubt in my opinion that they made that full disclosure which the law exacts from those who are in a like situation of trust and confidence. They could not truthfully have stated more than they did. There was no definite plan pending, and there was no certainty that any plan could be made effective, and there was no certainty that any plan, which the United and Electric Company would agree to, would include the Short Line Company or be for its benefit. In the face of all this uncertainty to have undertaken to give suggestions to Barreda would not have been to give him information on which he could base a judgment, but to suggest a mere floating possibility upon which neither he nor anyone else could form any sensible judgment.

It appears that Mr. Barreda had a nephew, Mr. Robert de Barrill, living in Maryland, who in August, 1906, wrote to him that he had heard of sales of Short Line stock and at \$200, and when he learned from Mr. Barreda that he had already sold his stock to the Browns at \$125 Mr. Barrill suggested to him that he had been dealt with unfairly. This led to a letter in June, 1907, from Barreda to the Browns in which Barreda stated that he could not persuade himself that the Browns had already matured their plans when they proposed to buy his 703 shares of Short Line stock from him, and requested the Browns to give to his nephew, Mr. Robert de Barrill, their explanation. An interview with Mr. Barrill was arranged, and the Browns, also, under date July 23, 1907, wrote very fully to Mr. Barreda, at

Lima, their understanding of the transactions complained of, and, further, they offered, as they had sold none of the Maryland Electric stock they had received in exchange for the Short Line stock, to return to Mr. Barreda the equivalent of his 703 shares of the Short Line of the par value of \$100 a share, viz., 4,218 shares of the Maryland Electric Company of the par value of \$50 a share, provided Barreda would repay the purchase money paid by them to him, with interest. This offer Mr. Barreda declined for reasons partly personal and because, if, as he stated, he had received the shares when issued he would long since have sold them to good advantage, but he made a counter offer to receive in full settlement 1,500 shares of the Maryland Electric stock. This suggestion was not entertained by the Browns, and this suit was entered.

I am of opinion that the proof establishes the good faith and the open and fair disclosure by the respondents of all facts within their knowledge when they made their offer to purchase the complainant's stock at the price he himself had fixed, and that the complainant is not entitled to a decree in his favor.

The bill of complaint will be dismissed at the cost of the complainant.

REGIS et al. v. UNITED DRUG CO. et al.

(Circuit Court, D. Massachusetts. May 28, 1910.)

No. 695.

1. REMOVAL OF CAUSES (§ 48*)—GROUNDS—"SEPARABLE CONTROVERSY."

Though a separable controversy exists so as to authorize the removal of a cause, notwithstanding the joinder of a defendant whose citizenship is the same as that of the plaintiff, with a noncitizen defendant, when the case is one capable of separation into parts, so that in one of the parts a controversy will be presented with citizens of one or more states on one side and citizens of another state on the other, which can be fully determined without the presence of any of the other parties to the suit as begun, or where two or more causes of action are united in one suit, and there can be a removal of the whole suit on the petition of one or more of the defendants interested in the controversy which, if it had been sued on alone, would be removable, the controversy does not necessarily become separable merely because the plaintiff could have prosecuted its cause of action against the defendant seeking to remove without the joinder of any other defendant.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 94; Dec. Dig. § 48.*

For other definitions, see Words and Phrases, vol. 7, p. 6412.

Separable Controversy, see notes to Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Valleytown Mineral Co., 35 C. C. A. 155.]

2. REMOVAL OF CAUSES (§ 54*)—FEDERAL JURISDICTION—DIVERSE CITIZENSHIP—SEPARABLE CONTROVERSY.

Complainants, residents of Massachusetts, filed a bill to restrain infringement of a trade-mark against a New Jersey corporation and defendant L., an individual resident of Massachusetts, whom the bill charged was defendant's president and general manager. The bill also alleged that L. had personally directed and procured to be carried on the wrongful acts of the corporation complained of, and prayed for an injunction

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

against both defendants, for a conveyance by defendant corporation of all rights secured by any registration by defendants' alleged infringing trade-mark, and for an accounting of profits. *Held*, that the bill did not show that a separable controversy existed between complainants and defendant corporation, so as to authorize a removal of the cause as to it to the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 106; Dec. Dig. § 54.*]

Action by Ellen M. Regis and others against the United Drug Company and others. On motion to remand the case to the state court. Granted.

Browne & Woodworth, for complainants.

Melvin M. Johnson and Johnson & North, for defendants.

LOWELL, Circuit Judge. This is a bill in equity filed in the Supreme Judicial Court of Massachusetts and brought by residents of Massachusetts against a corporation citizen of New Jersey and against Liggett, an individual resident of Massachusetts. The bill alleges the complainant's ownership of a registered trade-mark, "Rex"; that Liggett "is the president of said corporation and the general manager of its business and * * * has personally directed and procured to be carried on the wrongful acts of the respondent corporation hereinafter complained of"; that the defendant corporation has advertised and sold its goods marked "Rexall"; that the Supreme Judicial Court, in a suit against the selling agents of the defendant corporation for the use of the Rexall mark, decreed that these agents be enjoined from continuing this infringement of the Rex trade-mark; that the defendants in the case at bar "had direction and control of the defense of the suit or suits of these complainants against" the agents, "and were the masters of said litigation and paid all the expenses thereof, and therefore these complainants aver that the present respondents and each of them are bound by said rulings and findings of this court"; that the defendant corporation made a profit from the infringement. The bill prayed for an injunction against both defendants, for a conveyance by the defendant corporation of all rights "secured by any registration of the said trade-mark," and for an accounting of profits with the defendant corporation.

The defendant corporation in its petition for a removal of the case to this court made the usual allegations, and set out more particularly the citizenship in Massachusetts of the present complainants and of Liggett:

"That the controversy herein is wholly between citizens of different states. * * * That a complete determination of said controversy can be had as between your petitioner and the plaintiffs aforesaid, without the presence of the said defendant Louis K. Liggett. That this is a suit brought by the said plaintiffs to enjoin an alleged infringement of an alleged trade-mark, and for an accounting and damages against your petitioner, * * * and as a matter of fact the defendant Louis K. Liggett is merely an officer and employé of your petitioner, and would be bound by and subject to any and all decrees which may be entered in this suit against your petitioner. That the said Louis K. Liggett is neither an indispensable nor a necessary party to the complete determination of said controversy. That the action of the plaintiffs in making

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the said Louis K. Liggett a citizen of Massachusetts and an officer and employé of your petitioner, as aforesaid, a nominal party defendant, would not operate to prevent this removal, even if said action had been taken in good faith; but your petitioner avers that said Louis K. Liggett was not so joined in good faith, but that such joinder of him was for the express and fraudulent purpose of defeating the jurisdiction of the courts of the United States. That your petitioner is the defendant actually interested in this controversy."

The state court allowed the petition for removal. After the case was entered in this court the complainant filed a "plea in abatement," which set out that:

"(1) The controversy herein is not wholly between citizens of different states, inasmuch as the complainants at the time of the commencement of this suit were, have ever since been, and still are, citizens of the commonwealth of Massachusetts; the defendant Louis K. Liggett at the time of the commencement of this suit was, has ever since been, and still is, a citizen of the commonwealth of Massachusetts; and the defendant the United Drug Company is a citizen of the state of New Jersey.

"(2) The defendant Louis K. Liggett has personally directed and procured to be carried on the infringement complained of as set forth in paragraph 6 of the bill of complaint; and said infringement constitutes a joint and several tort, and therefore a single cause of action.

"(3) The said defendant Louis K. Liggett was joined in good faith, and the joinder of him was not for the express and fraudulent purpose of defeating the jurisdiction of the courts of the United States, as alleged in the petition for removal."

The case was thereupon set down for hearing, and the plea in abatement, although it raised an issue of fact concerning the alleged fraudulent joinder of Liggett, was yet treated for the purposes of the argument as a motion to remand for want of jurisdiction apparent on the face of the proceedings.

Inasmuch as the defendant Liggett, like the plaintiffs, is a citizen of Massachusetts, this case is not removable from the state court to this court unless there is here "a controversy which is wholly between citizens of different states and which can be fully determined as between them." Act March 3, 1875, c. 137, § 2, 18 Stat. 470, as amended (U. S. Comp. St. 1901, p. 509). In other words, the court has here to determine if there exists a controversy between the Massachusetts plaintiffs and the New Jersey corporation which is "separable" from that which exists and is here sued upon between the same plaintiffs and the Massachusetts defendant Liggett.

To define a "separable controversy" as intended by the statute cited has not been found easy, though the Supreme Court has had to pass upon the question in some 50 cases in fewer years. It is true that in *Fraser v. Jennison*, 106 U. S. 191, 194, 1 Sup. Ct. 171, 174 (27 L. Ed. 131), it was said by the Supreme Court that, to authorize removal, "the case must be one capable of separation into parts, so that, in one of the parts, a controversy will be presented with citizens of one or more states on one side, and citizens of other states on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun." This case was approved and cited in *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 432, 23 Sup. Ct. 807, 809 (47 L. Ed. 1122), where the Supreme Court added:

"And when two or more causes of action are united in one suit there can be a removal of the whole suit on the petition of one or more of the (de-

fendants) interested in the controversy which, if it had been sued on alone, would be removable."

But the language quoted, and other language which resembles it, is not to be taken as declaring that a controversy is separable merely because the given plaintiff could have prosecuted his cause of action against the defendant seeking to remove without the joinder of any other defendant. Thus in *Alabama Great Southern Railway Co. v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, which is but one of many similar cases, an action at law was brought against two tort-feasors who were sued jointly. One of them was a citizen of the same state as the plaintiff; the other sought to remove, but the Supreme Court held that the controversy between the latter defendant and the plaintiff was inseparable from that between the plaintiff and the resident defendant. Yet it is undisputed that the plaintiff could have sued either defendant without joining the other, and that the cause of action thus sued upon separately is the same as that sued upon jointly. *King v. Hoare*, 13 Mees. & W. 494, 505. Like the *Thompson Case*, the present proceeding is based upon a tort alleged to have been committed jointly by the defendant corporation and by Liggett, and must have a like decision unless it can be distinguished as hereinafter suggested.

An attempt to distinguish has been made upon the ground that the present case is a suit in equity, while the *Thompson Case* and most other cases referred to therein were actions at law. Thus in *Smith v. Rines*, 2 Sumn. 338, Fed. Cas. No. 13,100, a case approved by the Supreme Court, Mr. Justice Story observed:

"And it is most material to remark that this case (*Cameron v. McRoberts*, 3 Wheat. 591 [4 L. Ed. 467]), and all the others, in which a separate and distinct interest, or a nominal interest, is spoken of, were bills in equity, capable in their own nature of separate and distinct interests, where there was, or might be, no community of interest, and where the general question was presented as to the proper parties necessary to be made in a suit in equity. Very different considerations do, or at least may, apply to suits at common law, where the nonjoinder or misjoinder of parties has a very different effect upon the character of the suit, and very different rules apply to it."

But the Supreme Court has applied the rule of the *Thompson Case* to suits in equity as well as to actions at law. Thus in *Plymouth Gold Mining Co. v. Amador & Sacramento Canal Co.*, 118 U. S. 264, 6 Sup. Ct. 1034, 30 L. Ed. 232, the proceeding sought to enjoin a corporation and certain of its officers from polluting the defendant's waters. It must, therefore, have been a suit in equity, at least in the federal court to which it was removed, whatever it may have been according to the Code of California. The Supreme Court refused to hold that the corporation's controversy with the complainant was separable from the controversy of its officers, and the case was remanded accordingly to the state court. In deciding the case the Supreme Court said:

"It is claimed, however, that, as the answers show that the *Plymouth Company* is the real defendant, and the petition alleges that the others are nominal parties only, and joined with that company as 'sham defendants' to prevent a removal, the suit must be treated as in legal effect against the *New York corporation* alone, and, therefore, removable. So far as the complaint

goes, all the defendants are necessary and proper parties. A judgment is asked against them all, both for an injunction and for money. Hayward and Hudson are admitted by the answer to be officers of the corporation, and Montgomery its superintendent. These persons are all citizens of California, and amenable to process in that state. It is not denied that they are all actively engaged in the operations of the company; and Montgomery, as the superintendent of its mines and mills, must necessarily be himself personally connected with the alleged wrongful acts for which the suit was brought. It is undoubtedly true that, if the company has a good defense to the action, that defense will inure to the benefit of all the other defendants; but it by no means follows that, if the company is liable, the other defendants may not be equally so, and jointly with the company. It is possible, also, that the company may be guilty and the other defendants not guilty; but the plaintiff in its complaint says they are all guilty, and that presents the cause of action to be tried. Each party defends for himself, but until his defense is made out the case stands against him, and the rights of all must be governed accordingly." 118 U. S. 270, 6 Sup. Ct. 1037 (30 L. Ed. 232).

To the same effect is *Little v. Giles*, 118 U. S. 596, 7 Sup. Ct. 32, 30 L. Ed. 269, a bill in equity which sought to charge the defendants as joint trespassers and to obtain a conveyance from them. A non-resident defendant sought to remove, but the court held his controversy inseparable and likened the suit in equity in *Little v. Giles* to an action at law against joint tort-feasors. In *Starin v. New York*, 115 U. S. 248, 6 Sup. Ct. 28, 29 L. Ed. 388, the complainant brought suit in equity to restrain the defendants from tortiously maintaining a ferry, and the nonresident defendant was denied removal. Yet the complainant could have proceeded against any defendant separately.

The defendant corporation here relies greatly upon *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 23 Sup. Ct. 807, 47 L. Ed. 1122. That was a bill in equity brought by certain stockholders of the Mathieson Company against that company, some of its officers, and the Castner Company, to set aside a conveyance by the Mathieson Company to the Castner Company made by the alleged fraud of all the defendants. The bill also sought an accounting and a decree requiring the individual defendants to make good and pay to the grantor company and to the plaintiffs the loss and damage caused by their wrongful conduct. Some of the corporate officers were resident defendants. The corporations sought to remove. The complainants resisted removal on the ground that their controversy with neither corporation was separable from their controversy with the individual defendants. The Supreme Court held the case to be removable, apparently on the ground that no remedy was sought against them personally for their share in the alleged joint tort, but only a remedy against them in their official capacity. The Supreme Court quoted from *Hatch v. Chicago, R. I. & P. R. R.*, 6 Blatchf. 105, Fed. Cas. No. 6, 204, as follows:

"The directors and the treasurer are, therefore, not real parties to the suits, but merely nominal parties. No personal demand is made against any one of them, nor is any personal accounting asked for any one of them, and it is only in his relation to the company, and in the official position that he occupies toward the company, that any one of them is made a party. The test of this is that, if any one of the directors or the treasurer were to resign his office, he would necessarily cease, ipso facto, to be a proper party to the suit, and the plaintiff would be obliged to make his successor in office a party, and so on with every change. The reason for this would be that, there being no relief prayed against the individual in his individual capacity, and the in-

junction asked being to restrain him merely from doing or not doing what his official relation to the company alone enables him to do, or to refrain from doing, when such official relation ceases, the relief asked and the injunction issued become, as to him, utterly futile. This would not be the case where he was made a party defendant, jointly with the corporation of which he was an officer, for the purpose of obtaining some specific relief against him on a personal liability, or in order to obtain a discovery from him in regard to matters peculiarly within his knowledge. There the dissolution of his official relation would not affect the propriety of his being retained as a defendant. This view is conclusive to show that the entire real controversy in both suits, so far as it is shown by the prayer of the complaints, and which is the only guide the court can have, is between the plaintiff on the one side, and the company, as a corporate body, on the other. The plaintiff cannot, by joining, as nominal defendants with the corporation, persons who are citizens of the same state with the plaintiff, deprive the corporation of any right which it would otherwise have in respect to removing the cause into this court. In *Wormley v. Wormley*, 8 Wheat. 421, 451, 5 L. Ed. 651, it was held that the joining, as defendant in an equity suit in the Circuit Court, of a person who was a citizen of the same state with the plaintiffs, constituted no objection to the jurisdiction of the court over the suit, where such person was merely a nominal defendant, joined for the sake of conformity in the bill, and against whom no decree was sought; and the principle was laid down that the court would not suffer its jurisdiction to be ousted by the mere joinder of formal parties, but would decide on the merits of the case between the parties who had the real interests before it, whenever that could be done without prejudice to the rights of others. This doctrine is as applicable to a jurisdiction conferred by a removal, as it is to one conferred by the bringing of an original suit. So, also, in *Carneal v. Banks*, 10 Wheat. 181, 188, 6 L. Ed. 297, where parties were made defendants to a suit in equity who were citizens of the same state with the plaintiff, the court held that they were improperly made defendants, and that that fact could not affect the jurisdiction of the court as between the parties who were properly before it, and that the bill might be dismissed as to the improper parties, without in any manner affecting the suit against the proper parties."

It is true that in the *Geer Case* a remedy was sought against the directors personally as above stated; but of this remedy the Supreme Court said:

"If it be conceded that in a suit which seeks such relief (i. e., against the individual defendants) the Mathieson Company is a necessary party, it is certain the Castner party is not. Besides the relief is distinct from—separable from, to keep to the language of the cases—that which is sought as a result of the grounds of suit against the companies."

In other words, the individual defendants were held to be concerned in the relief sought by way of reconveyance against the corporations only in their official capacity, while one of the corporations at least was held not to be a necessary party to the obtaining of the relief sought against the defendants in their individual capacity. In the case at bar, the relief sought against Liggett is that sought against him as one who in his individual capacity has committed the torts complained of jointly with the corporate defendant. For these reasons, I hold that the *Geer Case* does not apply.

It is to be noticed that only in some half dozen cases has the Supreme Court found a separable controversy to exist within the intent of the statute. In *Wecker v. Enameling Co.*, 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, the case was held removable because the joinder of parties was held to be fraudulent. In *Yulee v. Vose*, 99 U. S. 539, 25 L. Ed. 355, and in *Powers v. Ches. R. R.*, 169 U. S. 92, 18 Sup.

Ct. 264, 42 L. Ed. 673, the resident parties once joined had been eliminated from the case by proceedings before removal. In *Connell v. Smiley*, 156 U. S. 335, 15 Sup. Ct. 353, 39 L. Ed. 443, the removal had been made on the petition of the parties who subsequently contested its validity, and the Supreme Court, after holding that, upon the record as it stood at the time of removal, the resident defendant was not a necessary party to the relief sought against the defendant who petitioned for the removal, said:

"We find ourselves at liberty to decline to deprive him of his decree on the ground that the cause was not rightfully transferred."

In *Fritzen v. Boatmen's Bank*, 212 U. S. 364, 29 Sup. Ct. 366, 53 L. Ed. 551, it appeared from the pleadings that the controversy existed between the nonresident defendant on one side, and the complainant and the resident defendant on the other, which controversy was unconnected with that between the complainant and the resident defendant. In *Harter v. Kernochan*, 103 U. S. 562, 26 L. Ed. 411, a bill in equity was filed against bondholders, township officers, etc., to restrain the levy of a tax to pay the bonds. As the bondholder was alone interested to maintain the validity of the bonds, he was held entitled to remove. The *Geer Case* is the only other case which I have been able to find in which the Supreme Court held that a separable controversy existed.

On the other hand, in *Pirie v. Tvedt*, 115 U. S. 41, 5 Sup. Ct. 1034, 1161, 29 L. Ed. 331; *Sloane v. Anderson*, 117 U. S. 275, 6 Sup. Ct. 730, 29 L. Ed. 899; *Core v. Vinal*, 117 U. S. 347, 6 Sup. Ct. 767, 29 L. Ed. 912; *Thorn Wire Hedge Co. v. Fuller*, 122 U. S. 535, 7 Sup. Ct. 1265, 30 L. Ed. 1235; *Louisville & Nashville R. R. v. Wangelin*, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 474; *Whitcomb v. Smithson*, 175 U. S. 635, 20 Sup. Ct. 248, 44 L. Ed. 303; *Chic., R. I. Ry. v. Martin*, 178 U. S. 245, 20 Sup. Ct. 854, 44 L. Ed. 1055; *Ches. & O. Ry. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121; *Kansas City Sub. Ry. v. Herman*, 187 U. S. 63, 23 Sup. Ct. 24, 47 L. Ed. 76; *Alabama Great South. Ry. v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441; *Cin., N. O. & Tex. P. R. v. Bohon*, 200 U. S. 221, 26 Sup. Ct. 166, 50 L. Ed. 448; *Lathrop v. Interior Construction Co.*, 215 U. S. 246, 30 Sup. Ct. 76, 54 L. Ed. —; and *Ill. Cent. R. R. v. Sheegog*, 215 U. S. 308, 30 Sup. Ct. 101, 54 L. Ed. —, the action was at law for a tort, and the controversy of the nonresident defendant was held inseparable.¹ In *Blake v. McKim*, 103 U. S. 336, 26 L. Ed. 563; *Hyde v. Ruble*, 104 U. S. 407, 26 L. Ed. 823; *Louisville & N. R. R. v. Ide*, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. Ed. 63; *Putnam v. Ingraham*, 114 U. S. 57, 5 Sup. Ct. 746, 29 L. Ed. 65; *Stone v. So. Carolina*, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; and *Brooks v. Clark*, 119 U. S. 502, 7 Sup. Ct. 301, 30 L. Ed. 482—the actions were at law upon a contract, and the controversies were held inseparable. In *Gardner v. Brown*, 21 Wall. 36, 22 L. Ed. 527; *Ayers v. Chicago*, 101 U. S. 184, 25 L. Ed. 838; *Shainwald v. Lewis*, 108 U. S. 158, 2 Sup. Ct. 385, 27 L. Ed. 691; *Winchester v. Loud*, 108 U.

¹ See *So. Ry. Co. v. Miller*, 217 U. S. 209, 30 Sup. Ct. 450, 54 L. Ed. —, reported since the case was decided.

S. 130, 2 Sup. Ct. 311, 27 L. Ed. 677; *American Bible Soc. v. Price*, 110 U. S. 61, 3 Sup. Ct. 440, 28 L. Ed. 70; *Thayer v. Life Ass'n Co.*, 112 U. S. 717, 5 Sup. Ct. 355, 28 L. Ed. 864; *Ayres v. Wiswall*, 112 U. S. 187, 5 Sup. Ct. 90, 28 L. Ed. 693; *Central R. R. v. Mills*, 113 U. S. 249, 5 Sup. Ct. 456, 28 L. Ed. 949; *Sully v. Drennan*, 113 U. S. 287, 5 Sup. Ct. 453, 28 L. Ed. 1007; *St. Louis & San Francisco Ry. v. Wilson*, 114 U. S. 60, 5 Sup. Ct. 733, 29 L. Ed. 66; *Farmington v. Pillsbury*, 114 U. S. 138, 5 Sup. Ct. 807, 29 L. Ed. 114; *Crump v. Thurber*, 115 U. S. 56, 5 Sup. Ct. 1154, 29 L. Ed. 328; *Coney v. Winchell*, 116 U. S. 227, 6 Sup. Ct. 366, 29 L. Ed. 610; *Fidelity Ins. Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. 733, 29 L. Ed. 898; *Rand v. Walker*, 117 U. S. 340, 6 Sup. Ct. 769, 29 L. Ed. 907; *East Tenn. Ry. v. Grayson*, 119 U. S. 240, 7 Sup. Ct. 190, 30 L. Ed. 382; *Peper v. Fordyce*, 119 U. S. 469, 7 Sup. Ct. 287, 30 L. Ed. 435; *Peninsular Iron Co. v. Stone*, 121 U. S. 631, 7 Sup. Ct. 1010, 30 L. Ed. 1020; *Graves v. Corbin*, 132 U. S. 571, 10 Sup. Ct. 196, 33 L. Ed. 462; *Brown v. Trousdale*, 138 U. S. 389, 11 Sup. Ct. 308, 34 L. Ed. 987; *Rosenthal v. Coates*, 148 U. S. 142, 13 Sup. Ct. 576, 37 L. Ed. 399; *Wilson v. Oswego*, 151 U. S. 56, 14 Sup. Ct. 259, 38 L. Ed. 70; *Merchants' Cotton Press v. Ins. Co.*, 151 U. S. 368, 14 Sup. Ct. 367, 38 L. Ed. 195; *Cal. v. South. Pac. Co.*, 157 U. S. 239, 14 Sup. Ct. 1138, 38 L. Ed. 702; *Gardner v. Brown*, 21 Wall. 36, 22 L. Ed. 527—the suits were in equity, and the resident defendants were held necessary parties to the relief sought against the nonresident defendants who sought to remove. In *Plymouth Gold Mining Co. v. Amador Co.*, 118 U. S. 264, 6 Sup. Ct. 32, 30 L. Ed. 232, in *Little v. Giles*, 118 U. S. 596, 7 Sup. Ct. 32, 30 L. Ed. 269, and in *Starin v. New York*, 115 U. S. 248, 6 Sup. Ct. 28, 29 L. Ed. 388, all referred to above, the suits were in equity based upon a tort. The controversy was held to be inseparable also in the following cases: *Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528 (bill in equity for partition); *Corbin v. Van Brunt*, 105 U. S. 576, 26 L. Ed. 1176 (action of ejectment); *Bellaire v. B. & O. R. R.*, 146 U. S. 117, 13 Sup. Ct. 16, 36 L. Ed. 910 (condemnation proceedings); *Laidly v. Huntington*, 121 U. S. 179, 7 Sup. Ct. 855, 30 L. Ed. 883 (assignment of dower); *Fraser v. Jennison*, 106 U. S. 191, 1 Sup. Ct. 171, 27 L. Ed. 131 (probate); *Am. Bible Soc. v. Price*, 110 U. S. 61, 3 Sup. Ct. 440, 28 L. Ed. 70 (bill to set aside a will).

Since 1875 (in effect about 100 U. S.) no appeal has lain from a remand to the state court made by the Circuit Court. Of the cases above cited, some 37 came to the Supreme Court from Circuit Courts which had allowed removal on the ground that the controversy was separable, decisions usually reached after mature deliberation. In only 4 of these 37 cases did the Supreme Court fail to hold that the Circuit Court had erred, that the controversy was inseparable, and that the case should have been remanded. A question of law cannot be satisfactorily decided merely by counting decisions in distinguishable, though more or less, analogous cases. But it must be admitted that the mere figures above mentioned are to some extent persuasive, and indicate that controversies separable within the statute are extremely rare.

Although Liggett's part in the controversy here litigated seems small compared to that of the defendant corporation, yet he is alleged to have personally directed the tort complained of, and an injunction against him is prayed. According to the understanding stated at the argument, the defendant may now prove that Liggett's joinder as defendant was fraudulent, if he can produce the needed evidence. Otherwise the case must be remanded to the superior court.

NOTE.—The case was referred to a master, who found that the joinder of defendant Liggett was not fraudulent, and the case was therefore remanded to the state court whence it came.

Ex parte MARTIN.

(Circuit Court, D. Oregon. June 20, 1910.)

No. 3,514.

I. HABEAS CORPUS (§ 70*)—FEDERAL COURT—STATE COURT PROCEEDINGS—STAY.

Rev. St. § 766 (U. S. Comp. St. 1901, p. 597), provides that pending habeas corpus proceedings, and until final judgment of discharge, any proceeding against the person so imprisoned or confined, or restrained of his liberty, in any state court or by or under the authority of any state for any matters so heard and determined under such writ, shall be deemed null and void. *Held*, that where, after the issuance of a writ of habeas corpus out of a federal court to review petitioner's arrest for violation of Laws Or. 1909, p. 386, regulating peddlers, he was tried and acquitted in the state court, such trial and acquittal were null and void.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 62; Dec. Dig. § 70.*]

2. COURTS (§ 489*)—CONCURRENT JURISDICTION OF STATE AND FEDERAL COURTS.

State courts have concurrent original jurisdiction with federal courts to determine cases at law or in equity, arising under the Constitution or laws of the United States, or involving rights dependent on such Constitution or laws.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324–1341, 1372–1374; Dec. Dig. § 489.*]

3. HABEAS CORPUS (§ 45*)—ISSUANCE—JURISDICTION—DISCRETION.

While the federal court has jurisdiction to issue a writ of habeas corpus to determine the jurisdiction of a state court to deprive a citizen of his liberty, whether such writ should be issued in the exercise of such jurisdiction is a matter to be determined in the exercise of a sound discretion in pursuance of law.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 1376–1385; Dec. Dig. § 45.*]

Jurisdiction of federal courts, see note to *In re Huse*, 25 C. C. A. 4.]

4. HABEAS CORPUS (§ 45*)—FEDERAL COURTS—ISSUANCE—DISCRETION.

Where petitioner, a citizen and resident of Iowa, was arrested in Oregon for an alleged violation of Laws Or. 1909, p. 386, regulating and licensing peddlers, and claimed that such ordinance was invalid as violating the commerce clause of the federal Constitution, he was not entitled to a writ of habeas corpus issued out of the federal court, in the first instance, but should be required to resort to the state courts for relief, and, if unsuccessful, to apply ultimately for review by the Supreme Court of the United States on a writ of error.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 1376–1385; Dec. Dig. § 45.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Index.
180 F.—14

Habeas corpus on petition of John Martin. Writ dismissed.

A. C. Lyon and Ralph R. Duniway, for petitioner.

George J. Cameron, Dist. Atty.

WOLVERTON, District Judge. John Martin, a citizen and resident of the state of Iowa, while engaged, as agent and representative of the Spaulding Manufacturing Company, also of Iowa, in taking orders for buggies manufactured by said company, with a view to selling such manufactured vehicles by sample, was, on the 27th day of May, 1909, complained against in the justice court, and arrested for violation of an act of the Legislative Assembly of the state of Oregon, entitled "An act to define and license and regulate peddlers and to provide a punishment for peddlers who peddle without a license," etc. Laws 1909, p. 386. Immediately after entering a plea of not guilty, and before trial was had, Martin applied to this court for a writ of habeas corpus to be released from his arrest; it being claimed that the act of the Legislative Assembly of the state of Oregon is in violation of the Constitution of the United States in three particulars, not necessary to specify, except that it is claimed especially that the said act is in contravention of the clause of the United States Constitution delegating to Congress the regulation of commerce among the several states. The writ of habeas corpus was allowed and issued on the 28th day of May, 1909. Subsequently, on the 5th of June, 1909, Martin was tried in the justice's court and acquitted. This fact of acquittal is set up by amended return of the officer who formerly had him in custody.

It is first insisted, by way of defense, that, Martin having been acquitted in the justice's court, this proceeding should be dismissed, for the reason that, by virtue of his acquittal and discharge, there is nothing left for controversy here. By section 766, Rev. St. (U. S. Comp. St. 1901, p. 597), relating to habeas corpus, it is provided that:

"Pending the proceedings or appeal in the cases mentioned in the three preceding sections, and until final judgment therein, and after final judgment of discharge, any proceeding against the person so imprisoned or confined or restrained of his liberty, in any state court, or by or under the authority of any state, for any matter so heard and determined, under such writ of habeas corpus, shall be deemed null and void."

The effect of this statute is to stay the hand of the state court, after a writ of habeas corpus has been issued by a federal court, until the cause thus brought upon the record is heard and determined. The state court is, after the issuance of such writ, wholly without authority to proceed further in the premises as against the petitioner. Such is the decision of the United States Supreme Court in the cases of *In re Shibuya Jugiro*, 140 U. S. 291, 294, 295, 11 Sup. Ct. 770, 35 L. Ed. 510; *McKane v. Durston*, 153 U. S. 684, 14 Sup. Ct. 913, 38 L. Ed. 867.

While in the present case it is urged that the discharge of the prisoner on trial was not contrary to his interest, yet it must be held that he was proceeded against by prosecuting him to trial, and, whatever was the result of the trial, the proceeding was contrary to the authority of Congress. Hence it must be held that the judgment of

the justice's court, so far as it affected this proceeding in any way, is utterly null and void.

This brings us to the question whether the writ of habeas corpus was properly issued. It is unquestioned that state courts of original jurisdiction, consistent with existing federal legislation, may determine cases at law or in equity arising under the Constitution or laws of the United States, or involving rights dependent upon such Constitution or laws. Upon these courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States, and laws made in pursuance thereof, whenever those rights are involved in proceedings before them. *Robb v. Connolly*, 111 U. S. 624, 637, 4 Sup. Ct. 544, 28 L. Ed. 542, reaffirmed in *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868. The leading case upon the question as to when a writ of habeas corpus should issue is that of *Ex parte Royall*, just cited. In that case it is declared that the court is endowed with a discretion in that particular. The discretion, of course, is one which should be governed by legal principles, and should be exercised in the furtherance of justice and right. Speaking of the relation existing between the state and national courts, and when the national courts should interfere with proceedings pending in the state courts, Mr. Justice Harlan has this to say:

"We cannot suppose that Congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in state courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require,' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution."

And as to when the federal court may properly entertain the authority, the learned justice continues:

"When the petitioner is in custody by state authority for an act done or omitted to be done in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or where, being a subject or citizen of a foreign state, and domiciled therein, he is in custody, under like authority, for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations—in such and like cases of urgency, involving the authority and operations of the general government, or the obligations of this country to, or its relations with, foreign nations, the courts of the United States have frequently interposed by writs of habeas corpus and discharged prisoners who were held in custody under state authority."

It was finally held in that case that the Circuit Court from which the appeal was taken had the discretion whether to entertain the writ or not, and that a proper exercise of that discretion would have been not to entertain the writ. It should be noted that the Circuit

Court dismissed the cause believing it had no jurisdiction thereof, while the Supreme Court held that it had undoubted jurisdiction, but affirmed the judgment of the lower court for a different reason, namely, that it had a discretion in the premises, and that a proper exercise of that discretion was to refuse to entertain the writ. The same question arose in a later case, namely, *Cook v. Hart*, 146 U. S. 183, 194, 13 Sup. Ct. 40, 36 L. Ed. 934, and Mr. Justice Brown, announcing the opinion of the court, says:

"We adhere to the views expressed in *Ex parte Royall*, 117 U. S. 241 [6 Sup. Ct. 734, 29 L. Ed. 868], and *Ex parte Fonda*, 117 U. S. 516 [6 Sup. Ct. 848, 29 L. Ed. 994], that, where a person is in custody under process from a state court of original jurisdiction for an alleged offense against the laws of that state, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court of the United States has a discretion whether it will discharge him in advance of his trial in the court in which he is indicted, although this discretion will be subordinated to any special circumstances requiring immediate action. While the federal courts have the power and may discharge the accused in advance of his trial, if he is restrained of his liberty in violation of the federal Constitution or laws, they are not bound to exercise such power even after a state court has finally acted upon the case, but may, in their discretion, require the accused to sue out his writ of error from the highest court of the state, or even from the Supreme Court of the United States. * * * We are unable to see in this case any such special circumstances as were suggested in the case of *Ex parte Royall* as rendering it proper for a federal court to interpose before the trial of the case in the state court. While the power to issue writs of habeas corpus to state courts which are proceeding in disregard of rights secured by the Constitution and laws of the United States may exist, the practice of exercising such power before the question has been raised or determined in the state court is one which ought not to be encouraged. The party charged waives no defect of jurisdiction by submitting to a trial of his case upon the merits and we think that comity demands that the state courts, under whose process he is held, and which are equally with the federal courts charged with the duty of protecting the accused in the enjoyment of his constitutional rights, should be appealed to, in the first instance. Should such rights be denied, his remedy in the federal court will remain unimpaired."

And again, in *Re Frederick*, Petitioner, 149 U. S. 70, 77, 13 Sup. Ct. 793, 37 L. Ed. 653, the court says, after making reference to the *Royall* Case:

"We adhere to the views expressed in that case. It is certainly the better practice, in cases of this kind, to put the prisoner to his remedy by writ of error from this court, under section 709 of the Revised Statutes [U. S. Comp. St. 1901, p. 575], than to award him a writ of habeas corpus, for, under proceedings by writ of error, the validity of the judgment against him can be called in question, and the federal court left in a position to correct the wrong, if any, done the petitioner, and at the same time leave the state authorities in a position to deal with him thereafter, within the limits of proper authority, instead of discharging him by habeas corpus proceedings, and thereby depriving the state of the opportunity of asserting further jurisdiction over his person in respect to the crime with which he is charged. In some instances, as in *Medley*, Petitioner, 134 U. S. 160 [10 Sup. Ct. 384, 33 L. Ed. 835], the proceeding by habeas corpus has been entertained, although a writ of error could be prosecuted; but the general rule, and better practice, in the absence of special facts and circumstances, is to require a prisoner who claims that the judgment of a state court violates his rights under the Constitution or laws of the United States to seek a review thereof by writ of error instead of resorting to the writ of habeas corpus."

So in *Whitten v. Tomlinson*, 160 U. S. 231, 242, 16 Sup. Ct. 297, 40 L. Ed. 406; the court, after citing several cases wherein the writ was entertained under the exception to the general rule, says:

"But, except in such peculiar and urgent cases, the courts of the United States will not discharge the prisoner by habeas corpus in advance of a final determination of his case in the courts of the state; and, even after such final determination in those courts, will generally leave the petitioner to the usual and orderly course of proceeding by writ of error from this court."

The doctrine was again strongly reaffirmed in *Minnesota v. Brundage*, 180 U. S. 499, 21 Sup. Ct. 455, 45 L. Ed. 639. In that case the party applying for the writ was convicted in a municipal court, and after his conviction applied for the writ, which was issued. The Supreme Court reversed the judgment on the ground that the lower court should have exercised its discretion to the contrary. In *Urquhart v. Brown*, 205 U. S. 179, 181, 27 Sup. Ct. 459, 51 L. Ed. 760, a very recent case, the court yet adheres to the doctrine of the *Royall Case*. Mr. Justice Harlan announces the decision in the following language:

"It is the settled doctrine of this court that although the Circuit Courts of the United States, and the several justices and judges thereof, have authority, under existing statutes, to discharge, upon habeas corpus, one held in custody by state authority in violation of the Constitution or of any treaty or law of the United States, the court, justice, or judge has a discretion as to the time and mode in which the power so conferred shall be exerted; and that in view of the relations existing, under our system of government, between the judicial tribunals of the Union and of the several states, a federal court or a federal judge will not ordinarily interfere by habeas corpus with the regular course of procedure under state authority, but will leave the applicant for the writ of habeas corpus to exhaust the remedies afforded by the state for determining whether he is illegally restrained of his liberty. After the highest court of the state, competent under the state law to dispose of the matter, has finally acted, the case can be brought to this court for re-examination. The exceptional cases in which a federal court or judge may sometimes appropriately interfere by habeas corpus in advance of final action by the authorities of the state are those of great urgency that require to be promptly disposed of, such, for instance, as cases involving the authority and operations of the general government, or the obligations of this country to, or its relations with, foreign nations."

To the same purpose are *Reid v. Jones*, 187 U. S. 153, 23 Sup. Ct. 89, 47 L. Ed. 116, and *Pettibone v. Nichols*, 203 U. S. 192, 27 Sup. Ct. 111, 51 L. Ed. 148.

From these authorities it will appear that the doctrine has become so well settled that there can be no further question about it. The federal court is vested with a discretion as to when, considering the attendant circumstances and conditions, the writ shall issue. That discretion, however, should be exercised in pursuance of law, and that justice and right may be subserved. There are a number of cases not unlike this on the facts, where the federal courts have, in the exercise of their discretion, entertained jurisdiction to try and determine the main issue. Among them may be cited *In re Kimmel* (D. C.) 41 Fed. 775; *In re White* (C. C.) 43 Fed. 913, 11 L. R. A. 284; *In re Spain* (C. C.) 47 Fed. 208, 14 L. R. A. 97; *In re Houston* (C. C.) 47 Fed. 539, 14 L. R. A. 719; and *In re Nichols* (C. C.) 48 Fed. 164. It will be noticed that in these cases reference is had to one or more of

the following cases, decided by the Supreme Court of the United States, as authority upon the main question; that is, touching whether an act like the one sought to be drawn in controversy here is in conflict with the commerce clause of the national Constitution: *Robbins v. Shelby Taxing District*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 368; *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311; *Stoutenburgh v. Hennick*, 129 U. S. 141, 9 Sup. Ct. 256, 32 L. Ed. 637; *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613.

By reference to these cases, it will be seen that the first was prosecuted to the Supreme Court of the state and then to the federal Supreme Court on writ of error. The second was instituted in the state court by habeas corpus, then prosecuted to the highest court of appeal, and thence by writ of error to the United States Supreme Court. The third came by writ of error to the Supreme Court of Alabama. The fourth was a writ of error from the Supreme Court of the United States to the Supreme Court of the District of Columbia, and the fifth was error to the Supreme Court of Pennsylvania. All these cases, therefore, took their ordinary course through the state courts before the federal court entertained jurisdiction concerning them. Other cases may be alluded to, where the propriety of the exercise of the discretion of the court in entertaining jurisdiction at once, notwithstanding the causes were then pending in the state courts, was very plain, namely, *In re Ah Jow* (C. C.) 29 Fed. 181, *Ex parte Kieffer* (C. C.) 40 Fed. 399, and *Ex parte Jervey* (C. C.) 66 Fed. 957. In each of these cases, and others that might be cited of the same tenor, the question involved was of prime importance, and it was patent from first impression that a great wrong was being perpetrated by an enforcement of the state law complained against, and it was a matter of potent justice that the federal court should right the wrong summarily, as it might do through the instrumentality of the writ of habeas corpus.

The case at bar is not one of these. The defendant is the representative of a manufacturing institution in the state of Iowa, and the seeming purpose of invoking the writ is to present a test case and get a ruling of the court upon the validity of the state law. The test can and ought to be made in the state court, where the law was enacted. True, it is charged that the law is inimical to certain clauses of the federal Constitution, but this alone does not confer jurisdiction upon federal courts to take the matter out of the hands of the state court. It is just as much the duty of the state court to try these constitutional questions and safeguard the interests of suitors as it is that of the federal courts. So that it must be assumed that justice and right judgment will be meted out in the state courts as well as in the federal courts. This case affords an illustration, as it appears that the petitioner was subsequently tried in the state court and acquitted. And while the state court had no lawful authority to entertain the prosecution further, yet, if allowed to proceed there, it might, and in all probability would, be wholly unnecessary to resort to the federal courts. Relief, therefore, should be sought in the state courts, where

all the questions can be regularly tried, rather than that resort be had to the federal courts by summary proceeding that permits only of a greatly narrowed inquiry. Nor is the discretion of the court in exercising its power upon habeas corpus to be especially controlled by the fact that particular business interests may be affected. I quote the language of Mr. Justice Harlan in *Minnesota v. Brundage*, supra:

"We do not think that the exercise by a federal court of its own power upon habeas corpus to discharge one held in custody by the state authorities and charged with a violation of a state enactment should be materially controlled by any consideration of the extent of particular business interests that may be affected by a prosecution instituted in a state tribunal against him, or of the indirect effect of his detention in custody upon the rights of the general public."

This case falls well within the principle of that case, the *Royall Case*, and others above cited, and I am impelled to the conclusion that the better and sounder discretion will not permit of the entertainment of the writ. The court ought not to, and may not, shirk any duty imposed upon it. It must be remembered, furthermore, that the exercise of a proper discretion, having regard to the attendant facts and circumstances, is one of the most important duties it has to discharge.

These considerations lead to a dismissal of the writ, and it is so ordered.

UNITED STATES v. EIGHTY-SEVEN BARRELS, ETC., OF WINE. SAME
v. SIXTY BARRELS OF WINE, ETC. SAME v. SIXTY-
TWO BARRELS OF WINE.

(District Court, D. Vermont. June 24, 1910.)

Nos. 26, 27, 28.

INTOXICATING LIQUORS (§ 138*)—SHIPMENT—INTERSTATE COMMERCE—STATUTES
—"CONSIGNEE."

Cr. Code, § 240 (Act Cong. March 4, 1909, c. 321, 35 Stat. 1137 [U. S. Comp. St. Supp. 1909, p. 1464]), provides that whoever shall knowingly ship from one state into another any package containing intoxicating liquor, unless the package be so labeled on the outside cover as to plainly show the name of the consignee, the nature of the contents, and the quantity contained therein, shall be fined and the liquor forfeited. *Held*, that the term "consignee" was so used in its primary legal sense to describe the person to whom the liquor was to be delivered at destination in accordance with the contract of carriage, and hence where wholesale merchants in California, after collecting enough orders from purchasers in New England to make car load shipments, labeled each package with its own name, the character and quantity of the liquor, and the name of the purchaser, and consigned the entire car to itself or to its own order with directions to the carrier to notify designated persons, the shipper was also the consignee within the statute; the names of the purchasers being regarded as surplusage, so that there was no violation of the act.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 138.*
For other definitions, see *Words and Phrases*, vol. 2, pp. 1449, 1450.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Libels of information by the United States for the condemnation and forfeiture of certain barrels of wine, under Cr. Code U. S. § 240, approved by Act March 4, 1909, c. 321, 35 Stat. 1137 (U. S. Comp. St. Supp. 1909, p. 1464). Dismissed.

William A. Lord and S. Hollister Jackson, for claimants.

Alexander Dunnett, U. S. Atty.

HOUGH, District Judge. The section of the Criminal Code upon which these actions are based is (in its material parts) as follows:

"Sec. 240. Whoever shall knowingly ship * * * from one state * * * into any other state * * * any package of or package containing any * * * intoxicating liquor of any kind, unless such package be so labeled on the outside cover as to plainly show the name of the consignee, the nature of its contents and the quantity contained therein, shall be fined not more than \$5,000; and such liquor shall be forfeited to the United States and may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law." Act March 4, 1909, c. 321, 35 Stat. 1137 (U. S. Comp. St. Supp. 1909, p. 1464).

The two preceding sections of the Code, however, relate to the same legislative subject. Section 238 renders it criminal for "any officer, agent or employé of any * * * common carrier" to knowingly deliver to "any person other than the person to whom it has been consigned (unless upon the written order in each instance of the bona fide consignee) or to any fictitious person, or to any person under a fictitious name," any intoxicating liquor arriving at its place of destination by interstate or international transportation; and section 239 renders it criminal for any common carrier transporting or delivering liquor after interstate or international transportation to "collect the purchase price or any part thereof," or "in any manner act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same."

As these three sections of the Code are (unlike most of that act) new legislation—and new not only in words but new in treatment of the subject-matter—their history may be appropriately considered in order to ascertain something of congressional intent.

During the Sixtieth Congress there were pending in the Senate at least seven bills intended to regulate commerce in such manner as to aid the "Prohibition" legislation of any state or territory. There were also at least two such bills introduced into the House of Representatives. Generally speaking, the Senate bills sought to accomplish their object by subjecting interstate and international shipments of liquor to the police power of the several states while still in transit or before final delivery by the carrier. In April, 1908, these proposals were the subject of an interesting and careful report by the Committee on the Judiciary (Senate Report No. 499 Sixtieth Congress). In that report the committee states the mischief (to the correction of which the proposed legislation was directed) to be "the misuse of the facilities furnished by railroad companies, express companies, and other common carriers in bringing in liquors from outside the states

to be paid for on delivery." That this mischief deserved correction the committee agreed; but, for constitutional reasons ably set forth in the opinions (embodied in the report) of Senators Rayner and Knox, it was deemed improper to recommend legislation in apparent conflict with the views regarding liquor shipments expressed in *Vance v. Vandercook Co.*, 170 U. S. 452, 18 Sup. Ct. 674, 42 L. Ed. 1100.

The committee therefore reported to the Senate a bill framed by it (Sixtieth Congress, Senate 6576). This, usually called the "Knox bill," contained three paragraphs corresponding in substance to sections 238-240 of the Criminal Code. The only substantial differences between the third section thereof and section 240 aforesaid is the insertion of the word "knowingly" before the word "unlawful" at the beginning of the section, and the requirement that each package shall not only be so labeled as to show the nature of its contents and the quantity contained therein, but also the name of the consignee. The changes just noted, and especially the requirement concerning the name of the consignee, are plainly in furtherance of the object looked upon with approval by the Senate Committee, viz.:

"That by requiring that all interstate shipments of liquor shall be plainly marked as to their contents, the (Knox) bill will enable the several states to trace and to control the disposition and use of such liquors under their own police powers."

The Criminal Code during its passage through the House of Representatives was amended by adding thereto what are now sections 238-240, being the substance of the Knox bill as enlarged in the House, and the new legislation in question was retained by the Conference Committee without any debate on the floor of either House so far as I can discover. Cong. Rec. March 3, 1909, vol. 43, p. 3791.

This history of legislation shows plainly that the object of the promoters of the bill was to restrict common carriers to the business of transportation only, so far as liquor is concerned, and to produce on the records of the delivering carrier evidence procurable by lawful subpoena of the identity of the recipient of any package containing liquor, which last result was thought to be attained by the requirement of section 238 that delivery should be made only to the consignee "unless upon the written order in each instance of the bona fide consignee," and by the further requirement of section 240 that any package delivered should bear upon it a description of the kind and quantity of its contents and "the name of the consignee."

It is observable that nowhere in these sections is the word "owner" or "purchaser" used. The requirement is not that the liquor package shall bear upon its exterior the name of the person buying or paying for it, or owning it or intending to consume its contents. The language is always that the package shall be delivered to "the person to whom it has been consigned," and that it shall be labeled with "the name of the consignee," and section 238 clearly recognizes the possibility and propriety of a transfer of title by authorizing delivery upon the written order of the consignee.

In the presentation of these cases no question has been made as to the form of proceeding or the method or manner of pleading. It has

been assumed that the shipments about to be considered were "knowingly" made, and the sole point submitted for consideration is whether the facts agreed upon show that the marking, labeling, or consigning of the liquor in question do or do not fall within the condemnation of the statute.

The stipulations on file show that at divers places in Vermont and one in New Hampshire reside various persons who wished to procure barrels of wine or kegs of brandy. These persons ordered the same from the Oliveto Wine Company or the Ciocca Lombardi Company, wine merchants of San Francisco, Cal. These companies permitted orders to accumulate, until the quantity so ordered was sufficient to load three freight cars—a procedure permitting the vendors to obtain "car load rates" on their shipments and save very considerable expense. The Oliveto Company accordingly shipped one car load from its California vinery to Barre, Vt., which car contained the number of barrels and kegs ordered from it by upwards of 80 different persons residing as aforesaid.

The Ciocca Company likewise shipped two car loads of wine, each containing the aggregate orders of an even larger number of customers.

For each one of the cars so loaded and shipped the shipper took out one bill of lading. In the case of the Oliveto Company the bill was "straight"; that is, it recites the receipt from said Oliveto Company of "one car load of wine" consisting of 87 barrels and 2 kegs "consigned to Oliveto Wine Company, Barre, Vt." The bill of lading is in terms "nonnegotiable," and at the foot thereof is written:

"Please deliver the car wine to Enrico Rulfo and oblige.

"Respectfully,

"Oliveto Wine Company."

Rulfo lived at Barre, and had ordered a single barrel, which was on the car.

Both bills of lading taken out by the Ciocca Company are "order" bills; that is, they acknowledge receipt from the vendor and shipper of a specified number of barrels and kegs of wine and brandy in certain cars, one of which is "consigned to order of Ciocca Lombardi Company destination Barre, Vt., Notify G. Moruzzi at Barre, Vt." And the other similarly consigned, except that the party to be notified is A. Sassorossi. Both persons to be notified had ordered small quantities of wine, which were parts of the several shipments.

Each barrel and keg of this liquor bore upon it a statement of the nature of the spirits contained therein, the quantity thereof, the name of the Oliveto or Ciocca Company (as the case might be), and the name of the person who had ordered it and for whom it was ultimately intended.

The bill of lading issued for each car declared the name of the shipping corporation and set forth that the contents of the car were to be delivered (in one instance) to the Oliveto Company itself and (in the other two instances) to the order of the Ciocca Company. The manifesting or freight records of the various railroads over which these cars passed followed the bills of lading, and showed in each

instance that a car load of wine was deliverable to a certain corporation or its order (as the case might be) at a place in Vermont.

The names of the ultimate consumers, or customers of the wine companies, were never brought to the carrier's attention, or made a matter of record by any carrier, except that Rulfo when he exhibited the Oliveto Company's bill of lading to the station agent at Barre showed him also a list of the customers (corresponding to the names on the barrels and kegs) pinned to the bill.

There being nothing in the act prohibiting bulk shipments, and nothing requiring liquors to be always delivered to the owner or purchaser or consumer (as such), it seems to me that this record was perfect, and that not only was the letter but the spirit of the legislation lived up to, unless the shipper, whose name was on each package, cannot be regarded as the consignee of the contents of the cars in question, or unless it is necessary for the vendor of liquor to ship in the name of his vendee, and such are the contentions of the government. It becomes necessary, therefore, to ascertain in what sense the word "consignee" is used in this statute.

There being no statutory definition of the word contained in the act itself, it must be assumed that Congress used it in its ordinary commercial and legal signification.

In California, where this shipment originated, it is declared by statute that a "consignee" is "the person to whom freight is to be delivered." Civ. Code 1906, § 2110. And this definition, which is plainly intended to be no more than a declaration of existing law and usage, has been carried into the Codes of Montana, Oklahoma, and North and South Dakota. It is undoubtedly true that a consignee is often a purchaser; but it is not necessary that he should have any interest in the goods consigned to him. As long ago as 1798 the Court of Common Pleas, per Buller, J., inquired, "What is a consignee?" and answered the question as follows:

"Consignee is a person residing at the port of delivery to whom the goods are to be delivered when they arrive there." *Wolf v. Horncastle*, 1 Bos. & Pul. 322.

In *Gillespie v. Winberg*, 4 Daly (N. Y.) at 320, the Common Pleas of New York City said:

"Consignor and consignee in the ordinary mercantile acceptation of these words signifies the shipper of merchandise and the person to whom it is addressed. To consign in the mercantile law is ordinarily to send or transmit goods to a merchant or factor for sale, and a consignee is consequently the person to whom they are consigned, shipped or otherwise transmitted."

In *Lyon v. Alvord*, 18 Conn. 66, the Supreme Court of that state, in considering a declaration in assumpsit to recover the expense of saving from sea peril certain goods alleged to be "consigned to the defendant," remarked:

"Counsel have attempted to show that the import of the language of the count is that the defendant was the owner (of said goods); and it is said that the term 'consignee' is often used as synonymous with 'owner.' We are not aware of any such use of the term, much less that such is the fair import of it. That a man may be and often is both consignee and owner of goods cannot be questioned, but still all that is meant by the term is one to whom

goods are consigned; and so far from any necessary or even natural inference arising from its use that the consignee is in fact owner, it is believed that the consignor is as often the owner of the goods consigned as that the consignee is. The term is nearly synonymous with 'factor,' a person to whom goods are sent for sale or safe-keeping."

It is said in *Memphis & L. R. R. Co. v. Freed*, 38 Ark. 622, that:

"When the terms 'consignor' and 'consignee' are used, by the former is meant a vendor who ships, and by the latter a purchaser to whom they have been sent."

But the court in that case was considering the right of stoppage in transitu, so that, while the statement is correct in respect of the matter under consideration, it cannot be accepted as a general commercial definition of the word "consignee."

It therefore seems plain that "consignee" as used in this statute must be taken in its ordinary signification, and to mean that person or corporation to whom the carrier may lawfully make delivery of the consigned goods in accordance with its contract of carriage. Such deliverer may or may not be the owner; he may be a mere bailee, gratuitous or otherwise, a vendee, a commission merchant, or a mere agent of the shipper; and he may even be a swindler, who had deceived the shipper or consignor into sending him goods to which he can assert no legal or equitable title or interest whatever. In determining who is a consignee the question is not in the first instance to ascertain the contractual relations or lack of them between the person shipping the goods and the person entitled to receive them, but to correctly interpret the contract of carriage made by the shipper with the carrier.

That the real owner of the goods may at any time lawfully assert his title thereto is unimportant, for whether such title be asserted by a stoppage in transitu, or a demand followed by an action in trover and conversion (*Bliven v. Hudson River R. R. Co.*, 36 N. Y. 403; *Lester v. Delaware, etc., R. R. Co.*, 92 Hun, 342, 36 N. Y. Supp. 907), the success of the stoppage notice or the action in conversion rests, not upon the contract of carriage, but upon the rescission or setting aside thereof by higher right.

In the case of the Oliveto Company the bill of lading was "straight"; that is, it was specifically agreed between shipper and carrier that it was not negotiable.

The request of the shipper to deliver the car to Enrico Rulfo (above set forth) is a written order within the language of section 239, but it was not (in the absence of any statute on the subject) such a transfer of the bill of lading or of the goods described therein as to oblige the delivering carrier to hand over the contents of the car to Rulfo if it was not thought safe so to do either out of distrust or for fear of violating any of the statutes now under consideration.

The test is whether Rulfo could have maintained an action upon the bill of lading in his own name by virtue of the request aforesaid. That he could not do so at common law is too plain for argument. It required the bills of lading act of 1855 (18 and 19 Victoria, c. 111) to render any bill of lading in Great Britain capable of even quasi negotiability, and no more than that has been recognized in the United

States, where, as said by Fuller, C. J., in *Friedlander v. Railroad Co.*, 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991:

Bills of lading "are regarded as so much * * * articles of merchandise, in that they are symbols of ownership of the goods they cover. * * * While not negotiable as commercial paper is, bills of lading are commonly used as security for loans and advances; but it is only as evidence of ownership special or general of the property mentioned in them and of the right to receive such property at the place of delivery."

No such quasi negotiability can attach to a bill nonnegotiable by agreement.

Both of the shipments by the Ciocca Company were under order bills; that is, the shipping instruments themselves contained an agreement that the fullest measure of negotiability recognized by law was to be given the bills of lading in question. The fact that the delivering carrier was directed to notify a resident of Barre of the arrival of the cars does not make the person to be notified either the consignee of the goods or the agent of the shipper—for any other purpose than that of receiving the notice. As was said in *Furman v. Union Pacific R. R. Co.*, 106 N. Y. 579, 13 N. E. 587:

"The very presence of the word 'notify' * * * shows that (the persons to be notified) are not intended as the consignees; if they are, the word is wholly unnecessary * * * and to place in the bill of lading a direction to notify certain persons to whom if consignees it was the carrier's duty to deliver, or at least to notify of the arrival of the goods, is a plain notice that (in the absence of further directions) they are not the consignees."

And the same doctrine is more concisely put in *Joslyn v. Grand Trunk Ry.*, 51 Vt. 95. In that case certain corn was shipped "by Nutting & Co. to Island Pond to their own order with directions to the defendant (railroad company) to notify J. C. Page." The railroad company "treated Page as the consignee and delivered" the goods to his teamsters. The court continued:

"This was a delivery to the wrong person which rendered the defendant liable for the value of the corn to the owner thereof unless such owner's conduct had induced the misdelivery by the defendant."

And this must follow from the very nature of a bill of lading, for, as asked by Redfield, C. J., in *Davis v. Bradley*, 28 Vt. 124, 65 Am. Dec. 226, what is a bill of lading?

"It seems to be nothing more than an acknowledgment that the goods are put on board the ship at one port to be delivered to A. B. at another port or to his assigns. * * * The consignor may if he choose take the bill of lading in his own name, and he can then indorse it. But unless he restricts the consignment to be delivered for his own use the consignee is the party entitled *prima facie* to control the delivery and the title."

Who therefore is entitled under the law merchant to "control the delivery and the title of goods in the possession of a common carrier? Evidently the consignee, and it is one of the tests of his position as consignee that he is so entitled, and no one can be more absolutely so entitled than the shipper named as consignee in a "straight" bill, or the original holder of a negotiable bill with lawful right to indorse the same.

I am therefore of opinion that the Ciocca Lombardi Company was the consignee as well as the consignor of the goods shipped by them. If they had indorsed and delivered their negotiable bills of lading, the lawful indorsee or subsequent holder of said bills would have become the owner of the goods covered by them, and the indorsement would have been a written request within section 239; so that the transaction would have been lawful, although there is no evidence that in this case such a course was pursued.

Quite as plainly was the Oliveto Company the consignee of the goods shipped by them.

As therefore it appears by stipulation that every package contained in each one of the cars referred to was labeled with the name of the consignee (i. e., the Oliveto Company or the Ciocca Company, as the case required), as well as with the other information demanded by section 240, I think the goods in question are not subject to forfeiture.

The inscription upon the several barrels and kegs of the names of those persons who had ordered the wine from the shippers was mere surplusage, for there is nothing in the statute to prevent the addition of any legend to a barrel of wine as long as the description, the quantity, and the name of the consignee be stated thereon.

The informations are severally dismissed.

GAY et al. v. HUDSON RIVER ELECTRIC POWER CO. et al.

In re QUINN.

(Circuit Court, N. D. New York. July 23, 1910.)

1. **BILLS AND NOTES (§ 363*)—TRANSFER—RIGHT OF TRANSFEREE—COLLATERAL SECURITY.**

A company sold goods under a contract, among other things retaining title until payment of the price. Purchase-money notes were given and subsequently were transferred to a purchaser for value, without transfer of the contract. It did not appear that the company abandoned the lien before transferring the notes. *Held*, that the transfer of the notes carried with it the contract in so far as it reserved title to the goods, as collateral security for payment of the notes, though the transferee was at the time of the transfer ignorant of the existence of the contract.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 363.*]

2. **BILLS AND NOTES (§ 363*)—TRANSFER—RIGHT OF TRANSFEREE—COLLATERAL SECURITY.**

The transferee was not estopped from asserting his lien because he filed a claim against the maker's receivers, stating that he had no security, when in fact he did have but was ignorant thereof.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 363.*]

Action by Eben H. Gay and another against the Hudson River Electric Power Company and others. Petition by John C. Quinn for a lien on certain property. Judgment for petitioner.

See, also, 178 Fed. 499.

This is a petition by John C. Quinn to have George W. Dunn, Milton De Lano, and Charles W. Andrews, receivers appointed in the above-entitled

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

action and continued as such in certain mortgage foreclosure proceedings now pending, authorized by the court instructed to carry out the terms of a certain contract entered into between the Engineer Company and the Hudson River Electric Power Company, by paying to said Quinn the sum of \$2,500, with interest from May 28, 1908, and also desires the court to hold that if not paid said Quinn is entitled to the property mentioned in such agreement.

Walter A. Chambers, for petitioners.

Abram J. Rose and Geo. B. Curtiss, for receivers.

RAY, District Judge. The material facts proved, and which I find from the evidence given before the special master, are as follows:

(1) March 30, 1898, the Engineer Company made a written contract with the Hudson River Electric Power Company whereby it agreed to sell to the power company, and that company agreed to purchase and have installed, what is known as the "balanced draft system," being certain appliances and personal property. The property was delivered, received, accepted, and installed by the power company at its plant in Utica, N. Y., and pursuant to the agreement the power company gave to the Engineer Company in payment therefor \$1,000 and four notes of \$1,000 each made by said company and indorsed as required by the contract and dated May 28, 1908. The notes were to run for 2, 4, 6, and 8 months. Article 4, § 1, provided as follows:

"The title to the apparatus herein sold shall not pass from the contractor (Engineer Company) until all payments hereunder (including deferred payments if any) shall have been fully made in cash. The purchaser agrees to do all the acts necessary to maintain and perfect such retention of title in the company as well as protect the apparatus from all damages whatsoever."

The clause of the contract relating to payment reads as follows:

"The price of the 'balanced draft system' as furnished by the contractor and the license to operate the same under the patents controlled by the Engineer Company in connection with the boilers herein specified shall be the sum of five thousand dollars (\$5,000) payable one thousand dollars (\$1,000) May 15, 1908, the balance by four notes for one thousand dollars (\$1,000) each, for 2, 4, 6 and 8 months, with interest, upon delivery of materials; said notes to be made by the Hudson River Electric Power Company and indorsed by Eugene L. Ashley and by E. H. Gay and Company."

It also contained the following:

"The purchaser agrees in case additional boilers are installed in this plant to equip them with the balanced draft system to the extent of the excess capacity of the apparatus furnished under this contract, at five dollars (\$5.00) per horse power, the contractor furnishing the damper controllers for the additional boilers.

"The contractor agrees as follows, subject to the operation of the equipment as per the instruction of the contractor, to wit: That the material and workmanship of the apparatus furnished under this contract shall be perfect and the contractor will furnish at his own expense any parts which may prove defective within one year from date."

This agreement was never filed or recorded as a mortgage or as a conditional sale.

(2) August 5, 1908, one note was paid in full, and October 5, 1908, \$500 was paid on another of said notes and a renewal note of \$500 given and accepted for the balance by said Quinn, who had then be-

come the owner of the notes but not of the contract by any written assignment.

(3) October 31, 1908, in the equity suit above entitled, Geo. W. Dunn, Milton De Lano, and Chas. W. Andrews were appointed receivers of all the property, etc., of said company, and seven other allied companies, and the Utica plant and this property came into their possession and has so remained ever since. The receivers were empowered and directed to carry on the business, and they have done so, and this property in question is necessary for the operation of the Utica electrical plant.

(4) In September or October, 1908, and before the appointment of the said receivers, the notes were transferred to John C. Quinn. They had been indorsed by the Engineer Company, but before delivery that company canceled its indorsement. They were transferred and delivered in exchange for some \$30,000 of the stock of that company. The contract of sale was not assigned or transferred to Quinn or to any one for him at the time the notes were given in exchange for the stock, and there was no agreement or understanding that it should be.

(5) In 1909 this court made an order directing the receivers to advertise for claims against said Hudson River Electric Power Company and requiring all claims to be presented, and notice was given accordingly.

(6) On or about the 10th day of July, 1909, said John C. Quinn, then the owner of said notes, which he had acquired as aforesaid in payment for said stock, duly presented his claim in writing and under oath to said receivers, the officers of this court, on said notes against said Hudson River Electric Power Company, setting same out as his claim against the said company, stating the amount due and the consideration thereof, and also stating in said claim verified July 10, 1909, as follows:

"That the said notes were duly delivered before maturity to the said John C. Quinn, who is now the owner and holder thereof; that no part of said indebtedness of said twenty-five hundred (\$2,500.00) dollars has been paid; that there are no offsets or counterclaims to the same and no judgment has been rendered thereon; and the said John C. Quinn has not nor has any person by his order or to his knowledge or belief for his use had or received any manner of security for said debt whatever."

The said receivers accepted the said claim so presented, and allowed same and acted thereon in making reports to this court, obtaining orders of reference, etc.

(7) Thereafter and in January, 1910, and after the power company had made payments to Quinn on said notes and he had taken a new note of \$500 in renewal of the balance of the \$1,000 note, one Lezinsky, who had acted for Quinn in getting the notes, obtained for the Engineer Company an assignment as follows:

"In consideration of the sum of one dollar the Engineer Company hereby sells, assigns, transfers and sets over unto John C. Quinn all its right, title and interest in and to all property delivered by it to the Hudson River Electric Power Company in accordance with the terms of a contract between the Engineer Company and the said Hudson River Electric Power Company of which a copy is hereunto annexed and made a part hereof, together with any and all rights and privileges to ask, demand and receive payment for said

property, or to take, receive and reclaim said property and to take any and all proceedings to reclaim said property.

"In witness whereof the Engineer Company has hereunto set its corporate seal and caused the same to be executed by its vice president this 11th day of January, 1910.

The Engineer Company,
"R. E. Fox, Jr., Vice Pres."

That thereafter and in February, 1910, said Quinn filed and served his petition in this proceeding.

(8) The evidence shows that Quinn and the person acting for him in exchanging the stock for the notes did not see this contract or know its contents, and that at the time the exchange was made the Engineer Company did not make its existence or terms known or agree to transfer any such contract. Quinn concedes he knew nothing of it.

(9) I think and hold that the Engineer Company did not agree or intend to assign or transfer the contract to Quinn, or to retain any lien or claim on the property. George Lezinsky, a California lawyer, who did the business, and who was representing himself as the owner of the stock when he was not, says:

"I then negotiated this matter with Mr. McLean on behalf of the Engineer Company which resulted in my turning over to him this stock of the company and received these three notes (the ones in question) as a consideration therefor."

He also says:

"The notes were considered as perfectly good, but at the time the notes were turned over to me, or about to be turned over to me, they bore the indorsement of the Engineer Company, and Mr. McLean said he did not desire to bind the Engineer Company to pay the notes; that I would have to take the notes at my own risk. I said I was quite satisfied to do that and was satisfied to have the indorsement of the Engineer Company which was on those notes canceled, but that I desired it understood that, although the Engineer Company was not responsible as an indorser on the notes or responsible to me for the notes, I did not want to take them at my own risk. Mr. McLean then told me that all rights and interest of any kind that the Engineer Company had against the Hudson River Electric Power Company would be transferred to me together with these notes, and that the Engineer Company would do all that they could in every way; that I might call upon them to assist in the collection of the notes, if anything of that kind was required, and Mr. McLean said that that was his understanding. That was the understanding between us, but that the Engineer Company itself should not be responsible for the payment of the notes. I took the notes with that understanding and turned over the stock to him, of the Engineer Company. That was in July, 1908. Afterwards I turned the notes over to Mr. Quinn and claimed no interest in them after I turned them over to Mr. Quinn. I never did as between Mr. Quinn and myself obtain any substantial interest in the notes."

He also says he had no interest in the stock or notes. He also disagrees with Quinn as to what he told Quinn.

The power company by the receivers insists: (1) That the transfer of the notes by the Engineer Company without an assignment of the contract or the rights of that company under the contract operated to relieve the property from the conditional sale; and (2) that by the presentation of the claim by Quinn and his oath that there was no security he is now estopped from claiming security. I do not believe Lezinsky when he says McLean agreed to transfer to him the contract.

No excuse for not doing it when the notes were delivered, if it was a part of the agreement of transfer, is given. His story on this point is not consistent or probable. But subsequently the Engineer Company did transfer the contract to Quinn. Can he enforce it as against this property? Is the title of the property in him? When the Engineer Company sold the notes and Quinn bought them he did not purchase the property or the interest the Engineer Company had therein. Having sold the notes without transferring the contract or its rights under it, did the Engineer Company have any claim on the property which it could subsequently transfer for \$1 to Quinn?

I do not think the time or date when the assignment of the contract was made is material, provided it was agreed that the contract should be assigned with the notes to Quinn or for his benefit. The claim on the property, the retention of title by the Engineer Company, was in the nature of collateral security for the payment of the debt.

In *Stillman v. Northrup et al.*, 109 N. Y. 473, 481, 482, 17 N. E. 379, a bond and mortgage was executed and delivered. The mortgage was, of course, security for the bond. The mortgagee assigned the bond and mortgage to one N., and in the assignment guaranteed the payment of the mortgage to N., but did not guarantee the payment of the bond. Thereafter N. assigned the bond and mortgage, but did not assign the guaranty. The Court of Appeals held that it was evidently the intent to guarantee the payment of the bond, or debt, as well as the mortgage, and that the guaranty so operated, and also that the assignment operated to assign the guaranty which was subsequently done, and also:

"But it is well settled that the assignment of a bond and mortgage carries with it the guaranty of payment or collection although not mentioned in the assignment. *Craig v. Parkis*, 40 N. Y. 181 [100 Am. Dec. 469]. The transfer of the debt to the plaintiff carried with it, as incident thereto, all the securities for its payment."

Treating the contract so far as it retained title to the property as a collateral security for the payment of the notes, the mere transfer of the notes carried the collateral. But this contract contained other provisions obligatory on both the Engineer Company and the power company at the time the notes were transferred to Quinn, as before recited. It is evident from the testimony that there was no agreement to transfer the contract as such and as a whole and impose its obligations on Quinn, or any intent on his part to assume it or its obligations. The subsequent absolute assignment of the contract was not therefore in execution of any agreement, express or implied, made as part of the agreement for transferring the notes and debt represented thereby. If the rule is applicable here that the transfer of notes carries the collateral, and it is held that the contract so far as it reserved title was collateral, and that it passed as an incident of the debt represented by the notes to that extent, and so carried title to such property to Quinn, it must be so held because the law so operated, and not because of any express agreement to that effect. In *Winstead v. Bingham* (C. C.) 14 Fed. 1, 2, the court said, holding that the transfer

of a note, the payment of which was secured by a mortgage on real estate, carried the mortgage although there was no assignment thereof:

"At common law and in equity it is well settled that the incidents follow the principal, and that the transfer of a note secured by a mortgage carries with it the mortgage security; so that the transfer by delivery of a note payable to bearer will transfer the mortgage given to secure the note."

When the notes in question were transferred to Quinn, neither he nor Lezinsky knew of the existence of this contract reserving title. Quinn knew nothing of it, but Lezinsky knew generally that the Engineer Company had printed contracts which it used in making such sales containing this clause and assumed there was such a contract in this case. No representation was made that such a contract existed. But if the contract was a collateral security for the notes, and such a security passes on the transfer of the notes, it would seem to be immaterial that Quinn did not know the contract was in existence. There is respectable authority to the effect that the assignee of a debt "—is entitled to the benefit of all collaterals received by the creditor, although he did not originally rely upon them, or know of their existence, and is entitled in equity to the benefit thereof as against B. who surrendered the same to A. without his knowledge or consent. *Vail v. Foster*, 4 N. Y. 312; *Higgins v. Wright*, 43 Barb. [N. Y.] 461; *Merchants' & Mfrs.' Bank v. Cumings*, 149 N. Y. 364 [44 N. E. 173]; *Cowen's Treatise*, vol. 1 (5th Ed.) § 457."

But it is claimed that the Engineer Company abandoned its security or claim on the property. I really find no evidence of such an abandonment unless it results from the fact that it severed the notes from this contract and sold the notes independent thereof and by canceling its indorsement and holding the contract may be said to have abandoned or released all claim to the property itself. When Quinn took the notes, there was no default, and no right existed to take the property; but I cannot see that this makes any difference here. If the retention of title in the nature of a lien on the property as security for the debt was in fact collateral security, I do not see, on principle, how it can be held in face of the authorities that the lien or security did not pass to Quinn.

This position finds strong support in *Esty v. Graham*, 46 N. H. 169, 170; *Rigney v. Lovejoy*, 13 N. H. 247; *Ross-Meehan Co. v. Ice Co.*, 72 Miss. 608, 18 South. 364; *McPherson v. Lumber Co.*, 70 Miss. 649, 12 South. 857; *Cutting v. Whittemore*, 72 N. H. 107, 110, 54 Atl. 1098; *Willston on Sales*, p. 522, § 332; *Little Rock v. Collins*, 66 Ark. 240, 50 S. W. 694; *Townsend v. Southern Pac. Co.*, 127 Ga. 342, 56 S. E. 436, 119 Am. St. Rep. 340. In *Cutting v. Whittemore*, supra, at page 110 of 72 N. H., at page 1099 of 54 Atl., the court says:

"It has been decided in this state that a vendor who sells a chattel reserving the title until the purchase price is paid retains the general property therein, not as the absolute owner, but as collateral security, not differing materially from security by way of mortgage or other lien, and that a transfer of the debt carries with it, as an incident, his interest in the chattel, in the same manner as the assignment of a mortgage debt would carry with it the mortgage."

Cases are cited to sustain the contention. *Willston on Sales* states the same rule.

In some of the cases the note transferred in and of itself reserves title to the property in payment for which it was given. In such a case there would be no question, it seems to me, that the transfer of the note would carry with it the contract reserving the title in the property, and hence carry the interest of the vendor of the chattel in the chattel to the purchaser of the note. My attention has not been called to but one case holding the contrary. *Domestic Sewing Machine Co. v. Arthurhultz*, 63 Ind. 322.

I think the view I have taken is also sustained by the Court of Appeals in *Merchants' & Manufacturers' National Bank v. Cummings*, 149 N. Y. 360, 44 N. E. 173. The question is not free from doubt; but it seems to me but just that the purchaser of the notes in question for a valuable consideration should have the benefit of the security held by the Engineer Company in view of the fact that that company subsequently actually assigned its interest in the property to Quinn. It is of course true that, if the Engineer Company actually abandoned its lien and claim upon the property when it assigned the notes to Quinn without transferring its interest in the property, the lien was extinguished and could not thereafter be revived by an assignment of the contract. But I find no evidence that the Engineer Company intended to abandon the lien and did abandon it before passing the notes to Quinn. If the contract retaining title was a collateral security for the notes and passed with the notes as an incident thereto, in so far as title to the property was retained as security, then, in the absence of some agreement or other affirmative action on the part of the Engineer Company, it seems to me that Quinn took title as collateral security, even though he was ignorant at the time of the agreement between the Engineer Company and the power company.

The general trend of the cases is to apply equitable rules in such a case and give the purchaser of the debt for a consideration all the collateral security which the original holder of the note held for its payment.

I am therefore compelled to hold that Quinn has a lien on this property for the amount of the notes. I do not think that Quinn is estopped from asserting his lien at this stage for the reason he filed a claim stating he had no security, when he in fact did but was ignorant thereof. The situation of the parties has not been changed for the worse in reliance thereon. The receivers are instructed to pay the \$2,500, and interest at the rate of \$250 per month commencing August 1, 1910. They will also pay the charges and expenses of the special master fixed and allowed at \$164.83.

So ordered.

In re BIRD.

(District Court, D. Minnesota. Fourth Division. June 27, 1910.)

1. EVIDENCE (§ 441*)—WRITTEN CONTRACT—PAROL EVIDENCE.

Where an assignment of certain collaterals provided that any surplus remaining after the assignee's debt was paid should be returned to the assignor, evidence of the assignee's agent that the assignment was taken in full settlement of the assignee's claim was inadmissible as contradicting the assignment.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2038; Dec. Dig. § 441.*]

2. BANKRUPTCY (§ 161*)—PLEGDED SECURITIES—ASSIGNMENT OF EQUITY—EFFECT.

A bankrupt having in June, 1906, assigned certain securities to a bank to secure payment of a debt owing to the bank, on the same date executed to the A. Company, another creditor, an assignment of all his equity in the securities. The equity assigned was to be determined only after the bank's debt and interest had been fully satisfied, the A. Company agreeing to return any surplus remaining after satisfaction of its claim. Nearly two years after, while the securities remained in the possession of the bank, and when its claim had been paid, except the sum of \$165.82, a bankruptcy petition was filed against the assignor and he was adjudged a bankrupt. *Held*, that such assignment of the bankrupt's equity in the pledged securities was valid both under the Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) and under the law of Minnesota (Rev. Laws 1905, § 4302) without registration, and took effect from the date of delivery and notice to the bank.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 261; Dec. Dig. § 161.*]

3. BANKRUPTCY (§ 161*)—STATUTES—CONSTRUCTION—TAKE POSSESSION OF—"DELIVERY AND TAKING POSSESSION."

Bankr. Act, July 1, 1898, c. 541, § 3b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3422), provides that the four-month period shall not expire until four months after the date of the recording or registration of the transfer or assignment, if by law such recording or registration is required or permitted, or if it is not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment. *Held* that, where a bankrupt, two years prior to adjudication, assigned his equity of redemption in certain pledged securities, and notified the pledgee of such assignment, such notice was equivalent to a delivery and a taking possession thereof by the assignee within the bankruptcy act.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 261; Dec. Dig. § 161.*]

4. BANKRUPTCY (§ 161*)—ACCOUNTS—ASSIGNMENT—COLLECTION—PREFERENCES.

When an assignment of accounts is made by a debtor more than four months prior to bankruptcy, the fact that the accounts are not collected by the creditor within four months does not make the transaction a preference.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 161.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the matter of Francis J. Bird, bankrupt. On certificate to review the determination of a referee directing the delivery of certain pledged securities to the Foster-Armstrong Company. Affirmed.

Dodge & Webber, for creditors.

Welch, Hayne & Hubachek, for Armstrong Piano Co.

WILLARD, District Judge. On April 8, 1908, a petition for involuntary bankruptcy was filed against Bird, and he was adjudicated a bankrupt on the 5th day of May, 1908. On June 9, 1906, the Northwestern National Bank of Minneapolis had in its possession a large quantity of promissory notes and conditional sale contracts belonging to Bird, which notes and contracts had been pledged to the bank by Bird, to secure the payment of a debt owing to the bank by him. On the same day—June 9, 1906—almost two years before the petition in bankruptcy was filed, Bird and the Foster-Armstrong Company made the following contract in writing:

"For the consideration of one dollar and other valuable consideration, I hereby assign all my right, title, and interest in the equity of collateral paper held by the Northwestern National Bank of Minneapolis, Minn., against my loan of present date amounting approximately to four thousand three hundred seventy-eight dollars (\$4,378) and interest due and accruing thereon, to the Armstrong Piano Company of Rochester, N. Y., and hereby guarantee the payment of same, together with interest, cost of collection and attorney fees, at maturity or any time thereafter. I further agree that, should any of the instruments be repossessed and be resold, should any deficiency arise by reason of such sale, to pay same, together with all costs of repossession and sale, and hereby waive notice of nonpayment, demand, notice of protest and suit against the signer, and agree that any extension which may be granted to the maker thereof shall not in any manner release the undersigned. Equity referred to shall be determined only after said bank shall have their loan and all interest due thereon fully satisfied. I further agree and guarantee to the Armstrong Piano Company, that the said equity shall net not less than one thousand dollars and interest thereon, and it is further agreed and understood that, should said equity net in full claim of Armstrong Piano Co. amounting to \$1,920 and interest due thereon, the surplus remaining thereafter shall be returned to me.

"Dated this ninth day of June nineteen hundred six, at Minneapolis, Minn.

"Francis J. Bird. [Seal.]

"Armstrong Piano Co.,

"J. H. Shale, Treas.

"Witness: May A. Smith."

To this contract was attached and made a part thereof a list of the notes and accounts therein referred to. Before signing the contract the agent of the Foster-Armstrong Company went with Bird to the Northwestern Bank, and there examined all of the notes and contracts, made a list thereof, and ascertained the amounts that had been paid thereon. After the contract was signed a copy of it was left with the Northwestern Bank, and the officer in charge of the matter refused to accept the contract; but that refusal of course could not in any way affect the rights of either Bird or of the creditor. Since June 9, 1906, the bank has collected from the notes and contracts sufficient money to pay its claim against Bird, except the sum of \$165.82, and on October 3, 1908, upon a petition of the Foster-Arm-

strong Company made in this bankruptcy proceeding, the bank disclosed that it had in its possession the notes and contracts mentioned and described in a certain Exhibit A, and that the balance of its said claim against said bankrupt was at that time the sum of \$165.82. The bank then and there agreed to turn over and did turn over to the trustee in bankruptcy the notes and contracts described in said exhibit, it being then and there also agreed by all of the parties that said trustee should take the whole sum of the proceeds thereof, and pay the bank \$165.82, and hold the balance for such person or persons as might by the court be found to be entitled thereto. The Foster-Armstrong Company has filed its petition in this proceeding, asking for an order directing that the said notes and contracts be turned over to the trustee, or such sums as have been collected thereon be turned over or paid to it. A hearing was had upon such petition, the referee made an order granting the prayer thereof, and that order the trustee is now seeking to have reviewed, his claim being that the transaction constituted a preference voidable under section 60 of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3446]).

The bankrupt testified on the hearing that he signed the contract and delivered it to the creditor, merely to be used by the creditor in certain negotiations with the Northwestern Bank, and that it was to be returned by him if those negotiations failed. This was denied by the agent of the creditor who conducted the transaction for it. It is apparent that the testimony of the bankrupt is entirely insufficient to defeat this contract which on its face was a present transfer of the bankrupt's interest in this property. On the part of the creditor testimony was given by said agent to the effect that the document was taken in full settlement of its claim against Bird. This testimony contradicts the plain terms of the contract, for it is therein said that any surplus remaining after the debt to this creditor was paid should be turned over to Bird. The testimony therefore was incompetent. The trustee claims that that part of the contract which says, "Equity referred to above shall be determined only after said bank shall have their loan and all interest due thereon fully satisfied," indicated that this contract of assignment was not to take effect until after the bank had been paid in full.

It is somewhat difficult to determine why that clause was inserted in the contract, but in no event can it have the effect of destroying the absolute assignment made in the first part of the contract, which by its terms took effect at once. It probably was inserted merely to indicate that the creditor should have no claim upon any of the notes or contracts until the bank had been paid in full. The document must therefore be taken as it stands. In legal effect it was a transfer and assignment on June 9, 1906, of all the interest which Bird had in the personal property then in the possession of the Northwestern Bank as security for a debt then due from Bird to the Armstrong Company. It was in fact a second pledge to one creditor of personal property already pledged to another creditor. That such a contract as this is entirely valid at the common law does not admit of doubt. That it was a valid contract under the laws of Minnesota is equally clear. The

statutes of Minnesota (Rev. Laws 1905, § 4302), provide that the interest of the pledgor can be levied upon and sold under execution. If that is true, it is certainly true that a pledgor himself can convey his interest in the pledged property. The trustee claims, however, that whatever may have been the legality of this transaction at common law, and under the laws of Minnesota, it is provided in the bankrupt law, and particularly in the last part of section 60a, as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1909, p. 1314), that:

"Where the preference consists of a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

There is nothing in the law of Minnesota which requires the recording or registering of a transfer by a pledgor of his interest in the property pledged. But section 3b of the act provides that:

"Such time shall not expire until four months after the date of the recording or registering of the transfer or assignment. * * * If by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment."

The Circuit Court of Appeals for this circuit in the case of *Long v. Farmers' State Bank*, 147 Fed. 360, 77 C. C. A. 538, 9 L. R. A. (N. S.) 585, has held that:

"Said provisions of sections 3 and 60 are to be read together. When so read there can be no permissible question but that the date of the preference referred to in section 60 is the same as that referred to in section 3b, which, as applied to the facts of this case, is the date when the transferee takes possession of the property."

The trustee therefore claims, under this decision, that although the contract in question was made almost two years before the bankruptcy, yet the creditor did not take possession of the property assigned four months before the petition was filed against Bird, and, in fact, never did take possession, is not now in possession, and that the contract therefore is void as a preference.

The question to be determined is, What does the phrase "take possession of" mean when applied to a case of this kind? In *Whitaker v. Sumner*, 20 Pick. (Mass.) 399, Chief Justice Shaw said, on page 405:

"It seems now well settled that, when personal property is under a pledge or lien, whether created by operation of law, or by the act of the owner, the general property remains in the owner, and that he may transfer it by a proper contract, and upon a good consideration, subject only to the lien. *Tuxworth v. Moore*, 9 Pick. [Mass.] 347 [20 Am. Dec. 479]; *Fettyplace v. Dutch*, 13 Pick. [Mass.] 388 [23 Am. Dec. 688]. And in such case, as the actual custody and possession of the goods for the time being is in the hands of the party having the lien, it follows that a constructive or symbolical delivery is sufficient to pass the property. An order by the vendor upon the keeper, or if the contract of sale or conveyance be in writing, proper and satisfactory notice of the conveyance by the vendee to the holder constitutes such constructive delivery. Where goods are lying in a warehouse, although subject to a lien for keeping, notice to the warehouse keeper, where all the other requisites of a sale are proved, is equivalent to a delivery. After such

notice the keeper ceases to be the agent of the vendor, and becomes the agent of the vendee, and thus the goods are placed under the effective control of the vendee, as they would be by an actual delivery. Here notice was given by the plaintiff to Horr, who had the custody of the goods, with no claim of title but that of a pledge; the property passed to the plaintiff subject to that lien."

In the case of *In re Ozark Cooperage & Lumber Co.* (decided by the Circuit Court of Appeals of this circuit on May 3, 1910) 180 Fed. 105, the court, speaking of the Missouri statute relating to change of possession, said:

"Some kinds of personal property may be readily delivered from hand to hand, and interested persons may rightfully expect that method to be observed. In other cases the character of the property and the circumstances of its situation preclude such a delivery; and other indicia of a change of ownership, such as signs, brands, and marks are generally accepted as sufficient. Each case however, as it arises, should be determined by its own peculiar facts and circumstances."

In the case of *Thompson v. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, the court said on page 521, of 196 U. S., on page 308, of 25 Sup. Ct. (49 L. Ed. 577):

"There is no pretense of any actual fraud being committed or contemplated by either party to the mortgage. Instead of taking possession at the time of the execution of the mortgage, the defendant had it recorded in the proper clerk's office, and the record stood as notice to all the world of the existence of the lien as it stood when the mortgage was executed, and that the defendant would have the right to take possession of property subsequently acquired as provided for in the mortgage. The bankrupt was, therefore, not holding himself out as unconditional owner of the property, and there was no securing of credit by reason of his apparent unconditional ownership. The record gave notice that he was not such unconditional owner. There was no secret lien, and if defendant cannot secure the benefit of this mortgage, which he obtained in 1869, as a lien upon the after-acquired property, yet prior to the title of the trustee for the benefit of creditors, it must be because of some provision of the bankruptcy law, which we think the court ought not to construe or endeavor to enforce beyond its fair meaning."

And again on page 524, of 196 U. S., on page 309, of 25 Sup. Ct. (49 L. Ed. 577):

"The principle that the taking possession may sometimes be held to relate back to the time when the right to do so was created, is recognized in the above case. So in this case, although there was no actual existing lien upon this after-acquired property until the taking of possession, yet there was a positive agreement as contained in the mortgage and existing of record, under which the inchoate lien might be asserted and enforced, and when enforced by the taking of possession, that possession, under the facts of this case, related back to the time of the execution of the mortgage of April, 1891, as it was only by virtue of that mortgage that possession could be taken."

This case was followed in *Humphrey v. Tatman*, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956. The law in Minnesota is absolutely the same as the law in Massachusetts referred to in the case of *Thompson v. Fairbanks*. In *Prouty v. Barlow*, 74 Minn. 130, 76 N. W. 946, the Court said on page 133, of 74 Minn., on page 948, of 76 N. W.:

"This being so, the case is a very simple one; for conceding, without so deciding, that the parties to the farm contract were co-tenants in the crop, still the plaintiff was given by the terms of the contract a lien on the ex-

ecution debtor's share of the grain, by way of a mortgage or pledge. The defendant's counsel say it was a mortgage, but it is immaterial which it was. The findings show that this lien was based upon a valuable consideration, and created under circumstances which rebut any inference of fraud in the premises. The case then falls within the rule that, if a mortgagee or pledgee takes possession of the mortgaged or pledged chattels before any other lien attaches thereto, his title is valid as against subsequent attachment or execution creditors, there being no fraud in fact, although the mortgage was not filed or the chattels delivered when the contract of pledge was made. *Jones, Chat. Mort.*, §§ 178, 245; *Jones, Pledges*, § 38; *Baker v. Pottle*, 48 Minn. 479, 51 N. W. 383; *Clark v. Richards Lumber Co.*, 68 Minn. 282, 288, 71 N. W. 389."

From 1906 until the bankruptcy this personal property was never in the possession of the bankrupt. No creditor ever became such relying upon the possession by Bird of these notes. If any one had inquired of Bird with regard to the notes and contracts he would have learned that they were in the possession of the Northwestern Bank. If inquiry had been made of the Northwestern Bank the creditor would have learned from it that it held them to secure a debt due to itself, and that it had been notified of an assignment of the bankrupt's interest in them to another creditor, the Foster-Armstrong Company.

That this contract of June 9, 1906, was made in good faith there can be no doubt. The contention of the trustee that notice should then have been given by Bird to all of his creditors of this transfer would effectually prevent a solvent merchant who happened to be in debt, from making use of his assets for the purpose of carrying on his business. It might well happen that such a person had a part of his property pledged for an amount small in comparison with the value of the property. To require him, in order to sell his interest in that property or to pledge it a second time, to give notice to all of his creditors, would be something that is unknown in the business world, and would practically prevent his making use of his equity therein. The important thing is, not that the property be in the possession of the creditor, but that it be out of the possession of the debtor.

Several cases have been cited by the trustee to support his position, but in all of them the property in question was within four months of the bankruptcy in the possession of the bankrupt himself. The case of *Long v. Farmer's State Bank*, already cited, was a case where the policy of insurance was in the possession of the bankrupt within that period. In the case of *In re Klingaman* (D. C.) 101 Fed. 691, the binding twine and the proceeds of the sale thereof were in the possession of the bankrupt within four months of his bankruptcy. In *Johnston v. Huff, etc., Company*, 133 Fed. 704, 66 C. C. A. 534, the debtor collected from the railroad company until within a day of his bankruptcy claims against the railroad company which he had assigned to a creditor nearly a year before. Notice of that assignment was not given to the railroad company until one day before the petition was filed. In *English v. Ross*, 140 Fed. 630, the mortgages were not filed until within four months of the bankruptcy, and during all that time the real estate remained in the possession of the bankrupt. In *McElvain v. Hardesty*, 169 Fed. 31, 94 C. C. A. 399, decided by the Cir-

cuit Court of this circuit, the document in question was by law required to be recorded, and was kept from the record until the four months began to run, and during that time the property remained in the possession of the bankrupt.

When an assignment of accounts is made more than four months prior to the bankruptcy, the fact that the accounts are not collected by the creditor until within four months does not make the transaction a preference. *Lowell v. International Trust Company*, 158 Fed. 781, 86 C. C. A. 137.

The order of the referee is in all things affirmed.

In re YOKE VITRIFIED BRICK CO.

(District Court, D. Kansas, Third Division. June 18, 1910.)

No. 494.

1. BANKRUPTCY (§ 345*)—PRIORITIES IN DISTRIBUTION OF ESTATE—CONSTRUCTION OF ACT.

Bankr. Act July 1, 1898, § 64b, cls. 4, 5, c. 541, 30 Stat. 563 (U. S. Comp. St. 1901, pp. 3447, 3448), which respectively give priority to wages due workmen, etc., and debts owing to any person who by the laws of the states or the United States is entitled to priority, relate exclusively and alone to priority among those whose claims would, in the absence of such clauses, stand on terms of equality before the law as general unsecured claims, and have no reference whatever to the subject of liens.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 345.*]

2. BANKRUPTCY (§ 348*)—PRIORITIES IN DISTRIBUTION OF ESTATE—DISPLACEMENT OF LIENS.

Claims of laborers for wages against the estate of a bankrupt, although given priority "over every other debt or claim" in cases of receivership or general assignment by the law of the state, and Bankr. Act July 1, 1898, § 64b, cls. 4, 5, and section 64, c. 541, 30 Stat. 563 (U. S. Comp. St. 1901, pp. 3447, 3448), are not entitled to priority of payment from the proceeds of property subject to valid fixed liens over the holders of such liens in view of section 67d, which provides that valid liens "shall not be affected by this act."

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 348.*]

In the matter of Yoke Vitrified Brick Company, bankrupt. On review of order of referee. Affirmed.

Charles D. Welch, for petitioner on review.

W. S. McClintock, A. L. Quant, and W. E. Rice, for respondent.

POLLOCK, District Judge. The question certified for review in this matter is the extremely difficult and doubtful one of the rights of laborers, clerks, and other employes to priority of payment out of the proceeds derived from a sale of the assets of the estate of the bankrupt now in the hands of the trustee for distribution over the rights of those having fixed liens on the property at the date of the institution of the proceedings and the subsequent adjudication. The question arises in this manner:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

This proceeding was instituted August 7, 1909. The order of adjudication was entered August 28, 1909. At this time there were fixed liens on the property procured at the dates, in the amounts, and ordered paid by the referee in the order stated, as follows, to wit:

Name.	Date.	Filing.	Character.	Amount.
1. Am. Clay Mach. Co.		12/18/06	Vendor's	\$ 3,577 92
2. Alanson Bennett	8/ 1/07	5/ 1/07	Lien	
3. Chas. Binder, Adm'r	8/28/09	8/ 5/07	Trust Mtg.	28,245 00
4. Chas. Binder "	"	3/18/09	"	3,478 31
5. Chas. Binder "	"	"	"	726 82
6. J. W. Metz Lumber Co.	"	"	"	215 50
7. Chas. Binder, Adm'r	"	7/17/09	"	2,505 52
8. Chas. Binder "	8/28/09	3/18/09	"	95 11
9. Chas. Binder "	"	"	Mech. Lien	3,124 52
10. Chas. Binder "	"	"	"	43 54
11. Chas. Binder "	"	"	"	139 78
12. Ruthrauff Bros.	"	"	"	258 02
13. Chas. Binder, Adm'r	8/28/09	8/28/09	"	209 47
14. Chas. Binder "	"	9/ 7/09	"	472 44
15. N. W. Murphy "	"	7/ 7/09	"	1,323 54
16. Coffeyville F. & M. Co.	"	8/26/09	"	78 11
17. Mehl Bros.	"	9/ 1/09	"	122 09
18. T. H. Rogers Lumber Co.	"	8/16/09	"	150 47
19. Medart Patent Pulley Co.	"	7/21/09	"	101 66
		10/ 7/09	"	361 06

To this order of the referee marshaling the fixed liens on the property and directing payment to be made by the trustee there is no objection made by any lienor. However, at the date of the institution of this proceeding, the bankrupt company was indebted to laborers, clerks, and servants for wages earned by them within three months next preceding the date of the institution of the proceeding, and to no one more than \$300, in the aggregate the sum of \$6,680.78, all of which said wage claims had been before the institution of the proceeding assigned to one Robert Binder, now deceased, and here represented by his administrator, Chas. Binder, and said Robert Binder before the institution of this proceeding had assigned to the Condon National Bank, as collateral security to his note for \$5,000, \$3,232.69 of said labor claims. All the property of the bankrupt has been sold under order of court, freed from liens, and the bank and Chas. Binder, as administrator, have filed their intervening petition before the referee praying an order directing the trustee in making distribution of the proceeds of the estate to pay the amount of their said claims for wages in preference to the claims of Bennett under his first mortgage, and in preference to the holders of the mechanics' liens on the property. This claim of petitioners was by the referee denied, and the correctness of this ruling has been certified here for review.

The right of the assignees of the claims of the wage-earners to priority of payment is based upon section 64b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]), which provides as follows:

"The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition;

(2) the filing fees paid by creditors in involuntary cases; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed \$300 to each claimant; and (5) debts owing to any person who by the laws of the states or the United States is entitled to priority."

And on section 1, c. 229, Laws Kan. 1901, which provides:

"That whenever a receiver shall be appointed of the estate of any corporation, copartnership or individual, under the laws of this state, or whenever any corporation, copartnership or individual shall make a general assignment for the benefit of the creditors of such corporation, copartnership or individual, the wages due to all laborers or employes other than officers of such corporation, accruing within six months immediately preceding such appointment of a receiver or such assignment, shall be preferred to every other debt or claim against such corporation, copartnership or individual, and shall be paid by the receiver or assignee of such corporation, copartnership or individual, from the money thereof which shall first come into the hands of such receiver or assignee."

The rights of the lienors are based on the provisions of section 67d of the bankruptcy act, which provides:

"(d) Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."

The question is: Does the phrase "debts which are entitled to priority of payment," as employed in section 64b, refer to simple contract debts unsecured, or does it apply to and include all debts, those secured by fixed liens as well as those unsecured by lien?

In so far as the statute law of this state quoted is concerned, it has not received consideration by the Supreme Court of this state; hence whether that act shall be construed to give the wage-earner priority of payment over fixed liens on the property in the hands of the receiver or assignee remains to be determined. However, as it obviously must be classed among the insolvency laws of the state, its operation remains suspended as to any matter over which a court of bankruptcy has jurisdiction except in so far as the bankruptcy act preserves and enforces such act. It is therefore clear, in so far as the right of unsecured contract creditors is concerned, clause 4 of section 64b of the bankruptcy act gives a preferential right of payment to those having claims for wages due to workmen, clerks, traveling salesmen, and servants, and that this preferential right of payment must by the very terms of the act be made before any payments can be made on claims falling in the subsequent classification, and that this preferential right of payment attaches to the claim itself and is not personal to the holder. *Shropshire, Woodliff & Co. v. Bush*, 204 U. S. 186, 27 Sup. Ct. 178, 51 L. Ed. 436.

The right of wage-earners and employes except officers of a corporation to priority of payment created by the statute of the state above

quoted is preserved and enforced by clause 5 of section 64b of the bankruptcy act. Hence it is clear after payment of the priorities provided for in clause 4 of section 64b of the act, in so far as simple contract creditors are concerned, those priorities provided for in clause 5 must be paid before distribution of any portion of the estate to general unsecured creditors may be made.

The question presented for decision is this: Are petitioners entitled to be paid out of the money now in the hands of the trustee in bankruptcy awaiting distribution which arose from a sale of the property under the order of court, freed from liens thereon, in preference to the demands of those having fixed and valid liens on the property at the date of the adjudication?

In so far as the statute of the state above quoted is concerned, it may be said: Conceding for the purpose of argument, as contended by petitioners, the broad and comprehensive language of the statute should be held to grant to the laborers and employes therein enumerated a prior right of payment to those having fixed liens on the property of an insolvent in the hands of a receiver or assignee for the benefit of creditors, if that question were presented in other than a bankruptcy proceeding, and further conceding this proceeding in bankruptcy is the legal equivalent for the receivership or assignment for the benefit of creditors employed in the statutes, as I think must be done (see *In re Laird*, 109 Fed. 550, 48 C. C. A. 538), yet the question remains: Does it follow therefrom petitioners are entitled to be paid out of the fund now in the hands of the trustee in this case, in preference to the rights of the mortgagee and mechanic's lien claimants here opposing such payment?

I think not, and for the following reasons: The liens here asserted are admittedly valid and within the protection afforded by section 67d of the bankruptcy act. Therefore the mandate of the act is: Such liens shall not be affected by the provisions of the act; that is to say, neither the priority nor the validity nor any other subsisting right in the property acquired and held by virtue of such liens shall be affected by any provision of the act. The statute of the state on which petitioners rely, above quoted, is an insolvency law of this state. While its repeal was not affected by the passage of the bankruptcy act, yet its operation was suspended during the period the bankruptcy act shall remain in force. *Butler v. Goreley*, 146 U. S. 303, 13 Sup. Ct. 84, 36 L. Ed. 981. And were it not for the fact that clause 5 of section 64b of the bankruptcy act preserves such statute in effect as a law of the state touching the subject of priorities, it would remain entirely inoperative and of no force in the settlement of estates of bankrupts under the provisions of the bankruptcy act.

It therefore follows, I think, as the night follows the day, it must be given effect under the provisions of clause 5 of section 64b of the bankruptcy act, as a law of the state in determining who, as claimants of an estate in bankruptcy, are entitled to the right of priority of payment; but its operation must be so circumscribed as to not affect the rights of such lienholders as are comprehended within and protected by the provisions of section 67d of the act.

When viewed in this light, it readily appears if the only prior right of payment provided for in section 64b of the bankruptcy act had been debts owing to any person who by the laws of the state are entitled to priority of payment, and the state statute should receive the construction above conceded, such provision in the act would not have affected the rights of a lienholder who received his lien after the state statute had become a law of the state. But such are not the terms of the bankruptcy act. Instead of claimants here demanding priority of payment of their claims under the state law in question, receiving their demands, as commanded by the terms of the statute, "from the money thereof which shall first come into the hands of such receiver or assignee" (in this case, trustee), the provisions of the bankruptcy act are such that four classes of claimants must be first paid in full before one claiming priority of payment of his demand under the state law may be paid anything, and of the four classes of demands entitled to be so paid in preference to one claiming priority of payment under the state law are such demands as filing fees, and certain costs of administration not going to the preservation of the estate, and which do not protect or further the interest of the lienholder, and which for this reason, as against his rights, cannot be ordered paid out of the estate on which his lien holds against his consent. It therefore follows, of necessity, if such demands must be paid before one demanding priority of payment under the laws of the state can be paid, and as such prior demands, which by the very terms of the act itself must be first paid, cannot be enforced against the rights of a valid lienholder, to enforce the rights of petitioners in accordance with the statute of the state, as it is contended by them should be done, would operate to affect the fixed liens thereon, and thus contravene the express provision of section 67d of the bankruptcy act.

In my judgment clauses 4 and 5 of section 64b of the bankruptcy act relate exclusively and alone to the subject of the right to priority of payment arising among those whose claims would, in the absence of such clauses, stand on terms of equality before the law as general unsecured claims, and that said clauses have no reference whatever to the subject of liens. It was in contemplation of the lawmaking power that estates passing, as of the date of the adjudication, to the trustees in bankruptcy, would be covered and affected by fixed and valid liens resting thereon. Hence, for the protection of those holding such valid liens, and lest the rights of such lienholders should become confounded with the rights of those holding general unsecured demands against the estate which had been accorded priority in payment by the provisions of section 64b of the act, it was provided in section 67d of the act, in effect, that nothing appearing elsewhere in the act itself, no matter how general and comprehensive the language employed might be, should affect the validity, extent, or operation of such liens. However, anything inhering in the general principles of equity or the law, such, for example, as the duty of the property to contribute its just proportion of the expense of government, or to pay its pro rata share of the expenses incurred in the preservation of the estate, and such like matters, remain still enforceable

against the estate, although covered by fixed liens and against the consent of the holder of such liens, for such expenses are incurred for the protection of the lienholder and are enforceable for that reason and not because embodied in the act. This is the conclusion reached in *Re Cramond* (D. C.) 145 Fed. 966, and, notwithstanding decisions apparently to the contrary, I am convinced is the true construction of the act.

The decision of the referee is therefore approved and confirmed.

Ex parte HOFFSTOT.

(Circuit Court, S. D. New York. May 12, 1910.)

1. CONSPIRACY (§ 23*)—PLACE OF CRIME—PRESENCE OF DEFENDANT.

One may be guilty of conspiracy to bribe municipal officers of a city, without ever having been personally present within the state where such city is located.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 32; Dec. Dig. § 23.*]

2. EXTRADITION (§ 21*)—INDICTMENT.

A man may be indicted in a case in which he cannot be extradited.

[Ed. Note.—For other cases, see Extradition, Dec. Dig. § 21.*]

3. EXTRADITION (§ 30*)—FUGITIVE FROM JUSTICE.

Petitioner, a resident of New York, indicted in Pennsylvania for conspiracy to bribe members of the Pittsburg city council, could not be extradited, in the absence of some proof that he had been physically present in Pennsylvania when the offense was committed, as otherwise he could not be a fugitive from justice of that state.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 32; Dec. Dig. § 30.*]

4. EXTRADITION (§ 30*)—FUGITIVE FROM JUSTICE—LEAVING STATE—PURPOSES.

Where accused has committed a crime in one state, and afterwards leaves it, the right of extradition exists, without reference to his purpose in going.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 32; Dec. Dig. § 30.*]

Fugitives from justice under extradition laws, see note to *In re Strauss*, 63 C. C. A. 104.]

5. EXTRADITION (§ 39*)—PRESENCE IN STATE—EVIDENCE.

Where there was specific evidence that petitioner, a resident of New York, participated there in a conspiracy to bribe members of the city council of Pittsburg to select certain banks in Pittsburg, of one of which petitioner was president, as city depositories, and there was substantial evidence from which a jury would be justified in drawing an inference that petitioner was in Pittsburg on a day when some act or acts in furtherance of the conspiracy were performed, there was sufficient proof that he was a fugitive from justice to justify his extradition to Pennsylvania.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 45; Dec. Dig. § 39.*]

Application of Frank N. Hoffstot for a writ of habeas corpus to obtain his release from a Governor's extradition warrant. Denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Joline, Larkin & Rathbone (Adrian H. Joline, John D. Lindsay, Adrian H. Larkin, and Harold Russell Griffith, of counsel), for petitioner.

William A. Blakely and Warren I. Seymour (George Gordon Battle, of counsel), for the State of Pennsylvania.

Charles S. Whitman (Charles A. Perkins, Robert S. Johnstone, and Stanley L. Richter, of counsel), for the State of New York.

HOLT, District Judge. This is a writ of habeas corpus to test the legality of the detention of the petitioner, Frank N. Hoffstot, who is held under a warrant issued by the Governor of the state of New York directing the surrender of Hoffstot to the authorities of Pennsylvania as a fugitive from justice. On April 6, 1910, an indictment was found against Hoffstot by the grand jury of the county of Allegheny, Pa. This indictment contains five counts, charging, in substance, in different forms, that Hoffstot conspired with James W. Friend and Charles Stewart to bribe members of the council of the city of Pittsburg to pass an ordinance designating certain banks of the city of Pittsburg as depositories for the public funds of that city. Hoffstot is a citizen of the state of New York, residing and doing business in the city of New York. He is also president of the German National Bank of Pittsburg, and has other business interests there. He is in the habit of going to Pittsburg on business once a month and staying there for a day or two. Each count in the indictment alleges that the crime was committed on the 3d day of June, 1908. It was proved at the hearing before the Governor of New York, and is admitted, that Hoffstot was in New York, and not within the state of Pennsylvania, on the 3d day of June 1908; that he was in Pittsburg in the latter part of April, on the 28th of May, and on the 29th of June, 1908; and that he was absent from Pennsylvania the rest of those months.

The counsel for the petitioner claims that the Governor of New York had no jurisdiction to issue a warrant of surrender, because it was admitted that Hoffstot was not within the state of Pennsylvania on June 3d, the date stated in the indictment as the time at which the crime was committed, and it did not appear that he was within that state at any other time when the crime was committed. It is conceded that the date of a crime stated in an indictment is not necessarily essential, and that if a defendant is not prejudiced in his defense by an error in the date he may be convicted upon proof of the commission of the crime charged upon a different date from that stated in the indictment. But it is claimed that the Governor was without jurisdiction to issue the warrant unless it was shown either that there was proof before the grand jury or that proof has been furnished to the Governor of New York that Hoffstot was in Pennsylvania at the time of the commission of the crime, and it is denied that there is any such proof in this case.

The crime of conspiracy, with which the defendant is charged in the indictment, is one of which he may be guilty without ever having engaged in the conspiracy or done anything in pursuance of it while

physically in the state of Pennsylvania. The charge is, in substance, that he took part in a conspiracy to bribe members of the Pittsburg council to designate certain banks, and among others the one of which he was president, to be depositories of the city money. He may have engaged in such a conspiracy by letters, or telephone conversations, or through agents by whom he, while in New York, communicated with others. He may therefore have been subject to indictment in Pennsylvania without ever having been physically present in that state. There are various cases in which a person may do something in one state which will result in a crime committed in another state, as when a shot is fired in one state which kills a man in another, or property is obtained from one state by false pretenses uttered in another, or a libel is written in one state and published in another. In such cases usually the criminal may be indicted and tried either in the state in which he did the act which caused the crime or in which it was ultimately completed.

But a man may be indicted in a case in which he cannot be extradited. Under the constitutional provision, and the statute passed in conformity with it, providing for the extradition of fugitives from justice from one state to another, it is necessary that the defendant should have been physically present in the state in which it is alleged that the crime was committed, at the time when it was committed, in order to make him, on his subsequent departure from the state, a fugitive from justice. *Hyatt v. Corkran*, 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657.

The question in this case, therefore, is whether there was any proof before the Governor that Hoffstot was in the state of Pennsylvania when the crime, or any material part of the crime, with which he is charged was committed. On that question the evidence is very meager and unsatisfactory, and I have felt great difficulty in reaching a conclusion. The grand jury handed down a presentment, upon which the indictment was authorized by the court, stating the facts concerning the alleged bribery which had been ascertained by its investigation. In this presentment it is nowhere asserted that Hoffstot did any act in Pennsylvania in connection with said conspiracy, and various acts of Hoffstot are so stated in it as to show, or tend to show, that they were done in New York. For instance, it asserts that the original arrangement for the payment of the bribe was made between Stewart, a member of the Pittsburg council, and Friend, "representing Frank N. Hoffstot"; that Stewart and Friend first asked Blakeley to act as stakeholder, who refused; that subsequently an arrangement was made "whereby said Frank N. Hoffstot would pay, or cause to be paid, to said Charles Stewart the amount of money agreed upon in the city of New York, in order, if possible, to avoid all criminal liability in the county of Allegheny"; that "pursuant to said agreement" Hoffstot "did pay, or cause to be paid," to Stewart \$52,500; that between June 22, 1908, and July 9, 1908, Hoffstot "did call up by telephone" James M. Young, cashier of the Second National Bank of Pittsburg, and request him to forward to a person "at a certain address in New York" said sum of money as a bribe.

Evidence, however, was taken before the Governor of New York upon the question whether Hoffstot did anything in furtherance of the conspiracy in Pennsylvania. Mr. Seymour, the assistant district attorney of Allegheny county, was examined, and he testified that there was evidence before the grand jury, upon which this indictment of conspiracy was found, as to transactions tending to prove the conspiracy which extended over a period from about the 1st of May to about the 1st of July, 1908. The Governor declined to go into the details of these transactions. Upon cross-examination Mr. Seymour was asked whether there was any evidence before the grand jury tending to show any act on the part of Mr. Hoffstot committed in the state of Pennsylvania when he was physically present there at any time during the period mentioned to which he at first replied that he did not think there was. He subsequently, however, testified upon further examination that there was circumstantial evidence as to acts by Mr. Hoffstot in the state of Pennsylvania while he was within that state during that period; that there was no direct, positive testimony by any one who saw him there, but there was circumstantial testimony that he was there.

This evidence is undoubtedly vague; but I think that the substantial effect of it is that, while there was no specific evidence by an eyewitness that Hoffstot was in Pennsylvania on any particular day on which any act in furtherance of this conspiracy was done, there was circumstantial evidence from which a jury would be justified in drawing the inference that he was there on such a day. Now, if it shall be proved that a conspiracy was entered into by Mr. Hoffstot, and circumstantial evidence shall be offered sufficient to authorize a jury to draw the inference that he was present in Pennsylvania when any act material in carrying out the objects of the conspiracy was done, I think that he would be properly held to have been within the state of Pennsylvania at the time that the crime charged in the indictment was committed, and that his subsequent return from that state to New York would render him a fugitive from justice within the meaning of the United States Constitution and statute upon that subject.

It is well settled that the purpose with which a man who has committed a crime in a state leaves it is immaterial. It is not necessary to prove that he fled from fear of arrest. If he has committed a crime in a state, and afterwards leaves it, the right of extradition exists. *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544. The provision for the extradition of criminals is essential to the efficient administration of criminal justice. When an indictment and the requisition papers issued by the Governor of the demanding state are regular and sufficient upon their face, and when there is some evidence which, although not of a very satisfactory kind, is sufficient to satisfy the Governor of the surrendering state, and he has issued his warrant for extradition, it is well settled that the judiciary should not interfere on habeas corpus and discharge the prisoner upon technical grounds, unless it is clear that the Governor's action in issuing the warrant plainly contravenes the law. *Compton v. Alabama*, 214 U. S. 1, 29 Sup. Ct. 605, 53 L. Ed. 885; *In re Strauss*, 126 Fed. 327, 63 C. C. A. 99.

The petitioner's counsel have submitted to me a very recent opinion of Gov. Fort of New Jersey upon an application for a requisition upon the Governor of Illinois for the extradition of J. Ogden Armour. Armour was indicted in New Jersey, with others, for a conspiracy to produce an artificial scarcity in the supply of meats and to increase the price thereof. The proof upon which it was claimed that he was a fugitive from the justice of New Jersey is contained in an affidavit of the chief steward of the steamship Kaiser Wilhelm II, that on April 28, 1908, Armour left the city of Hoboken upon said ship on a voyage to Bremen, and that on June 15, 1909, he arrived in Hoboken, on his return from Bremen, on the same vessel. Gov. Fort held that there was nothing in these facts to indicate that Armour was a fugitive from justice from New Jersey. Obviously all that occurred was that Armour, in going from Chicago, where he resided, to Europe, took passage on the steamer at Hoboken, and on returning from Europe to Chicago landed at Hoboken. In this case, if the only evidence of Hoffstot's presence in Pennsylvania during the time in which it is alleged that he engaged in the conspiracy had been that he passed through the state as an incident of a journey, as, for instance, that he went from Chicago to New York over the Pennsylvania Railroad, I should have no doubt that the proof of his commission of the crime, or any material part of it, in the state of Pennsylvania, was insufficient.

But the facts in this case are much stronger. It is alleged in the second count of the indictment that Hoffstot, with the other conspirators, received from each of three banks, one of which was the German National Bank of Allegheny, of which he was president, \$17,500, making \$52,500 in the aggregate, and it is alleged in the presentment that Hoffstot paid to Stewart \$52,500 pursuant to the agreement to make such payment for the purpose of securing the selection of the said three banks as city depositories of the city of Pittsburg. It may well have happened that Hoffstot, at some of his visits to the city of Pittsburg, engaged in the conspiracy to pay this money, or did some act in connection with its collection and payment. The case as presented in the indictment, the presentment, and the evidence stands on an entirely different footing from that of a man whose extradition is sought as a fugitive from justice on the bare fact that he has passed through the state upon a continuous journey.

My conclusion is that the writ should be dismissed; but as, in my opinion, the question involved in this case is doubtful, a stay will be granted if the petitioner desires to appeal.

PEPER AUTOMOBILE CO. v. AMERICAN MOTOR CAR SALES CO.

(Circuit Court, E. D. Missouri, E. D. June 14, 1910.)

No. 5,811.

1. COURTS (§§ 280, 347*)—FEDERAL COURTS—JURISDICTION—RAISING OBJECTION.

Where an objection goes to the jurisdiction of the court over the subject-matter, the defense, in Code states, may be put in on the general issue; and, where such practice is followed in the federal Circuit Courts sitting in such states, no presumption of jurisdiction attends their judgments or decrees, but facts showing jurisdiction must appear of record.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 816, 817, 921; Dec. Dig. §§ 280, 347.*]

2. COURTS (§§ 24, 37*)—JURISDICTION—WAIVER.

Jurisdiction of the court over the subject-matter of the controversy cannot be waived by the parties, nor can it be conferred by consent.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 76-78, 147-151; Dec. Dig. §§ 24, 37.*]

3. COURTS (§ 280*)—FEDERAL COURTS—JURISDICTION OF PERSON—OBJECTION—DETERMINATION.

Jurisdiction of the person of the defendant rests on the actual facts, and not on the accuracy of the decision of the marshal of the question whether defendant corporation, at the date of the service, was doing business within the state and district, and, if so, whether the person on whom the writ was served was the defendant's representative in doing such business.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 816; Dec. Dig. § 280.*]

Jurisdiction of federal courts over corporations, see note to St. Louis, I. M. & S. Ry. Co. v. Newcom, 6 C. C. A. 174.]

4. COURTS (§ 324*)—FEDERAL COURTS—JURISDICTION OVER PERSON—FORM OF OBJECTION.

Challenge to the court's jurisdiction over the person of the defendant cannot be made by answer to the merits or coupled with such answer, but must be by motion to quash the return and set aside the service.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 882; Dec. Dig. § 324.*]

5. JURY (§ 16*)—TRIAL BY JURY—SERVICE.

Const. Amend. 7, preserves the right to trial by jury in suits at common law according to the rules thereof. Rev. St. § 648 (U. S. Comp. St. 1901, p 525), provides that the trial of issues of fact in Circuit Courts shall be by jury, except in cases of equity, admiralty, and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy; and section 649 declares that issues of fact in civil cases in any Circuit Court may be determined by a court without the intervention of a jury whenever the parties, or their attorneys, file a stipulation waiving a jury, etc. *Held* that, on a motion to quash the service on a foreign corporation defendant, it was not entitled to a jury trial of the issues whether it was doing business within the state, and whether the person on whom service was made was its representative.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 16.*]

At Law. Action by the Peper Automobile Company against the American Motor Car Sales Company. On motion to quash the return and set aside the service. Sustained.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Jones, Jones, Hocker & Davis, for plaintiff.
Watts, Williams & Dines, for defendant.

POLLOCK, District Judge. This action to recover damages for breach of contract was commenced March 4, 1910. It is alleged in the petition that plaintiff is a citizen and resident of the city of St. Louis, and the defendant a citizen and resident of the city of New York, having an agent and office in the city of St. Louis. On præcipe duly filed for that purpose, a writ of summons was issued which by direction of counsel for plaintiff was served by the marshal on one J. H. Cody as agent for defendant company; the return of the marshal being as follows, to wit:

"I do hereby certify that by direction of the attorneys of record of the within-named plaintiff I served the within writ on the 5th day of March, A. D. 1910, in the Eastern district of Missouri on the within-named defendant, American Motor Car Sales Company, a corporation, said corporation then having an office and doing business in the city of St. Louis and state of Missouri, by delivering to J. H. Cody, agent of said defendant corporation, at said office and place of business, a true copy of said writ, together with a true copy of the petition in this cause, annexed, as furnished by the clerk, the said J. H. Cody being then and there in charge of said office and place of business."

On March 21st thereafter, defendant entered its special appearance and filed its motion to quash this return of the marshal and set aside the service so obtained on defendant. The grounds of this motion are that the defendant was not, as stated in such return, doing business in the state of Missouri and within the jurisdiction of the court at the date of the pretended service upon it, and that the person on whom the writ was served was not the agent or representative of defendant. This motion is supported by the affidavit of John H. Cody, the party on whom the service was actually made, John H. Willys, president of the defendant company, William H. Atkinson, manager of the defendant company in the city of Toledo in the state of Ohio, and Frederick A. Barker, general sales agent of the defendant company, resident of the same place. On March 24th the plaintiff filed its motion to strike from the files the motion of defendant to quash service. On March 25th this motion was by the consideration of the court overruled. Thereafter and on April 7th, the plaintiff filed what it styles its "reply" to the plea in abatement of defendant. The matter was presented to the court and stands now for decision.

It is the contention of counsel for plaintiff the matter so presented is one for the consideration of a jury, and a trial by jury is demanded. Is the plaintiff entitled to such trial by jury on the matters presented? If so, it is clear the court has neither the power to deny it such right, nor to receive in evidence the affidavits filed by defendant in support of its motion to quash, to which plaintiff has replied, because such affidavits are not competent evidence in the trial of an issue of fact before a jury.

The seventh article of amendment to the Constitution provides:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by

a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Section 648, Rev. St. (U. S. Comp. St. 1901, p. 525), provides:

"The trial of issues of fact in the Circuit Courts shall be by jury, except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, and by the next section."

Section 649 (U. S. Comp. St. 1901, p. 525) provides:

"Issues of fact in civil cases in any Circuit Court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury, etc."

It has been held repeatedly, where the objection goes not to the jurisdiction of the court over the person of a party litigant, but to the subject-matter in litigation, such defense may, in Code states, such as this, be put in on the general issue, and, where so put in issue, as the Circuit Courts of the United States are courts of special and limited jurisdiction, no presumption of jurisdiction attends on their judgments or decrees; but facts showing the lawful right of the court to exercise the power thus denied must appear from the record. *Roberts v. Lewis*, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. Ed. 579; *Yocum v. Parker*, 130 Fed. 770, 66 C. C. A. 80; *Cole v. Carson*, 153 Fed. 278, 82 C. C. A. 408; *Roberts v. Langenbach*, 119 Fed. 349, 56 C. C. A. 253. If in such cases the answer be true in point of fact, the want of jurisdiction pleaded cannot be waived by the parties or conferred on their consent, and the judgment of the court in assuming to act without proof of the facts on which its special jurisdiction rests is void and of no effect.

However, the question here presented is not one which arises as to the jurisdiction of the court over the subject-matter of the litigation. Jurisdiction over the subject-matter is conceded. The question here presented touches only this one matter: Did the court by the service of the summons, as shown by the return of the marshal, acquire jurisdiction over the person of the defendant? The determination of this question must rest on the actual facts, and not upon the accuracy of the decision of the marshal of the question as to whether the defendant was at the date of the service doing business in the state and district, and, if so, whether the person on whom the writ was served was the representative of the defendant in the doing of such business, for as defendant, by the declaration of plaintiff made for the purpose of showing the jurisdiction of the court over the subject-matter of the litigation, is alleged to be a corporate citizen of the state of New York, it must of necessity have been engaged in doing business in this jurisdiction, else it was not amenable to the process of this court without its consent. *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 30 Sup. Ct. 125, 54 L. Ed. —; *Peterson v. Chicago, Rock Island & Pac. Ry.*, 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841; *Green v. Chicago, Burlington & Quincy Ry.*, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; *Wabash Western Railway v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431.

The jurisdiction of this court over the subject-matter of the action made by the declaration of plaintiff being undoubted, the plaintiff by the filing of its declaration herein having submitted itself to the jurisdiction of the court, and having procured the issuance and service of process for defendant, regular in form, and having caused service of such process to be made by the marshal in such form as shown by the return thereon as to confer jurisdiction on the court over the person of defendant in the event it failed to appear, or in event of appearing it failed to first challenge the jurisdiction of the court over its person, it is clear such challenge cannot be made by way of answer to the merits or coupled with such answer to the merits as may be done in case the objection goes to the want of jurisdiction over the subject-matter, as was done in cases of that character above cited.

The only contention therefore raised for decision being one going to the correctness of the conclusion drawn by the marshal from appearance as set forth in his return that defendant was at the time of the service doing business in this state of such character and in such manner as to subject it to the jurisdiction of the court at the suit of plaintiff, and that Cody was its agent and representative in the transaction of such business, and the question thus decided and the result determined by the return of the marshal being one for the determination of this court as to its jurisdiction when questioned by the defendant in limine, prior to any general appearance in response to the command of the writ, there is, to my mind, no valid reason appearing why the court, without the intervention of a jury, may not and should not proceed to an investigation and decision of such question touching its jurisdiction so acquired over the person of defendant. The question presented is not such an issue of fact as entitles the plaintiff to a jury trial thereof as a matter of right under the Constitution and the statute. This has been the manner in which the precise question here presented has been determined by the courts under the accustomed practice, as evidenced by many adjudicated cases. *Mechanical Appliance Company v. Castleman*, 215 U. S. 437, 30 Sup. Ct. 125, 54 L. Ed. —; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; *Peterson v. Chicago, Rock Island & Pac. Ry.*, 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841; *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; *Green v. Chicago, Burlington & Quincy Railway Co.*, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916; *Wabash Western Railway Co. v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431; *Boardman v. S. S. McClure Co.* (C. C.) 123 Fed. 614; *Forrest v. Pittsburgh Bridge Co.*, 116 Fed. 357, 53 C. C. A. 577; *Wall v. Chesapeake & O. R. Co.*, 95 Fed. 398, 37 C. C. A. 129; *Feder v. A. B. Fiedler & Sons et al.* (C. C.) 116 Fed. 378; *American Cereal Co. v. Eli Pettijohn Cereal Co.* (C. C.) 70 Fed. 276.

In *Mechanical Appliance Company v. Castleman*, *supra*, which case was determined in the Circuit Court on a plea to the jurisdiction over the person of the defendant, and in which case affidavits were filed in support of the plea, Mr. Justice Day, delivering the opinion, said:

"The Circuit Court should have considered the question upon the issues of fact raised, as to the presence of the corporation in Missouri and the authority of the agent upon whom service had been attempted. It is true, as suggested by the defendant in error, that the affidavits appearing in the bill of exceptions are stated to have been filed, and there is no definite statement that they were offered to be read in evidence; but we think it is apparant that they were filed for that purpose. No objection appears in the record to the filing of the affidavits; on the other hand, it appears that plaintiff below also filed an affidavit. These affidavits are made a part of the record by a bill of exceptions, and we think they should have been considered upon the question of jurisdiction."

From a consideration of that case, it must be assumed the court was not of the opinion the question presented was such an issue of fact as is contemplated by the constitutional and statutory provisions above quoted on which a trial by jury was demandable of right, else the ex parte affidavits would not have constituted competent evidence as to the facts presented to the court for decision.

I am therefore of the opinion the question presented is one touching the jurisdiction of the court over the person of the defendant; that the question presented is one for the determination of the court, and not such an issue of fact as entitles the plaintiff to demand a trial thereof by jury as a matter of right under the Constitution and laws.

Recurring to the affidavits filed in support of the motion to quash, it is entirely clear from a consideration of the same that the defendant company was not so doing business within the jurisdiction of the court through J. H. Cody, the person on whom the summons was served, as its agent and representative, that valid service of process sufficient to bring the defendant before the court to answer to its judgment might be made.

The motion to quash must be sustained, and it is so ordered.

IN RE CONECUH PINE LUMBER & MFG. CO.

(District Court, M. D. Alabama, N. D. June 23, 1910.)

1. CORPORATIONS (§ 657*)—FOREIGN CORPORATIONS—DOING BUSINESS IN STATE—WHAT LAW GOVERNS.

Where a foreign corporation contracted for the manufacture and delivery to it for resale of 3,000,000 feet of lumber in Alabama, the contract being executed and the intention being that it should be performed there, it was governed by the Alabama law.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2553; Dec. Dig. § 657.*]

2. CORPORATIONS (§ 643*)—FOREIGN CORPORATIONS—COMPLIANCE WITH STATE LAW—RETROACTIVE OPERATION.

Compliance with the laws of Alabama relating to foreign corporations authorized to do business within that state is not retroactive, so as to validate a prior contract otherwise void under section 232 of the Alabama Constitution, forbidding corporations not having so complied with its laws from doing business in that state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2545; Dec. Dig. § 643.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. CORPORATIONS (§ 657*)—FOREIGN CORPORATIONS--DOING BUSINESS IN STATE—VOID CONTRACT.

Under section 232 of the Alabama Constitution, forbidding any foreign corporation to do any business in the state without having at least one known place of business and an authorized agent or agents therein, and statutes passed in conformity therewith, making the doing of any business in the state without compliance with the Constitution and statutes illegal, and forbidding it under a penalty, a contract between a resident and a foreign corporation, executed and intended to be performed in Alabama, was not only contrary to the public policy of the state, but illegal, and would not be enforced, under the rule that, where a contract is illegal, the courts will leave the parties where they find them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. 2340; Dec. Dig. § 657.*]

4. COMMERCE (§ 40*)—INTERSTATE COMMERCE.

A contract made in Alabama for the purchase and sale there of 3,000,000 feet of lumber to a foreign corporation, the buyer to inspect and accept a delivery there, did not constitute interstate commerce, though the buyer intended thereafter to ship the lumber outside the state.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 29; Dec. Dig. § 40.*]

In the matter of the Conecuh Pine Lumber and Manufacturing Company. On petition to review a referee's decision disallowing the claim of the Parsons-Willis Lumber Company. Affirmed.

Oates & Oates, for claimant.

Steiner, Crum & Weil, and Ball & Samford, opposed.

JONES, District Judge. The Constitution (Const. Ala. § 232) forbids any foreign corporation to do "any business in this state, without having at least one known place of business, and an authorized agent or agents therein," and statutes passed to give effect to the constitutional provision make the doing of any business in this state, without compliance with the Constitution and statutes, illegal, and forbid it under a penalty.

The Parsons-Willis Lumber Company, hereafter called the "Lumber Company," is a Kentucky corporation, and the bankrupt, the Conecuh Pine Lumber & Manufacturing Company, is an Alabama corporation. On the 21st day of June, 1905, the two corporations made a contract in Kentucky, to be executed in Alabama, whereby the bankrupt agreed to cut 3,000,000 feet of timber from lands controlled by the bankrupt in this state, and manufacture it into lumber, and deliver it at stated times, at an agreed price per thousand, at a point near Elmore Station, in this state, where it was to be received and inspected by the Lumber Company, and stacked by the bankrupt, which also bound itself to load the lumber on cars whenever required by the Lumber Company for shipment elsewhere. The Alabama corporation received \$10,000 cash advance, and the promissory note of the Lumber Company for \$5,000, on the making of the contract, in accordance with its terms, and agreed to begin the delivery of the lumber by the 26th of June, 1905, at the rate of three or more car loads per week, at the option of the Lumber Company,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

until the 3,000,000 feet were delivered. The parties commenced the execution of the contract in Alabama at the stated time. At that date the Lumber Company had not complied with the laws of this state regarding the doing of business by foreign corporations, but did so on the 14th of October, 1905, by the filing of the proper papers with the Secretary of State. The Conecuh Pine Lumber & Manufacturing Company was adjudicated a bankrupt on the 14th of June, 1907. At that time it had delivered only 1,673,877 feet of the 3,000,000 contracted to be delivered, and the Lumber Company thereupon filed its claim against the bankrupt estate for the failure to deliver the quantity of lumber contracted for, and also for certain special damages alleged to grow out of the breach of the contract.

The intention of the parties was that the contract was to be executed in Alabama, and there was performance here, and the law of this state must govern. *Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 613, 23 Sup. Ct. 206, 47 L. Ed. 328. The doing of business by a foreign corporation, without compliance with the laws of the state in that regard, was not only contrary to its policy, but was made illegal, and forbidden under a penalty. The courts will not enforce such a contract, directly or indirectly, but leave the parties in the situation in which they have placed themselves, and refuse to aid either. Very clearly, the Lumber Company did business in this state, when it contracted to have timber manufactured into lumber here, and then received, inspected, and stored it in Alabama, where it held it for sale, and sold it from time to time, and shipped it to customers as they directed. It was incorporated to buy and sell lumber, and it exercised its corporate franchises in that regard to the fullest extent in this state. The contract was made, and money advanced under it, and its execution commenced, in Alabama, some months before the Lumber Company complied with the laws of Alabama. Its subsequent compliance with these laws on the 14th of October, 1905, cannot relate back, so as to give validity to that which the law made void at the time it was done. *Woods & Co. v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671.

It is earnestly and ably insisted that the contract between the two corporations and the deliveries of lumber under it were so connected with interstate commerce that the provisions of our Constitution and statutes cannot operate upon them. This is easier said than maintained. Wherein were the purchase and sale of the lumber here so connected with interstate commerce as to prevent the operation of the police power of the state, or deprive the state of the authority to prescribe the terms upon which foreign corporations may do business in this state, and the effect upon their contracts, if they do not comply with its laws? How can the fact, if it be a fact, that the Lumber Company, when it entered into this contract, had the intention to sell the lumber so purchased here only to persons in other states, convert what was done at Elmore Station where the lumber was inspected, received and stored for future shipment, into a transaction of interstate commerce? *Coe v. Errol*, 116 U. S. 517-525, 6 Sup. Ct. 475, 29 L. Ed. 715; *Hopkins v. United States*, 171 U. S.

592-594, 19 Sup. Ct. 40, 43 L. Ed. 290. The lumber at that time had not started on an interstate journey in consummation of any interstate sale. It was not stopped temporarily at Elmore Station, in any stage of necessary interruption of transportation, while on its way to its ultimate destination. Its destination, when the contract was made and acts done under it, was Elmore Station. When it was delivered, it was in compliance with the contract, and the legal title and full ownership in the lumber vested and remained in the Lumber Company until divested by a resale of the lumber. No other person had the legal title to any part of the lumber so delivered, or any equitable right in consequence of any interstate sale of it, which could be enforced against the lumber at Elmore, or against the Lumber Company.

Having reached its destination, and been received in this state, and held here for subsequent resale, the lumber became intermingled with the general mass of property in Alabama, was under the protection of its laws, and subject to local taxation. Its situs and status are in no way changed because the Lumber Company, when it bought, had the intent to resell and ship the lumber to any one who might buy it for shipment out of the state. The intent of the foreign corporation to sell what it bought and received here to parties outside of the state could not alter the fact that the corporate acts, by which it purchased, received, and stored the lumber in this state and held it for a resale, were the exercise of its corporate functions in this state, and constitute the doing of business in this state. Regulations, such as we have here, in respect to the exercise by foreign corporations of their corporate functions in this state, have only an indirect and remote effect upon interstate transactions, and have never been held to amount to forbidden regulations of interstate commerce. As said in *Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 23 Sup. Ct. 206, 47 L. Ed. 328:

"The foundation of commerce outside of the state was the doing of business within it, and superintendence and manufacture had to come before sale."

Again, as said in *Diamond Match Co. v. Ontonagon*, 188 U. S. 82-95, 23 Sup. Ct. 266, 271, 47 L. Ed. 394:

"Whenever a commodity has begun to move as an article of commerce from one state to another, commerce in that commodity between the states has commenced; but this movement does not begin until the article has been shipped or started for transportation from one state to the other. The carrying of them on cars or vehicles, or even floating them to the depot where the journey is to commence, is no part of the journey."

Here the selling of the lumber after it was deposited near Elmore Station, or whether it would go outside of the state, depended on chance or extrinsic business considerations. It is impossible to distinguish this case from *Chattanooga Building & Loan Association v. Denson*, 189 U. S. 410, 23 Sup. Ct. 630, 47 L. Ed. 870, *Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 23 Sup. Ct. 206, 47 L. Ed. 328, and *General Oil Co. v. Crain*, 209 U. S. 211, 28 Sup. Ct.

475, 52 L. Ed. 754. The order of the referee disallowing this claim must be affirmed.

The retaking of testimony on one point, and the misplacing of the record for a long time, by some of the numerous counsel in the case, prevented earlier decision as to this claim.

OREGON R. & NAVIGATION CO. v. CAMPBELL et al. (SMALLWOOD, Intervener).

(Circuit Court, D. Oregon. July 11, 1910.)

No. 3,308.

COMMERCE (§ 41*)—INTERSTATE COMMERCE—TRANSPORTATION—ORIGINAL PACKAGES—"INTRASTATE COMMERCE."

Where merchandise was transported in interstate commerce to its destination in Oregon, where it was received by the consignee, placed in a warehouse, and freight paid, the interstate character of the shipment thereupon terminated, and the subsequent transportation of the goods in the original packages to other points in Oregon by the consignee constituted intrastate traffic, for which the carrier was only entitled to charge state rates provided by the State Board of Railroad Commissioners.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 41.*]

Action by the Oregon Railroad & Navigation Company against Thomas K. Campbell and others, and W. S. Smallwood, intervener. Judgment for intervener.

See, also, 177 Fed. 318.

W. W. Cotton, for complainant.

Teal, Minor & Winfree, for intervener.

WOLVERTON, District Judge. The purpose of this proceeding is to recover from the complainant above named, through intervention of W. S. Smallwood, overcharges on freight shipped out of Portland to Pendleton and Baker City, being the difference between the tariff adopted by the State Board of Railroad Commissioners for the transportation of freight intrastate in character and the tariff fixed by the railroad companies upon interstate traffic, under what is known and designated as "tariff L525." Three shipments are involved, each under slightly different conditions. The first relates to a shipment of groceries in general, and the other two to the article of sugar. As to these it is specified as follows:

(1) "Said goods, wares and merchandise were purchased by said Allen & Lewis in states other than Oregon to become a part of its common stock in trade at Portland, Oregon, and were billed and transported to their said point of destination, to wit, Portland, Oregon, by various means of carriage, both water and rail, and on arrival at said city said Allen & Lewis surrendered the bills of lading therefor, paid the freight thereon, took possession of the same, and the same were taken in original packages by the said Allen & Lewis to its storerooms and became a part of the common stock in trade carried by it for sale in said city of Portland, Oregon, and there held an indefinite period for sale, and were thereafter sold from the said stock in said city in the orig-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

inal packages as received by said Allen & Lewis and transported to La Grande, Oregon, in said packages by the complainant."

(2) "Said sugar so shipped was a portion of a lot of sugar purchased in California by said Allen & Lewis to become a part of its common stock in trade at Portland, Oregon, and was billed and transported to its said point of destination, to wit, Portland, Oregon, by water by the Richardson Steamship Line, an independent water carrier not under common control or management by or with the complainant and having no joint tariffs, through rates, arrangements or connections with the complainant for continuous carriage or shipment or otherwise. On arrival at said city said Allen & Lewis surrendered the bills of lading therefor, paid the freight thereon, took possession of the same, and the same was taken in original packages by said Allen & Lewis to its store and warehouse and became a part of its common stock in trade carried by it for sale, and there held an indefinite period for sale, and was thereafter shipped from its said stock in Portland, Oregon, in the original packages as received by said Allen & Lewis, and transported to La Grande, Oregon, in said packages by the complainant and delivered to said Oliver, who held the same for the account of and subject to the order of said Allen & Lewis."

(3) "Said sugar was purchased in the state of California by said Lang & Co. for future sale by it at Portland, Oregon, with the intention of shipping it from Portland to some point within the state of Oregon. Said sugar was sold and billed to Lang & Co. and transported to Portland, Oregon, its point of destination, by the Richardson Steamship Line, an independent water carrier not under common control or management by or with the complainant and having no joint tariffs, through rates, arrangements or connections with the complainant for continuous carriage or shipment or otherwise. On arrival of the sugar at said city of Portland, said Lang & Co. surrendered its bill of lading therefor, paid the freight charges thereon and took possession of the same in the original packages as shipped from San Francisco. Thereupon said sugar was insured against loss by fire by said Lang & Co. in its own name and as owner thereof while in warehouse at Portland, Oregon, and was held by said Lang & Co. in warehouse until sold and cars supplied for loading, and the same was sold after its arrival at Portland, Oregon, to said Baker City Grocery Company by Lang & Co. at Portland, Oregon, reshipped from said city by Lang & Co. to said Baker City Grocery Company at Baker City, Oregon, over the lines of the complainant under a bill of lading issued to said Lang & Co. therefor, and was transported by complainant under said bill of lading in the original packages to Baker City, Oregon, and there delivered by complainant to said Baker City Grocery Company, the consignee named in said bill of lading, and the charges collected thereon from said Baker City Grocery Company for transporting the same from Portland to Baker City."

The especial contention of the railroad company is that the goods included in these shipments partake of the character of interstate commerce, and hence that they should take the rate under tariff L525, notwithstanding the transportation thereof was wholly within the state. It is so contended from the fact that the goods were shipped into the state in original packages, and that they were shipped from the point of their arrival within the state to other points within the state in the same original packages. In other words, it is maintained that goods do not lose their character as interstate commerce while handled in the original packages in which they enter the state. This would lead, of course, to the doctrine that "once interstate commerce in the original package always interstate commerce," in its most comprehensive sense, until the packages are broken. I am not impressed with the soundness of the position. The idea is based on what are known as the Original Package Cases of the Supreme

Court, the leading one being *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128. A different principle is involved here, however, from that applied there. It was maintained there, and so determined by the court, that it was an interference with interstate commerce for one state to inhibit the sale of beer in original packages or kegs, unbroken and unopened, by the importer from another state. It is said in that case, at page 124, of 135 U. S., at page 689, of 10 Sup. Ct. (34 L. Ed. 128):

"Under our decision in *Bowman v. Chicago, etc., Railway Co.*, supra (125 U. S. 465 [8 Sup. Ct. 689, 1062, 31 L. Ed. 700]), they (the importers) had the right to import this beer into that state, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the state."

It would seem that the act of sale alone within the state to which it was imported, whether such sale was in original or broken packages, would liberate the article from the character of interstate commerce, and henceforth "it would become mingled in the common mass of property within the state." And while it is true, as is said in another place in the same opinion (135 U. S. 112, 10 Sup. Ct. 685, 34 L. Ed. 128), that "the transportation of freight or of the subjects of commerce, for the purpose of exchange or sale, is beyond all question a constituent of commerce itself," yet it must be that a different principle applies to the carrier of freight from that which appertains to the importer of goods. An importer may insist that he has a right to sell goods that he has brought into a state from another state, while in the original packages, but it would not follow that a carrier has the right to treat those goods as interstate commerce so long as they remain in that condition, or unsold by the importer. The carrier depends rather upon his contract of carriage, and interstate traffic as to him depends upon whether he is called upon to transport from one state to another, or to serve his patrons by transportation wholly within the limits of a state.

Nor does it seem to me that the principle applied in the *Tax Cases* is wholly applicable here. That principle rests, not upon the fact that the property taxed has ceased to be interstate commerce, but upon the condition that it has, in the course of its transportation, arrived at its destination, is at rest and enjoying the protection which the laws of the state afford, and is taxed without discrimination like all other property. Such is the doctrine of *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. Ed. 538. The court in this case adheres to the rule announced in *Leisy v. Hardin*, supra, that the fact of sale at point of destination was essential to relieve the property from the character of interstate commerce, but holds that, notwithstanding the property continues to be interstate commerce, it may yet be taxed by the state in which it has come to rest, under the conditions just narrated. The doctrine has been reaffirmed in *General Oil Company v. Crain*, 209 U. S. 211, 28 Sup. Ct. 475, 52 L. Ed. 754. Transportation from a point in one state to a point in another is undoubtedly interstate commerce. But, says the court in *Gulf, Colorado & Santa Fé Ry. Co. v. Texas*, 204 U. S. 403, 409, 27 Sup. Ct. 360, 51 L. Ed. 540:

"When the commodity transported has reached the termination of its journey and has been delivered to the consignee, it ceases to be a subject of interstate commerce, and the subsequent shipment from the point at which it has been delivered to another point in the state, is an intrastate shipment."

The case turns upon the contract of shipment between the shipper and carrier, and when that is at an end, the shipper can claim nothing further as it respects the property carried. It is then at the command of the owner, and if he chooses to ship it again from one point to another in the state, it becomes an intrastate shipment, notwithstanding the owner may be dealing with an article of interstate commerce. For illustration, take the case of *Leisy v. Hardin*, *supra*; where beer was shipped into Iowa in original packages, the owner could not be deprived of the right to sell the beer while it remained in original packages because it was an article of interstate commerce. The shipment of the beer to him from another state was an interstate shipment. When that shipment was at an end, another carrier, who might transport the beer to another point in the state of Iowa, could not claim that the shipment was interstate because the article might be characterized interstate commerce in the hands of the owner. There must be, and is, a distinction between interstate commerce as it pertains to the article and interstate commerce as it pertains to transportation and carriage. The former depends upon the fact that it is an article of commerce—that is, of barter and sale—between the states or with foreign countries, and the latter upon the fact that it is being transported from one state into another. When the transportation ceases or comes to an end, the shipment has lost its character as an interstate shipment, and if the commodity is again moved it becomes an intrastate or interstate shipment according as it is moved to a point wholly within the state or a point without.

I am constrained to the view that the case of *Gulf, Colorado & Santa Fé Ry. Co. v. Texas*, *supra*, is controlling in this, and I therefore hold that the intervener is entitled to the rebate demanded in each of the three shipments specified. Let the decree be entered accordingly.

WHITE-SMITH MUSIC PUB. CO. v. GOFF et al.

(Circuit Court, D. Rhode Island. August 5, 1910.)

No. 2,741.

COPYRIGHTS (§ 33*)—RENEWALS—RIGHTS OF PROPRIETOR.

Act Cong. March 4, 1909, c. 320, § 8, 35 Stat. 1077 (U. S. Comp. St. Supp. 1909, p. 1292), provides that the author or proprietor of any work made the subject of copyright by the act, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in the act. Section 24 provides that the copyright subsisting in any work when the act goes into effect may at the expiration of the term provided for under existing law be renewed by the author, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then by the author's executors, or in the absence

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of a will his next of kin. *Held*, that the proprietor and assignee of the author of a copyrighted musical composition is not entitled to renewal of the original term of his copyright by force of section 8.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 33.*]

In Equity. Bill by the White-Smith Music Publishing Company against Ira N. Goff and others. On demurrer to bill.

Sustained.

Browne & Woodworth and Alex. P. Browne, for complainant.
Horatio E. Bellows, for respondents.

BROWN, District Judge. The complainant charges that the defendants have violated its copyright in a musical composition entitled: "Sparkling Waves, Original Theme with Variations, by E. H. Bailey."

For the purposes of demurrer it may be assumed that the complainant corporation as proprietor became the owner of a valid copyright in this musical composition for the original term of 28 years, expiring July 21, 1909. Just prior to the expiration of the original term, upon July 14, 1909, the complainant, as assignee of the author, sought to extend the copyright for a further or renewal term of 28 years. The register of copyrights refused registration for a renewal or extension of copyright, under section 24 of the new copyright law (Act March 4, 1909, c. 320, 35 Stat. 1080 [U. S. Comp. St. 1909, p. 1296]), on the ground that it could be made only in the name of one of the designated beneficiaries, and not in the name of an assignee.

To support the proposition that as proprietor the complainant has a right of renewal the complainant cites the following portions of "an act to amend and consolidate the acts respecting copyright," passed March 4, 1909:

"Sec. 8. That the author or proprietor of any work made the subject of copyright by this act, or his executors, administrators, or assigns, shall have copyright for such work, under the conditions and for the terms specified in this act. * * *

"Sec. 24. That the copyright subsisting in any work at the time when this act goes into effect may, at the expiration of the term provided for under existing law, be renewed and extended by the author of such work if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then by the author's executors, or in the absence of a will, his next of kin, for a further period such that the entire term shall be equal to that secured by this act, including the renewal period: Provided, however, that if the work be a composite work upon which copyright was originally secured by the proprietor thereof, then such proprietor shall be entitled to the privilege of renewal and extension granted under this section: Provided, that application for such renewal and extension shall be made to the copyright office and duly registered therein within one year prior to the expiration of the existing term."

The complainant contends that, in order to carry out the provisions of section 8, a general power of renewal by a proprietor must necessarily be read into section 24; also that the use, in section 8, of the expression "for the terms," indicates that both author and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

proprietor are to be entitled to an extended term, as well as an original term. Such a construction of the act is by no means necessary, since author or proprietor are to have copyright under the conditions specified in the act. The intent of Congress to distinguish between the renewal right of a proprietor and of an author is evident, both from section 23 and from section 24.

The right of an assignee to a renewal can hardly be greater than the right of an author. The right of renewal secured to an author, both under section 23 and under section 24, is conditional upon his survival. Upon his decease the right of renewal does not follow the author's estate, but is given to the widow, widower, or children of the author, or if they be not living then to his executors, or in the absence of a will to his next of kin. The statute is peculiar, in that it does not provide that in case of the decease of the author the renewal right shall follow the ordinary rules of law in case of testacy or intestacy, but designates beneficiaries who take the right directly from the statute. It is to be noticed that both in section 23 and section 24 the author's administrators are excluded.

According to the complainant's contention the assignee of an author would have a right of renewal, even if the author had deceased, although the author's right of renewal was conditional upon his survival, and did not pass to his estate, but directly to widow or children by operation of the statute. The bill does not allege whether or not the author survived, so as to have a right of renewal under the statute. If the complainant relies upon rights coming to him through assignment, it seems essential that the bill should state that at some time a vested right of renewal was in the assignor.

Upon a consideration of the entire act due effect can be given to section 8 as applicable primarily to original copyrights, wherein the author and proprietor stand upon equal footing, and secondarily to renewals under the conditions subsequently set forth, wherein author and proprietor do not stand on similar footing. As the statute both in sections 23 and 24 deals specifically with the question of renewal by a proprietor, and grants the right of renewal to a proprietor only in connection with specific kinds of works, an attempt to read into section 24 an implication that the proprietor shall also have a general right of renewal, additional to that specifically provided, would throw the act into inconsistency and confusion. The provisos of both sections 23 and 24 would be hard to explain upon the complainant's theory that it was intended that a proprietor should have a general right of renewal in all classes of works after the expiration of the original term.

It is unnecessary for the purposes of this case to decide whether under section 24 an author if living, or if not living any of the other designated persons, can be entitled to an extended term, during which they may prevent a proprietor who has enjoyed an original term in his own name from continuing publication.

Ordinarily, when an author sells his manuscript outright for a fixed sum, it would be understood that the purchaser had a right to publish, and either to secure a copyright or not, as he saw fit. By

electing not to secure a copyright, and by publishing without notice of copyright, he would deprive the author of no property right. It is difficult to say upon what principle the exercise of his rights as a proprietor to secure copyright for himself for the original period of 28 years should give to the author or his widow or children the right to exclude the proprietor after the 28th year from the right to publish which he acquired by the purchase of the manuscript.

By section 2 the rights of the author or proprietor of an unpublished work are preserved. If the purchaser of an unpublished work has the right of publication, with or without copyright, it is difficult to see upon what principle that right can be lessened or reduced to a limited term by his registration of a copyright as proprietor for his own exclusive benefit. In *Paige v. Banks*, 13 Wall. 608-615, 20 L. Ed. 709, it was said:

"As between the parties to the agreement the absolute interest was conveyed by the stipulation of Paige that he would furnish the manuscript for publication. Paige could no longer do any act after such delivery for publication inconsistent with the absolute ownership of the publishers."

A construction of the copyright law which gives to an author or to members of his family or others a right to an independent term of copyright succeeding, and inconsistent with, a proprietor's right to continue publication, is full of difficulty. It may be well to remember that the copyright law does not grant the original right of publication, but only serves to make exclusive rights which previously existed. In this respect it is similar to the patent right. *Paper Bag Patents Case*, 210 U. S. 424, 425, 28 Sup. Ct. 748, 52 L. Ed. 1122; *U. S. v. Bell Telephone Co.*, 167 U. S. 224-249, 17 Sup. Ct. 809, 42 L. Ed. 144; *Bloomer v. McQuewan*, 14 How. 539-549, 14 L. Ed. 532; *Blount Mfg. Co. v. Yale & Towne Mfg. Co.* (C. C.) 166 Fed. 555. Although a patent contains terms which imply a grant to make, use, and vend, the right of an inventor to make, use, and vend his invention is not granted, but only made exclusive, by the patent.

The author of an unpublished book or musical composition, by virtue of his proprietary right, may assign his property and confer his rights upon another. If he has done so, then a statute, subsequently passed, which should create in the author, the assignor, or in any third person, a right which would destroy the previously conveyed right of publication, would be open to serious doubts of constitutionality. The copyright statute is concerned, not with the creation of original rights of publication, but with making exclusive rights originating in the familiar principles of private property.

Section 24 provides that the "copyright subsisting in any work may be renewed and extended." If the proprietor's term expires in 28 years, and a new term of 28 years is granted to a third person, to the exclusion of the proprietor, it is an unusual use of language to call this the renewal or extension of the copyright subsisting. A copyright implies a person in whom the right resides, and the act apparently contemplates continued protection of an existing right, rather than the creation of a new and inconsistent right, springing into effect 28 years after the original registration.

But, even should we assume that, upon a proper construction of the statute, such right to a new and inconsistent term exists, this would not extend the right of the proprietor, since, whatever may be the renewal rights of others, the statute grants only limited rights of renewal to a proprietor. Whether, upon the expiration of the proprietor's original term, the work becomes free to the public, so that the proprietor has no longer an exclusive right under the statute, but still a right in common with the public, or whether, at the conclusion of the proprietor's original term, a new term may arise which is inconsistent with the further right of a proprietor, is immaterial to a decision upon this demurrer.

Whatever view may be taken of the statute, I am of the opinion that it fails to support the complainant's main proposition that upon the expiration of his original term a proprietor merely by force of section 8 is entitled to a renewal thereof for a further period of 28 years.

As the bill fails to allege any copyright in the complainant at the time of the defendants' acts, the demurrer must be sustained.

UNITED STATES v. CERTAIN LANDS IN TOWN OF NARRAGANSETT.

(Circuit Court, D. Rhode Island. July 8, 1910.)

No. 2,807.

EMINENT DOMAIN (§ 124*)—DAMAGES—TIME OF ASSESSMENT—ENHANCEMENT OF VALUE BY IMPROVEMENT.

Where the government, before instituting condemnation proceedings by the filing of a petition, had practically completed the end of a breakwater adjoining claimant's property, thus creating, under the shelter of the breakwater, a wharf site, which was taken away by the subsequent condemning of part of the upland adjacent to the alleged wharf site, the rule that damages are to be assessed as of the date of condemnation did not apply, so as to entitle the owner of the upland to damages as of the date of condemnation, and as enhanced by the wharf site created by the work; it being certain from the beginning of the work that the upland would be condemned, and the alleged wharf site not being available as such without the approval of the Secretary of War, which could not reasonably be expected in view of the location of the government improvements.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 332-344; Dec. § 124.*]

Condemnation proceedings by the United States against certain lands in the Town of Narragansett. On motion to confirm the commissioners' report for assessment of damages. Motion granted.

Chas. A. Wilson, for United States.
Tillinghast & Collins, for defendant.

BROWN, District Judge. After a consideration of the commissioners' report, of the claimant's exceptions thereto, and of the arguments thereon, I am of the opinion that the award to the claimant is

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

liberal, and that no substantial reason appears to justify a modification of the commissioners' findings.

Before instituting condemnation proceedings by the filing of a petition in court, the government had practically completed the end of the breakwater adjoining claimant's property. The claimant contends that there was thus created under the immediate shelter of the breakwater a very valuable wharf site, and that by subsequently condemning a part of the upland immediately adjacent to the breakwater the government has taken away the wharf site which it had previously created, in enhancement of the value of claimant's lands. In other words, that the United States should pay the claimant for taking away from her the wharf site which was created by extending the breakwater to the land.

It is true that according to the general rule damages are to be assessed as of the date of condemnation. This rule has been so applied as to compel the state, in the exercise of the power of eminent domain, to pay for values created by the public improvement itself. This was illustrated in the building of the Rhode Island Statehouse. After purchasing a portion of the land, the state proceeded to condemn the adjacent lands, and was compelled to pay a price for these adjacent lands enhanced by the fact that it had, by embarking upon the building of a State Capitol and purchasing lands therefor, increased the value of all lands in the vicinity. In *re* State House Commission, 19 R. I. 390, 35 Atl. 212; *Stafford v. City of Providence*, 10 R. I. 567, 14 Am. Rep. 710.

While such a rule is probably sound where the condemnation of adjacent lands is for the purpose of enlarging an old and fixed location, the rule seems of more doubtful justice in cases where, from the nature of the work, it is evident, from the moment of the passage of the legislation authorizing it, that the land in question will necessarily be required for the public improvement. Where, from the inception of the public improvement, it is known with practical certainty that the land will be required for the public project, this in itself negatives any supposed advantages which might accrue to the land held in private ownership by reason of its adjacency to the grounds of a public Capitol, park, or like improvement. If from the outset it is known that the lands must be taken for the public purpose, it is unsound to base their valuation upon any supposed advantages arising from their continuance in private hands as lands adjacent to public grounds.

The application of the rule that the date for the valuation is the date of legal condemnation, rather than the date upon which by legislative act or by practical and necessary inference from such act it became known that the lands would be required for public purposes, is a matter that seems to me to require some further and careful consideration.

The enhancement of price due to the public improvement, if based upon the reasonable expectation that the lands may be held by the private owner with the added advantages of adjacency to the lands improved by the public, is legitimate; but when this expectation is destroyed by the practical certainty, as distinguished from legal certainty,

that the lands are not to continue in private ownership adjacent to improved public lands, then the reason fails. It is unsound to look merely at the date of filing a petition for condemnation in considering how far the value has been enhanced by the public project.

In view of the fact that by the application of this rule the public has been compelled to pay private owners of lands an advanced value due to the very improvement which the public has undertaken, it would be wise, upon the institution of public works requiring the exercise of eminent domain, that officers of government, national, state, or municipal, should have some of the prevision shown by Jeremy Bentham, when, among other interesting occupations, he framed a project for a canal across the Isthmus of Panama, and in pursuance of his habit of foresight made provision that, in awarding compensation for lands taken, no compensation should be awarded for values created by the improvement itself.

Assuming, however, that it is proper to apply in the present case the rule that damages must be assessed as of the date of condemnation, the present case is quite different from the cases which we have cited. The right to wharf out in front of the claimant's land was not absolute, but was conditional upon the recommendation of plans by the Chief of Engineers and their authorization by the Secretary of War. See Act March 3, 1899, c. 425, § 10, 30 Stat. 1151 (U. S. Comp. St. 1901, p. 3541).

The opinion of this court in the present case on demurrer to the claimant's answer considers the legislation relative to this condemnation proceeding. 145 Fed. 654.

The purpose of Congress in extending the breakwater to the shore was to provide a shelter and a landing place for the passengers, crews, and cargoes of vessels in distress, and other vessels, and for the life-boats of the Point Judith Life-Saving Service. The general improvement at Point Judith was for the creation of a harbor of refuge. See Act March 3, 1905, c. 1482, 33 Stat. pt. 1, p. 1119.

The amended petition for condemnation in the present case was filed on March 8, 1906. After the passage of an act so clearly defining the purpose of Congress, no owner or purchaser of the upland in this vicinity could reasonably expect the approval of the Secretary of War for the erection of a wharf by private parties in the most sheltered location immediately adjacent to the breakwater. A value based upon such expectation is entirely too conjectural, under the circumstances.

The purpose of Congress in its large expenditures upon this breakwater, the creation of a harbor of refuge for small craft and live-saving boats, as well as for larger vessels, seems inconsistent with any reasonable expectation that an owner of the upland was to be permitted to appropriate for himself the choicest location in a harbor of refuge created at the expense of the people. It is true that under other circumstances the condition precedent, that the approval of the engineers and the authorization of the Secretary of War must be procured, might not prevent a valuation based upon a reasonable expectation that such authority might be procured and that a wharf might be

erected. In such a case a wharf site might have special value, even though governmental authority were necessary before the wharf could be erected; but that, in the present case, any one should expect that the Secretary of War would grant to private owners what the claimant says is the best protected part of the harbor of refuge, and which obviously is a suitable anchorage ground for small craft, for the erection of a private wharf, is an expectation of such unsubstantial character that it could not fairly be taken into consideration as a basis for holding that this claimant has suffered substantial damages by being deprived of a wharf site beside the breakwater.

The legislation which accompanied the building of this important national work was sufficient to apprise any owner or intending purchaser of the upland that it was primarily undertaken in the interests of the people of the United States, and not for the enhancement of the values of private property.

While the petition for condemnation was filed after the work was substantially completed, the proceedings from the passage of the act to the decree of condemnation were so continuous as to render it practically certain that the Secretary of War would not have granted permission to build a private wharf in front of lands which the government would need for carrying out its project. That intelligent officials, for the sole advantage of a private owner, would voluntarily grant him a valuable privilege, knowing that subsequently they must condemn and compensate him for it at the expense of the public, is not to be supposed.

For the above reasons, as well as for the reasons set forth therein, the commissioners' report should be confirmed. A draft decree confirming the commissioners' report may be presented accordingly.

IN RE MISSION FIXTURE & MANTEL CO.

(District Court, W. D. Washington, N. D. May 19, 1910.)

No. 4,041.

1. CHATTEL MORTGAGES (§ 196*)—FAILURE TO FILE—EFFECT.

Under Act Wash. March 13, 1899 (Laws 1899, c. 98) §§ 2, 3, 6, requiring chattel mortgages to be filed within 10 days after their execution, and making filed mortgages notice to the world, until filing a mortgage not filed within that time, does not affect creditors, whether antecedent or subsequent.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 429; Dec. Dig. § 196.*]

2. BANKRUPTCY (§ 161*)—PREFERENCES—CHATTEL MORTGAGES.

Since a chattel mortgage not filed within 10 days as required by Act March 13, 1899 (Laws Wash. 1899, c. 98) §§ 2, 3, 6, first became a lien when filed, it constituted a preference when filed within four months next preceding the mortgagor's bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 261; Dec. Dig. § 161.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the matter of the Mission Fixture & Mantel Company, bankrupt. Order of the referee, allowing a claim of Northwest Trust & Safe Deposit Company as an unsecured claim, affirmed.

Leander T. Turner and Sandford C. Rose, for claimant.

McClure & McClure, for trustee.

Carkeek & McDonald, amici curiæ.

DONWORTH, District Judge. On February 17, 1909, the Mission Fixture & Mantel Company made and delivered to Thomas S. Lippy its promissory note for \$6,000, with interest at the rate of 8 per cent. per annum, and a chattel mortgage bearing the same date, covering its stock in trade. The consideration for the note and mortgage was the loan of \$6,000 by Mr. Lippy to the company. While the record is not clear on the subject, it is assumed in the briefs on file that the loan was made contemporaneously with the delivery of the note and mortgage, and I shall make the same assumption. The mortgage was not recorded or filed in the county auditor's office until August 3, 1909. On the day following the filing of the mortgage these proceedings in bankruptcy were begun, and the mortgagor corporation adjudged bankrupt on its written admission and consent. The note and mortgage having been assigned to the Northwest Trust & Safe Deposit Company, that company has presented its verified proof, praying for their allowance as a secured claim. The referee, on the objection of the trustee, held the mortgage invalid, and allowed the claim as an unsecured claim only. On the petition of the trust company, the order of the referee is before the court for review.

In the objections of the trustee it is alleged:

"That during the period between the execution and delivery of said mortgage (on or about February 17, 1909) and the date of the filing and recording of the same, the entire property covered by said mortgage was in the sole possession of the bankrupt, and was in part sold by the bankrupt without the application of any of the proceeds thereof to the reduction of the mortgage debt; that a portion of the indebtedness proved in behalf of the creditors, as shown by proofs of debt on file herein, was incurred subsequent to the said February 17, 1909; that said mortgage was withheld from record for the purpose of maintaining the credit of said corporation."

These allegations are not denied by the trust company.

The legislation of the state of Washington concerning the recording or filing of chattel mortgages was, for many years, embodied in a section of the Code reading as follows:

"A mortgage of personal property is void as against creditors of the mortgagor or subsequent purchasers and incumbrancers of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay or defraud creditors, and it is acknowledged and recorded in the same manner as is required by law in conveyance of real property." Ballinger's Ann. Codes & St. § 4558 (Pierce's Code, § 6531).

In 1899 the Legislature passed "An act relating to chattel mortgages and the filing thereof, and repealing all laws in conflict therewith," approved March 13, 1899 (Laws 1899, p. 157).

Section 2 of this act provides that:

"Every such instrument within ten days from the time of the execution thereof shall be filed in the office of the county auditor of the county in which the mortgaged property is situated."

And further provides that:

"Such instrument shall remain on file for the inspection of the public."

The only other sections of the act pertinent to the present subject are as follows:

"Sec. 3. Every mortgage filed and indexed in pursuance of this act shall be held and considered to be full and sufficient notice to all the world, of the existence and conditions thereof, but shall cease to be notice, as against creditors of the mortgagors and subsequent purchasers and mortgagees in good faith, after the expiration of the time such mortgage becomes due, unless before the expiration of two years after the time such mortgage becomes due, the mortgagee, his agent or attorney, shall make and file as aforesaid an affidavit setting forth the amount due upon the mortgage, which affidavit shall be annexed to the instrument to which it relates and the auditor shall endorse on said affidavit the time it was filed."

"Sec. 6. That a mortgage given to secure the sum of \$300 or more exclusive of interest, costs and attorneys or counsel fees may be recorded and indexed with like force and effect as if this act had not been passed, but such mortgage or a copy thereof must be filed and indexed also as required by this act."

In the case of *Mills, Trustee, v. Smith*, 177 Fed. 652, the Circuit Court of Appeals of this circuit decided that the act of 1899 did not repeal the section of the Code above quoted and superseded it only to the extent that the provisions of the two enactments are in conflict.

It is urged by counsel for the trust company that the word "creditors," both in the Code and in the later act, must be construed as meaning only persons who become creditors during the period intervening between the execution of the mortgage and its filing in the recording office. The courts of Michigan and Kentucky have given this construction to statutes of similar import, holding that an unrecorded chattel mortgage is good as against prior creditors. *Brown v. Brabb*, 67 Mich. 17, 34 N. W. 403, 11 Am. St. Rep. 549; *First National Bank v. Gunterman*, 94 Mich. 125, 53 N. W. 919; *Heenan v. Forest City Paint Co.*, 138 Mich. 548, 101 N. W. 806; *Swafford's Administrator v. Asher* (Ky.) 105 S. W. 164; *Wicks v. McConnell*, 102 Ky. 434, 43 S. W. 205.

The United States District Courts sitting in those states have followed the construction of the statutes adopted by the state courts. In *re Adams* (D. C.) 97 Fed. 188; In *re Ducker* (D. C.) 133 Fed. 771.

In *Willamette Casket Company v. Cross*, 12 Wash. 190, 40 Pac. 729, the Supreme Court of Washington declined to decide whether withholding a mortgage from record would affect its validity as against prior creditors, for the reason that the question was not involved in the case.

In *Blumauer v. Clock*, 24 Wash. 596, 64 Pac. 844, 85 Am. St. Rep. 966, reference was made to the Michigan statute as being "a statute like ours"; but it was again unnecessary for the court to say whether or not it would follow the Michigan decisions on the point now under consideration. The court, however, did say:

"It is generally held that, where the statute does not restrict the word 'creditor,' the courts will not limit its application. A creditor and an in-

cumbrancer may stand in a dual capacity; for an incumbrancer must, at least, be a creditor, although a creditor need not necessarily be an incumbrancer. It seems to us that the more reasonable and just construction of the law would be to construe the term 'creditor' with reference to the inception of the obligation of the debtor, rather than to conditions which might afterwards arise."

This language, I think, means that a person is to be deemed a creditor within the contemplation of the statute from the time when the debtor becomes obligated to him, and, if that is its meaning, an unrecorded mortgage is void as to one who holds an obligation against the mortgagor, though the inception of the obligation antedated the making of the mortgage.

The Court of Appeals of New York, in construing a similar statute, has reached a conclusion essentially different from that adopted by the courts of Michigan and Kentucky.

In *Karst v. Gane*, 136 N. Y. 316, 32 N. E. 1073, the New York court says:

"It is claimed in behalf of the defendants that the word 'creditors,' in the act of 1833, only applies to a person whose debt originated after the execution of the mortgage, and during the default in filing, and that by the true construction of the act a mortgage of chattels is not void for an omission to file the same, as against a creditor whose debt antedated the execution of the mortgage, or, at least, that it is valid as against an antecedent creditor, provided it is filed before he acquired a lien upon the mortgaged property. It is to be observed that the limited meaning of the word 'creditors' in the act of 1833, insisted upon in behalf of the defendant, has no support in the literal reading of the act. The first section declares that a mortgage of chattels which shall not be accompanied by an immediate delivery, and an actual and continued change of possession, of the things mortgaged, 'shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed as directed in the succeeding section of the act.' There is nothing in the language of the section confining the meaning of the word 'creditors,' or restricting its natural sense, or which indicates an intention to distinguish between a creditor who became such before, and one who became a creditor after, the execution of the mortgage. The section speaks of 'subsequent purchasers and mortgagees.' There was a very good reason for this, since a prior purchaser or mortgagee would stand on his paramount right, and needed no protection, or would have the means of protection, against a subsequent mortgagee. The use of the word 'subsequent,' as applied to purchasers or mortgagees, may not be of great importance in ascertaining the meaning of the word 'creditors'; but it indicates that the Legislature had in mind, and expressed, in respect to one class of persons to be protected by the statute, the time when their rights accrued with reference to the execution of the mortgage. * * * It is impossible to say that only creditors who became such during the existence of a mortgage may be injured by keeping the mortgage secret. It certainly is not improbable that in many cases antecedent creditors may be lulled into security and forbear the collection of their debts at maturity by the apparent unincumbered possession and ownership by the debtor of property covered by an undisclosed mortgage. The statute prescribes a general rule which must be observed in order to entitle a mortgagee to assert his lien as against creditors; and, although a creditor may have notice of an unfilled mortgage at the time the credit is given, yet it is held that as to a creditor with notice such a mortgage will be postponed to the lien of judgment and execution in his favor upon the debt so contracted."

This construction of the statute appears to me more reasonable, more in accordance with the views expressed by the Washington Supreme Court, and more likely to prevent frauds and evasions than the

construction adopted by the courts of Michigan and Kentucky. It naturally follows from the proposition, approved by the Washington Supreme Court, that, where the statute does not restrict the word "creditors," the courts will not limit its application.

The New York statute, like the Code section of this state, did not prescribe the time within which the recording must take place, and the court held that a reasonable time consistent with due diligence would be allowed. The Washington statute of 1899, however, expressly provides that:

"Every such instrument, within 10 days from the time of the execution thereof, shall be filed in the office of the county auditor."

This language must be given effect. It is contended by counsel for the trustee, as I understand them, that a mortgage not filed within the 10 days, though it may be filed subsequently, is absolutely null and void as to all creditors of every class, even as to persons who become creditors after the filing. Whether such construction is correct, it is not necessary now to decide. Whatever may be the effect of filing such a mortgage after the time limited, it seems clear that in order to make the mortgage binding on creditors of any class from the time of its execution it must be filed within the 10 days. Section 6 of the act, which provides that a mortgage for \$300 or more may be recorded and indexed with like force and effect as if the act had not been passed, cannot aid the trust company's contention, because the same section further provides that such mortgage, or a copy thereof, must be filed and indexed as required by this act. It follows, therefore, that as the mortgage was not filed within the 10 days it could have no force or effect as to any creditor, whether prior or subsequent, until it was actually filed on August 3, 1909, the day before the filing of the petition in bankruptcy and the adjudication.

Here the bankruptcy law of the United States, the paramount legislation on the subject, comes into play. Assuming that the mortgage first took effect as to creditors on August 3d, it then took effect as a mortgage given to secure a pre-existing indebtedness. If the state statute correctly construed did not make it invalid as to all creditors at that time, the bankruptcy law avoids it as a preference. The giving of the mortgage originally was for a present consideration, and therefore did not constitute a preference. In my opinion, however, by the provisions of the state statute the mortgage had no validity as to creditors prior to its filing on the day before the bankruptcy adjudication, and, if under that statute it first became a lien as against creditors on that date, it constituted a preference just as if it was first written at that time. By section 60 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), where the preference consists in a transfer, the period of four months for avoiding the preference does not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

The mortgage is, therefore, invalid as against the trustee and creditors generally, and the order of the referee is, accordingly, affirmed.

LARSEN v. UNITED GAS IMPROVEMENT CO.

(Circuit Court, E. D. Pennsylvania. July 21, 1910.)

No. 810,

1. MASTER AND SERVANT (§ 278*)—NEGLIGENCE (§ 134*)—SAFE PLACE—DANGEROUS BUILDING.

In an action for death of the servant of a subcontractor by the collapse of a building in process of alteration, evidence *held* to sustain a finding of negligence on the part of both the contractor and the subcontractor in the manner of their tearing out the old part of the building and putting in shoring.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 278;* Negligence, Dec. Dig. § 134.*]

2. MASTER AND SERVANT (§ 332*)—DEATH OF SERVANT—INDEPENDENT CONTRACTOR.

In an action against the lessee of a building in process of reconstruction for the death of the servant of a subcontractor by the collapse of the building, owing to the negligent manner in which the work was accomplished, whether one of the lessee's architects, who the contract provided should superintend the work, in fact directed the manner and method of doing the work, so as to charge the lessee with the consequences of the contractor's negligence in performing it, *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1276; Dec. Dig. § 332.*]

At Law. Action by Elizabeth Larsen against the United Gas Improvement Company. Verdict for plaintiff. On defendant's motions for judgment non obstante veredicto and for a new trial. Denied.

W. W. Mentzinger, Jr., and John McClintock, Jr., for plaintiff.

R. Stuart Smith and Morgan, Lewis & Bockins, for defendant.

HOLLAND, District Judge. This action was instituted by the plaintiff to recover damages for the death of her husband, who was killed in the falling of a building at the northeast corner of Eleventh and Market streets, Philadelphia, on the 15th day of July, 1909. Additions, alterations, and improvements were being made to this building, which required the tearing out of the two lower stories and almost the entire interior. During the progress of the work the upper stories were shored up, which made the work especially dangerous.

The defendant had entered into a contract with the Sax & Abbott Construction Company to do this work, in accordance with certain plans and specifications, which had been prepared by Rush & Lacey, architects. Sax & Abbott Company entered into a written contract with H. Sheeler & Co. for the furnishing of all labor, materials, tools, rigging, scaffolding, and appliances necessary to completely finish the work of shoring the walls, including the cutting of the walls and floors, and other cutting necessary to erect shores and needles, for which it was to receive a certain compensation. This work was the most important to be done, requiring knowledge and judgment in order that the place might be safe and secure against accident. The contractor and subcontractor started the work about the same time,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and continued from about the middle of May to the 15th day of July, when the building collapsed. There was evidence of negligence and imperfect work, and the falling of the building was no doubt the result of divided authority, bad management, and negligence. The husband of the plaintiff, who was employed by H. Sheeler & Co., the subcontractor, was killed by the falling of the building, and she alleges in her statement of claim that the defendant "by its duly authorized agents, servants, and employes was engaged in making certain improvements, alterations, additions and repairs," and that it "negligently directed the work in such a manner that the entire structure became weakened and dangerous to workmen engaged in and about the making of said improvements, alterations, additions, and repairs, and failed to provide a reasonably safe place for the workmen to perform their duties, and failed to use due and proper care in the selection and retention of competent agents to conduct and direct the operation of said building." So that, as tersely stated by the defendant, the plaintiff, in order to recover in this action, must show that the negligence resulting in the accident was the negligence of an employe or agent of the defendant who was doing the work for the defendant.

There was sufficient evidence submitted to carry the case to the jury on the question of negligence on the part of the contractor and subcontractor in their manner of tearing out the old part of the building and in putting in the shoring, which together resulted in making the place so obviously dangerous that William R. Hall, an experienced contractor and builder, three or four days before the collapse, observed that the work of shoring was done in a way to make it very dangerous, and the holes were cut in the partition wall from the foundation up in a very irregular manner. The building was then regarded by him in such a dangerous condition that he would not risk going to the fourth floor, but got out as quickly as he could. This contractor was doing some work on Market street, but for several days prior to the accident warned every one he knew not to stand near the building as it was liable to fall.

This evidence, together with that of the other witnesses, was, we think, sufficient on the question of the negligent performance of the work. The only other question then is as to whether or not the defendant was responsible for this negligence. There is no doubt that upon the contract alone made between the defendant and the Sax & Abbott Company the latter is an independent contractor, for whose negligence the defendant would not be liable.

The Sax & Abbott Company agreed to "provide all material and perform all work for the alterations and additions to these properties," in accordance with the plans and specifications prepared by Rush & Lacey, architects, and it is further agreed that the work "is to be done under the direction of said architects acting as counsel for the lessee, * * * and that the decision of the architects as to the true intent of the drawings and specifications shall be final." This supervision or direction reserved in the contracts, however, evidently is intended only to give the architects power to enable them to see to it that the

contractors and workmen were performing the work in accordance with plans and specifications, and authorizes them to pass upon the question as to whether or not they were complying with the requirements in these plans and specifications, and, of course, under the circumstances, if there had been nothing more in this case than the agreement showing the relation of the parties, the defendant would not be responsible for any negligence which might have occurred. But the plaintiff contends that notwithstanding the existence of this contract of employment made and entered into between the defendant and the Sax & Abbott Company, that the defendant company had Lacey, one of its architects, who was also an engineer, in the building daily, and that the evidence shows that he was in direct charge of the manner and method of performing the work. There was evidence that Lacey had a desk in the building; was there daily; settled disputes among the bricklayers; directed how certain bolts should be used; and at one time in the progress of the work, when a crack on the Eleventh street side of the building appeared, that work was stopped by the foreman of the Sax & Abbott Company to submit the question of its danger to Lacey, and that after an examination of the crack by Lacey and the foreman of the contractor the work was continued. The evidence as to the control by Lacey is found in the testimony of Anderson and Fickes, skilled workmen, and Coleman, who was a "labor boss," and it was the contention of the plaintiff that this was sufficient to carry the case to the jury upon the question as to whether or not the defendant was directing the manner and method of performing the work as well as seeing to it that the work generally was done in accordance with the plans and specifications.

The defendant offered no evidence, and submitted a request that the court charge the jury that under all the evidence the verdict should be for the defendant. This request was refused. The case was submitted to a jury on the question as to whether or not the supervision of the defendant was such as to make the contractor his agent, for whose negligent acts the defendant would be liable, and there was a verdict in favor of the plaintiff.

The defendant practically abandoned its motion and reasons for a new trial at the argument, and insisted upon the motion for judgment non obstante veredicto upon the ground that the Sax & Abbott Company was an independent contractor, for whose negligent acts, if any, the defendant was not liable, and insists that the case at bar is controlled by the principle followed in a long line of cases, and aptly stated recently by the Supreme Court of Pennsylvania in *Miller v. Merritt*, 211 Pa. 127, 60 Atl. 508. The language used there is directly applicable to the provision in the agreement in this case:

"It is apparent * * * that the clause of the agreement * * * conferred on the owner's superintendent of construction only such supervisory powers as would enable him to see that the defendants were performing the work in accordance with the provisions of the contract and specifications, and gave him no authority to direct the workmen as to the methods of executing the details of the work."

The same principle was applied in *Morning v. Cramp & Company* (C. C.) 170 Fed. 364, a case recently tried in this district before Judge

McPherson. The question of independent contractor is considered in a very complete note to the case of *Richmond v. Sitterding*, 101 Va. 354, 43 S. E. 562, 65 L. R. A. 445, 99 Am. St. Rep. 879. There is no doubt at all but that this line of decisions establishes the proposition that where the supervision of the owner does not extend to the manner and method of doing the work, but only empowers the superintendent to see to it that the work is done by the contractor in accordance with plans and specifications, the latter alone is liable for his own negligence, and it cannot be visited upon the owner of the property. But, in this case, the plaintiff contended there was evidence to show that the supervision of Lacey extended not only as to results, but that the manner and method of doing the work was passed upon and controlled by him, and that the evidence of Anderson, Fickes and Coleman, together with other facts and circumstances, was sufficient to go to the jury upon the question as to whether or not Lacey was not in such control. There is no dispute as to the testimony of these witnesses and other facts and circumstances with regard to what Lacey actually did about the building; but while the plaintiff insists that the proper inference to be drawn from his acts is that he was in control of the manner and method of doing the work, the defendant urges that this evidence shows that Lacey did no more than was required of him under the contract with the Sax & Abbott Company; that his acts were entirely consistent with his authority to direct as to results; and that the court should enter a judgment in favor of the defendant. But we cannot agree that it is the duty of the court to decide whether or not the facts and circumstances submitted as to Lacey's authority warrant the inference that he controlled the manner and method of doing the work, or that he directed as to results only. This was a question for the jury.

In the case of *Bain v. Works Company*, 223 Pa. 96, 72 Atl. 279, there was a recovery allowed for personal injuries against the defendant who had employed the contractor to do the work, but had paid the wages of the men employed by the contractor as they came due. Justice Stewart, in rendering the decision of the Supreme Court, said, *inter alia*:

"The evidence on the part of the plaintiff would have wholly failed to associate the defendant with any responsibility in connection with the erection of the tanks *except for one fact* which was undisputed. Though not a single one of the workmen who were engaged says that he was originally employed by any one known at the time to represent the defendant, yet, all say that the wages they received were paid them, in whole or in part, by the defendant company, and not by Robinson. *This circumstance, unexplained, would warrant the inference that the contract between defendant and Robinson had been ignored or superseaded.* The defendant advanced an explanation, wholly consistent with its position, that the work was being done by Robinson under contract when the accident happened. It was this: That Robinson reported to the company that he was without funds to pay the men he had employed, and asked that the company do so and charge him with the advancement; that rather than have the work fail, or run the risk of liens, the company acceded to his request, and paid the men directly. *This raised a question of fact which necessarily drew the question to the jury. The explanation rested wholly upon oral testimony, which, if believed by the jury, would leave the contract between the defendant and Robinson wholly unaffected by the circumstance that the de-*

pendant had paid the wages. If the explanation was a true statement of facts, it was more than sufficient to overcome the inference of abandonment of the contract from the payment of wages. *Whether it was true was a question for the jury."*

The inference, to be drawn as to the extent of the management and authority exercised by Lacey, from the acts he did and orders given in connection with the work, was for the jury. It was properly submitted, and a verdict rendered in favor of the plaintiff. This being a question of fact, it was decided by the proper tribunal, upon competent evidence, and we therefore are compelled to refuse the motion for judgment non obstante veredicto, and overrule the motion for a new trial.

THE JOSEPH VACCARO.

(District Court, E. D. Louisiana. June 25, 1910.)

No. 14,015.

1. COLLISION (§ 125*)—EVIDENCE—CAUSE OF COLLISION—OVERTAKING VESSEL.

Evidence on libel against an overtaking steamship for colliding with a steam tug *held* to show that the direct cause of the accident was an unforeseen shifting of the river current.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 275, 277; Dec. Dig. § 125.*]

Overtaking vessels, see note to *The Rebecca*, 60 C. C. A. 254.]

2. COLLISION (§ 51*)—OVERTAKING VESSELS—DUTIES.

An overtaking vessel must keep out of the overtaken vessel's way.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 57; Dec. Dig. § 51.*]

3. COLLISION (§ 102*)—NARROW CHANNEL—VESSELS ABREAST—JOINT NEGLIGENCE.

A steam tug and a steamship to which the tug had taken a pilot were equally negligent in attempting to enter a pass less than 700 feet wide, abreast and without exchanging signals, at a point where the current was treacherous and frequently shifted.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 182, 190, 196; Dec. Dig. § 102.*]

4. SHIPPING (§ 81*)—NEGLIGENCE OF PILOT—LIABILITY.

In admiralty a vessel may be held in rem for the negligence of a compulsory pilot, though the owner would not be liable in an action at common law.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 347; Dec. Dig. § 81.*]

5. PILOTS (§ 2½*)—PILOTS' ASSOCIATION—NATURE—"PARTNERSHIP."

The Associated Branch Pilots of the Port of New Orleans, an association created to pilot and assist in the salvage of vessels, the members sharing in the expenses and the profits equally, the association collecting the fees and being governed by a president and board of directors, is an ordinary partnership under the law of Louisiana and may select, control, and discharge any of its members.

[Ed. Note.—For other cases, see Pilots, Cent. Dig. § 17; Dec. Dig. § 2½.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5191-5202; vol. 8, pp. 7746-7747.]

6. PILOTS (§ 2½*) — PILOTS' ASSOCIATION — RIGHT TO SUE — NEGLIGENCE OF MEMBER.

The Associated Branch Pilots of the Port of New Orleans, being a partnership, cannot maintain libel against a steamship for collision with the association's tug, based on negligence of the steamship's pilot, where he is a member of the association.

[Ed. Note.—For other cases, see Pilots, Cent. Dig. § 17; Dec. Dig. § 2½.*]

Libel by Bernard Michel against the steamship Joseph Vaccaro. Libel dismissed.

J. R. Beckwith and Rice & Montgomery, for libellant.
Howe, Fenner, Spencer & Cocke, for defendant.

FOSTER, District Judge. This is a case of collision. The libellant, as president of the Associated Branch Pilots of the Port of New Orleans, La., brings his libel in rem against the steamship Joseph Vaccaro on behalf of the said association for damages occasioned the steam tug Underwriter, belonging to the said association, arising from a collision of the Vaccaro with said tug.

There is, as usual, some conflict of testimony as to just how the accident happened. Resolving this as best I can in order to have all the witnesses speak the truth if possible, I find the facts to be as follows:

On the night of the collision, February 23, 1907, about 11:30 p. m., the Vaccaro appeared off the mouth of the South Pass of the Mississippi river, and the Underwriter went out to her for the purpose of putting a pilot on board. The Vaccaro was lying about half a mile outside of the end of the jetties, and the Underwriter approached on her port side, went around her stern, came up on her starboard side, stopped a little forward of her beam, and a pilot put off in a small boat to board the Vaccaro. The Underwriter then dropped astern of the Vaccaro, and after picking up the returning small boat went about on the Vaccaro's quarter and came up on her port side. Both vessels got under way at about the same time, the Underwriter being a little astern of the Vaccaro when the latter started; but the Underwriter went ahead faster and was in advance with the Vaccaro overlapping her stern, and about 100 feet in width separating the two vessels, when they attempted to enter the South Pass jetties.

When fully in the current of the river, the Vaccaro took a sudden sheer to the left and ran into the Underwriter, striking her about 20 feet from her stern and cutting her plates down below the water's edge; the collision occurring about eight minutes after the Vaccaro started. The vessels exchanged no signals whatever. When the Vaccaro sheered, the accident seems to have been inevitable, and thereafter neither vessel was guilty of any fault.

It is true the master of the Underwriter testified that he went ahead full speed before the Vaccaro got under way, and opened up a gap between the vessels; but it is not probable that he was paying any attention at all to their relative positions. He was not looking, and did not know where the Vaccaro was, until after he had given a signal

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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to slow down the Underwriter, and only then did he see the dangerous proximity of the Vaccaro. Besides he is contradicted by others of libellant's witnesses. The engineer of the Underwriter testifies that they were running at about six knots an hour, half speed, when he received the signal to slow down. He did not obey it, as it was immediately followed by a signal for full speed ahead, and then he had to open the valves to let the steam into the low pressure cylinders to comply with the order. The pilot of the Vaccaro, libellant's witness, testifies that the Underwriter went about under the stern of the Vaccaro and then passed her on the port side while they were under way. This is corroborated by the master of the Vaccaro. The engineer of the Vaccaro also testified that her engines were stopped when he got the signal to go ahead full speed, and that it would take about a quarter of an hour to develop the Vaccaro's maximum speed of 12 knots.

The first inquiry is, naturally, as to the proximate cause of the accident. It is contended by libellants that the steering gear of the Vaccaro did not work; but I do not find this borne out by the evidence. There is some testimony to show that at previous times the steering gear of the Vaccaro had worked stiffly; but the same may also be said of the Underwriter. Both vessels have steam steering gear. Several witnesses testify without contradiction that the Vaccaro's steering gear was in perfect order, and the testimony of her pilot, who was in the best position to observe the handling of the boats, shows that his orders were responded to and she answered her helm up to the moment she took the sheer. I have no doubt the steering gears of both vessels were in good order at the time of the collision. Both vessels were properly manned and lighted.

The South Pass jetties are very narrow, about 700 feet in extreme width, and frequent wing dams tend to further constrict the channel. On this particular night there was a high stage of river, and the current going out of the mouth of the jetties was very strong, probably running at least five miles an hour. The evidence also shows that at this particular point the current is very treacherous, frequently shifting, and sometimes indulging in unaccountable whirls and eddies. The Vaccaro was on her proper course, running steady and obeying her helm, but suddenly sheered when the current struck her, so I must conclude that the direct cause of the accident was one of those unforeseen shiftings of the current, and to that extent the collision was unavoidable.

Nevertheless, had the vessels not been in such dangerous and close proximity, no serious accident would have occurred, at least not to the Underwriter. The Underwriter and the Vaccaro were in charge of skillful and experienced pilots who daily perform their relative duties in sight of each other. Necessarily the pilot of the Vaccaro was in absolute control as to the speed and course of the vessel, and he ought to have known the probable maneuvers of the Underwriter. The same may be said of the master of the Underwriter. He ought to have known approximately what the course and speed of the Vaccaro would be. Both men ought to have known the dangers of the current in this narrow pass. Both of these men were fully aware of the danger but

apparently, perhaps because of constant association and familiarity with it, each seems to have been oblivious to the possible result of these two vessels entering the pass practically abreast.

It is urged that the Vaccaro was an overtaking vessel, and the burden is on her, therefore, to establish want of negligence in herself to defeat a recovery by the Underwriter; but the present case is unique and cannot be governed by hard and fast rules as to overtaking or crossing. It may be that at the time of the collision the Vaccaro was the overtaking vessel, as her speed was being gradually accelerated; but it is also true that the Underwriter was first the overtaking vessel, and, therefore, when she passed the Vaccaro it was incumbent on her to keep out of the latter's way. So, too, the pilot in charge of the Vaccaro ought to have known better than to enter the pass practically abreast of another ship. To this extent he was equally at fault with the master of the Underwriter. In common prudence one of these boats should have stopped and allowed the other to go ahead. Perhaps the duty was greater on the Underwriter, as her sole object in going out was to insure the safe entrance of the Vaccaro. Yet these two experienced pilots, starting like entrants in a race, exchanging no signals, made the extremely hazardous navigation of the pass more difficult by attempting to negotiate it together. I consider they were equally negligent.

But the question of negligence is not the only one to be determined in this case.

It is contended by the claimant that libelant is a partnership and cannot recover because the Vaccaro's pilot is a member and she was compelled by law to take him. Libelant denies the partnership and relies mainly on the case of *Guy v. Donald*, 203 U. S. 399, 27 Sup. Ct. 63, 51 L. Ed. 245, to recover in any event.

In *The Merrimac*, 14 Wall. 199, 20 L. Ed. 873, the Supreme Court held that the Louisiana law did not enforce compulsory pilotage, but since then the statute of 1877 (Act No. 63 of 1877, p. 103) has made a material change. It is certain the Vaccaro was in charge of a compulsory pilot, a member of the association libelant herein, not the choice nor the voluntary agent of her master or owner, and her fault for the collision was solely his. However, it is settled in American jurisprudence in admiralty a vessel may be held in rem for the negligence of a compulsory pilot, though the owner would not be in an action at common law. *The China*, 7 Wall. 53, 19 L. Ed. 67; *Homer Ramsdell Trans. Co. v. La Compagnie Générale Transatlantique*, 182 U. S. 406, 21 Sup. Ct. 831, 45 L. Ed. 1155.

It may be that a voluntary association of pilots and its members are not liable at the suit of the owner of a vessel which has been held for damages by reason of the fault of one of its members; but what is the situation here.

In the case of *Guy v. Donald*, 203 U. S. 399, 27 Sup. Ct. 63, 51 L. Ed. 245, the Supreme Court held that the members of the Virginia Pilots' Association were not partners, and that they were not liable to owners of piloted vessels for the negligence of each other. The court based its decision mainly on the grounds that substantially the whole

government of the association was in the hands of a board of commissioners instituted by the law of Virginia, and it existed solely by permission of said board, on the implied condition that all the pilots belong to it, and therefore the association, could not select, control, or discharge one of its members.

The Louisiana in many respects is identical with the Virginia association; but there are some radical differences. It is not a commercial partnership under the law of Louisiana, but does it not possess every element to make it an ordinary partnership? Its organization is authorized by law, and no restrictions are placed upon the form it may take; it could be either a corporation or a partnership. By a written agreement it adopts a common name and declares its objects and purposes to be to carry on the business of piloting vessels and to assist in the salvage of vessels. It owns tangible property of great value, and the share of each member in the association property is fixed by the articles of agreement. No person can become a member without the consent of the majority of the members, and once in he cannot withdraw except by the same consent; but he ceases to be a member on surrendering his branch. A new member must pay to the association an amount sufficient to make him an equal owner in the association assets. He must bind himself to devote his entire time to the association and to not engage in any business at variance with its interests, nor in competition with it. It is provided that the members shall share the expenses and the profits equally, and a reserve fund of \$10,000 is provided for. No member has any interest in the fees he earns, as his services are for the exclusive benefit and profit of the association. The association issues the bills for pilotage, and, when necessary, sues to recover them, in its own name, without regard to the individual member. The management of the association is by a president and board of directors. They are given full power to prescribe and enforce all regulations that may be necessary, or expedient for the management of the business, the assignment of pilots to duty on outgoing or incoming vessels or the pilot boats of the association, and for the discipline of the association.

It seems that all the branch pilots licensed to pilot vessels into the mouth of the Mississippi river belong to this association, and perhaps it would be impossible for any one to obtain, or retain, a branch who did not belong. Branches are issued by the Governor of the state on recommendation of a board of examiners composed of three branch pilots, and this same board has the power to report any pilot to the Governor for cancellation of his license, practically at its discretion. As a matter of fact this board is composed of the president and two members of the association; but in contemplation of law there might be a dozen associations, or each pilot might do business on his own account provided he had the necessary equipment.

The Supreme Court, in passing upon the character of libelant's predecessor, practically the same association, held it to be a partnership, and thus tersely stated the proposition:

"Whilst every association of persons does not imply a partnership, it is certain that every partnership implies an association. In this instance,

as in many others, we find nothing in the name." *Levine v. Michel*, 35 La. Ann. 1126.

In view of the foregoing, I am constrained to hold that libellant is an ordinary partnership under the law of Louisiana, and also that it had the right to select, control, and discharge any of its members, and therefore the decision in *Guy v. Donald*, 203 U. S. 399, 27 Sup. Ct. 63, 51 L. Ed. 245, is not controlling.

So here we have a novel case. A partnership is suing to recover for damages to the partnership property occasioned by the fault of one of its members. When his wrongful act was committed, he was the specially selected agent of the association acting strictly within the scope of its business. He certainly could not recover in an individual suit, yet he will recover if the association is successful.

I cannot imagine upon what theory of law or justice the association can stand in any better position than does the individual member, and I do not think the admiralty doctrine, as laid down in *The China*, 7 Wall. 53, 19 L. Ed. 67, should be stretched to cover this case.

The libel will be dismissed.

PENNSYLVANIA R. CO. v. MAGEE.

(District Court, E. D. New York. May 17, 1910.)

1. COLLISION (§ 90*)—RULES—NARROW CHANNEL RULE.

The narrow channel rule (article 25 of the Inland Rules; chapter 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), requiring steam vessels navigating narrow channels when safe and practicable to keep to that side of the fairway which lies on their starboard side, is not strictly applicable to the passage around the Battery from the East to the North River, but still should be respected by boats passing around the Battery, especially from the North River, when they would otherwise interfere with vessels coming down the East River rightfully on the west side of the channel.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 90.*]

2. COLLISION (§ 95*)—STEAM VESSELS—FAULT.

The ferryboat Long Beach was passing around the Battery from the North River and stopped to permit a lighter to pass on her starboard side. At the time the tug Powhatan with a tow on her side was coming down East River and to pass around the Battery, being outside of three other tugs with tows which were as close to the New York piers as they could safely go. While so stopped, the ferryboat gave the Powhatan a signal of one whistle, which was answered, and she then started ahead; but, instead of keeping across toward the Brooklyn side so as to pass under the bows of all the tugs, she attempted to go to port to pass between the Powhatan and a tow which was in mid-river and came into collision with the Powhatan, which had stopped when the danger became apparent. *Held*, that neither the narrow channel rule nor the starboard hand rule for crossing vessels fully governed the situation, but that the ferryboat was solely in fault for not keeping to starboard, which it appeared she could have done, while the tug did not have room to go further to starboard.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*]

In Admiralty. Suit by the Pennsylvania Railroad Company against John Magee, Jr. Decree for respondent.

Robinson, Biddle & Benedict (E. G. Benedict, of counsel), for libelant.

William J. Youngs, U. S. Atty. (Selah B. Strong, of counsel), for respondent.

CHATFIELD, District Judge. On the afternoon of June 11, 1908, the United States tug Powhatan left the New York Navy Yard, a short distance above the Brooklyn Bridge, and proceeded down the East River, with a barge called the "Canister" in tow on her port side. After passing the Brooklyn Bridge, the Powhatan crossed over to the starboard side of the channel, and assumed a position outside of three other boats with tows headed in the same direction and proceeding at substantially the same speed, thus passing what is known as "Pier 5" in the East River about halfway between the Wall street ferry and the Battery, with these four craft abreast and so close together that none of them could proceed further to the starboard without collision. The inside boat was just off from the pierheads, and the positions which they maintained were necessitated by the presence of a tow of canalboats and also by the ferryboat of libelant, operated on a course from Jersey City to Brooklyn. This ferryboat was rounding the Battery, at a distance estimated by her own captain as 500 or 600 feet from the pierheads. At the time she was sighted by the boats above referred to, she was stopped on a course substantially parallel to a tangent to the pierhead line off the Battery, and nearly opposite the slip used by the Staten Island ferry. She had previously brought her engines to a stop upon receiving a signal from a steamlighter which had come down the East River on the Brooklyn side, but was then rounding the Battery toward the North River at a considerable rate of speed against the tide, and in such a position as to pass the ferryboat to starboard; a two-whistle signal having been exchanged with the ferryboat.

Another factor in the situation was what is called the "Albany tow"; that is, a string of canalboats being made up opposite the Wall street ferry, in the East River, and headed toward Governor's Island, but under just speed enough to counteract the flood tide which there runs up the East River.

The captain of the ferryboat testifies that the Albany tow was considerably below the Wall street ferry and was moving down the river. But in view of the object which this tow had in mind in maneuvering in that part of the river, and the testimony of the various witnesses upon other boats who are extremely positive in their statements, it would appear that the ferryboat could have safely crossed the bow of the tow and passed it to port after the lighter had gone on into the Hudson river. The captain of the ferryboat testified that after lying still during the passage of the lighter, he gave the signal to the engines of the ferryboat for full speed ahead, and proceeded in a direction substantially across the East River toward the Brooklyn slip of the Wall street ferry and across the bow of the Albany tow, but

that he was compelled immediately to starboard his helm and pass to starboard of the Albany tow; that is, on the New York side of the river.

In this he is contradicted by the captains of the boats coming down along the shore, who all agree, so far as they saw the ferryboat's course, that the ferryboat should have proceeded straight ahead and to port of this tow. This tow, therefore, should have had no effect upon the movements of the ferryboat relative to that of the four craft coming down the river.

It appears from the evidence that the ferryboat in question was not the one usually used for this service, but was a much heavier and longer boat, and it can be assumed that it neither responded to the helm as quickly nor got under way as rapidly as the smaller boat, and it is very probable that this difference may have prevented the ferryboat from turning and passing safely through a space which would have been sufficient for the usual boat.

The ferryboat claims to have blown one whistle to the Powhatan. The Powhatan blew one whistle which the ferryboat understood, and all the various craft inside the Albany tow were in clear view of the ferryboat at the time of this exchange of signals. It further appears that neither the Powhatan nor any of the three boats between her and the pierhead was then able to move to starboard, and a reversal of the Powhatan's engines, when it was seen that the ferryboat was not likely to get under way with sufficient quickness to avoid being carried by the tide to port and into the path of the Powhatan, was too late to prevent a collision between the forward port corner of the Canister, which was a square-nosed barge, and the paddle wheel guard upon the port side of the ferryboat. An abrupt turn on the ferryboat's part under a starboard helm swung the ferryboat alongside of the Canister and caused the carrying away of the guard to the paddle-wheel house and certain injuries to the wheel and shaft; but by this movement further penetration into the ferryboat and more serious consequences were probably avoided.

The respondent was the pilot of the Powhatan, and has been sued in personam for his own actions, inasmuch as he is shown by the testimony to have been entirely responsible for her movements.

It is contended on his behalf that the Powhatan at this time was entitled to at least one-half of the channel, under what is known as the "narrow channel rule" (chapter 4, art. 25, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), which has been many times held applicable to general navigation in the actual narrow channels in the Bay of New York (*The Sea King*, 114 Fed. 535, 52 C. C. A. 349), but not to the North River or the Upper Bay (*The Islander*, 152 Fed. 385, 81 C. C. A. 511; *The Bee*, 138 Fed. 303, 70 C. C. A. 593).

If we are to consider the passage from the East River around the Battery into the North River as but one continuous strait or channel, strict enforcement of this rule would require a boat coming from the North River and turning around the Battery into the East River to keep some 1,200 or more feet from the New York shore; that is, to make the turn upon the Governor's Island side of the channel. In

the same way it would be necessary for any boat passing through these waters to cross the other lines of traffic and go far out of the way, with no gain from the standpoint of safety. The chart shows that the distance between the Battery and Governor's Island is some 2,400 feet, with a minimum depth from shore to shore of 21 feet. The Battery shore is lined with ferry slips and piers, and the ferryboats coming in and out of these slips render navigation close to the pier-heads extremely dangerous, and at the same time cause great congestion when craft, attempting to pass in either direction, follow converging paths and are stopped by the crossing of so many ferryboats.

It is evident that an exact application of the narrow channel rule cannot be made. The place in question, while narrow, is but a crossing or connection between four channels of extremely different widths and forms.

But even if the narrow channel rule be not wholly applicable, it may still be respected by a boat passing directly around the Battery; that is, from the North River to the East River, or from the East River to the North River. In this regard, the Bay and Buttermilk Channel side of the passage can be eliminated, and it is evident that a boat rounding the Battery within dangerous proximity of the pier-heads would not only be violating the rules laid down by the courts in such cases as have been referred to, but would be in an entirely indefensible position if by its course it offered an obstruction to craft coming down the East River upon the proper or starboard side of that channel, which passes around the Battery upon the New York side.

Hence, assuming that the space for craft rounding the Battery, which could be made subject to the narrow channel rule, be the portion of the waters occupied by craft pursuing their rightful courses in the East River, and giving room to craft which they might meet headed up or down, it would be apparent that the Long Beach, if 350 feet from the Battery, or even if 500 feet away, when turning from the North River into the East River, would be so directly in the path of boats coming down the starboard side of the East River as to require her to give way and to take precautions for their safety, especially in view of the fact that their room for maneuvering to starboard was substantially interfered with by the various slips and the shape of the shore line, until a point more than halfway around the Battery had been passed.

On the other hand, a boat coming down the East River, in the position in which the Powhatan found herself, would certainly be compelled to follow a course which would cross that of any vessel coming east around the Battery, until the turn had been made sufficiently to make these courses parallel, or for the Powhatan to turn up the North River.

Under ordinary circumstances, a course at any given point is presumed to mean a straight line, and hence as the Powhatan came down the East River her course intersected that of the Long Beach at the time of the interchange of signals. The Long Beach must have been on the Powhatan's starboard bow, and the burden was upon the Powhatan to keep out of the way.

"Rule 8. When two steamers are approaching each other at right angles or obliquely so as to involve risk of collision, other than when one steamer is overtaking another, the steamer which has the other on her port side shall hold her course and speed; and the steamer which has the other on her own starboard side shall keep out of the way of the other by directing her course to starboard so as to cross the stern of the other steamer, or, if necessary to do so, slacken her speed or stop or reverse."

Should a different rule apply to govern the movements of steamers which may be following what could be plotted as substantially parallel courses upon parallel curves? It would seem that even if the Powhatan had the right to rely upon the fact that her course was one rounding the Battery, and that the ferryboat's course was also around the Battery in the opposite direction, she could not insist on her own course, but must keep out of the way in the situation shown.

If no whistles had been blown, and if it were merely a question of what the vessels were bound to understand as to each other's movements and as to the way their paths should avoid each other, the narrow channel rule might be of some effect, and the ferryboat could not avoid any negligence on its part by which it put itself in the water belonging to the other boat, or by which it attempted to usurp the expected and in fact only possible course of the Powhatan. If the ferryboat had been proceeding steadily and had insisted upon a right of way around the Battery, solely upon the theory that she could call any vessel coming down the East River a crossing vessel, without reference to the whereabouts of the ferryboat herself or of the burden upon her to respect the needs of the down-coming craft upon the starboard side of the available water, the court would have no hesitation in holding the ferryboat responsible for an undue insistence upon a technical rule which common sense would indicate was not applicable to the precise locality. To this extent the position of the respondent must be vindicated, and his attempt to invoke the narrow channel rule is in that respect not far fetched. But in the actual circumstances shown in this case the ferryboat was not attempting to dispute with the Powhatan the right to any particular course, but was navigating with respect to the steam lighter which had the right of way around the Battery ahead of the Powhatan. The ferryboat actually exchanged signals with the Powhatan while she was lying still in such a position that the course of the two vessels could not but be considered as a crossing course, with the Long Beach on the starboard hand of the Powhatan at the moment in question.

But even under these circumstances, special conditions governed the situation.

The ferryboat did not respond and did not maneuver as quickly as the captain, who had been used to a lighter boat, evidently desired and anticipated that she would. But even this was something which the Powhatan was bound to take into account. To the pilot of the Powhatan the ferryboat Long Beach was in plain sight, and his duty was to so navigate as to give her an opportunity to pass across the bow of the Powhatan and to her port side. To this extent the starboard hand rule is applicable and the ferryboat had the right of way. But, again, special circumstances in this particular case come into the

situation. The captain of the ferryboat testifies (page 8) that he answered the two whistles of the lighter, while slowed down; that he then hooked his boat up and stopped until he cleared the lighter; that he then blew one whistle to the Powhatan, hooked his boat up again, and proceeded between the Powhatan and the Albany tow; that he was making straight for the opening between the two vessels. And again (page 10) that he was off the Staten Island ferry slip at the time of giving the signal to the Powhatan, that he was headed straight toward the Montague street slip in Brooklyn, and that before his boat had gained a position beyond the course of the Powhatan, the tide brought the ferryboat so far to the north that even with a violent sheer under a starboard helm, the corner of the Canister ripped along the port side of the ferryboat. The captain testifies that the steam lighter was passing the Albany tow when the ferryboat answered the lighter's two whistles, and that he had to alter his "course and haul up on the other side of the Albany tow and the New York docks, because I would have either had to cross his whistles or run into this tow, as there wouldn't be room for me to answer his whistles and pass between him and the Albany tow" (page 7).

The captains of the boats inside of the Powhatan, as well as the respondent, testify that the lighter passed the Long Beach off the Staten Island ferry, having blown a signal of two whistles to the ferryboat when abreast of the South Ferry.

There is no apparent reason why the captain of the Long Beach (unless he mistook the character of the Albany tow and assumed that it was moving down the river) was compelled to turn to port and to come up on the New York side of that tow. His testimony indicates that this was surely the course which he had in mind, and that he did not attempt to keep to the southward of the Albany tow and cross its bow to get up upon the Brooklyn side of the river. He stopped in order to let the lighter go by, at the very time that he was signaling to the Powhatan, and says (page 10) that "on blowing the whistle he immediately started ahead."

The pilot of the Long Beach says (page 29) that the Long Beach, after passing the lighter, straightened for Brooklyn before giving the one whistle signal to the Powhatan, and that a space of 200 feet separated the Powhatan from the Albany tow.

The engineer of the Long Beach says (page 32) that at 5:28 p. m. he received one bell to slow, under which the boat continued for half a minute, then came a bell for full speed ahead, continuing about one minute, then a bell to slow and one to stop; that they ran slow for about half a minute, when he received a bell for full speed ahead, and after about three turns a signal to stop and reverse, when the collision came, at about 5:30 p. m.

A strict construction of the starboard hand rule, so far as the Powhatan was concerned, might have required the ferryboat to remain still and not change her speed and distance, so that the Powhatan might pass to port if the Powhatan accepted the one-whistle signal. But in view of the evident situation, and it being apparent that the ferryboat could then proceed to port of the Albany tow, and as the

Powhatan accepted the one-whistle signal and assumed the burden of passing under the stern of the ferryboat and keeping out of her way, it would seem that the captain of the ferryboat should not have waited for an opportunity, or attempted to so maneuver his boat as to pass between the Powhatan and the Albany tow. If necessary, he should have assumed that the one-whistle signal would include even the Albany tow, and should have held a course and endeavored to assume a speed with his vessel which would carry him clear, in order that he might pass all of the vessels coming down the river on their port hand. If he had done this, there would have been no accident, and, inasmuch as neither the narrow channel nor the starboard hand rule is complete in its control of the precise situation, it must be held that the libellant has not sustained the burden of proof in showing that the respondent was guilty of any negligence in not anticipating that the ferryboat would attempt to pass between the Powhatan and the Albany tow; it being evident that the Powhatan could not maneuver further to starboard, and that she did attempt to stop and to reverse as soon as the actions of the ferryboat indicated what the ferryboat was trying to do.

The libel should be dismissed.

STEVENS et al. v. EMPIRE CASUALTY CO.

(Circuit Court, N. D. West Virginia. July 22, 1910.)

1. EQUITY (§ 361*)—BILL—MOTION TO DISMISS—DISCHARGE OF RECEIVER.

Where a bill sought to dissolve a corporation and distribute its assets by means of a receiver, motions to discharge the receiver and dismiss the bill would be considered as equivalent to a demurrer to the bill for want of equity.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 757; Dec. Dig. § 361.*]

2. CORPORATIONS (§ 614*)—DISSOLUTION—SUIT BY STOCKHOLDERS—EQUITY RULES.

A bill by the holders of \$40,725 of a total \$106,000 of the capital stock of a corporation to dissolve the same and distribute its assets, because of a cessation of business and mismanagement, was not within equity rule 94, requiring that a bill by stockholders allege that the suit is not collusive and show particularly the efforts put forth to secure action by the corporation's directors, but was rather a suit under Code W. Va. 1906, § 2285, authorizing the dissolution of a corporation at the instance of not less than one-third in interest of the stockholders on sufficient cause shown.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2439; Dec. Dig. § 614.*]

3. CORPORATIONS (§ 614*)—DISSOLUTION—STOCKHOLDERS—STATUTES.

Under Code W. Va. 1906, § 2285, providing for a suit to wind up the affairs of a corporation at the instance of not less than one-third in interest of the stockholders, power is vested in courts of equity at the instance of stockholders holding one-third of the stock to wholly dissolve the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2435; Dec. Dig. § 614.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. CORPORATIONS (§ 621*)—DISSOLUTION—RECEIVERS.

Under Code W. Va. 1906, § 2286, declaring that, when a corporation expires or is dissolved or before its expiration or dissolution on sufficient cause shown, on application of a creditor or a stockholder, the court may appoint a receiver to take charge of and administer its assets, etc., and, whether a receiver be appointed or not, to make such orders and decrees and award such injunctions in the cause as justice and equity may require, a court of equity has power at the instance of a single creditor or stockholder, before or after dissolution of a corporation, on sufficient cause shown, to appoint receivers to take charge of and administer its assets, and make such orders and decrees and award such injunctions as justice and equity may require.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2461; Dec. Dig. § 621.*]

5. CORPORATIONS (§ 621*)—DISSOLUTION—RECEIVERS.

Defendant corporation was organized under Laws W. Va. Dec. 17, 1904, to do a general casualty, accident, and industrial insurance business with an authorized capital of \$150,000 subsequently increased to \$250,00. Plaintiffs were the owners of full-paid stock aggregating \$40,725, total stock subscribed and issued being \$106,000. It was alleged that the corporation had suspended its business for more than two years continuously, and that it had not sufficient assets to meet the requirements of West Virginia laws permitting it to do business; that it had practically abandoned as hopeless the effort to sell sufficient stock to enable it to do so, and in consequence it was sought to procure its stockholders to turn over their stock to another company in exchange for its stock; and that the corporation had invested a considerable portion of its funds in securities of doubtful value, and was spending for office rents, stationery, furniture, fixtures, etc., \$7,000 annually with no business done and no hope of doing business from which an income could be derived. *Held* sufficient to justify the appointment of a receiver in stockholders' dissolution proceedings and the issuance of an injunction restraining transfer of property.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2461; Dec. Dig. § 621.*]

In Equity. Bill by R. N. Stevens and others against the Empire Casualty Company for dissolution thereof. Plaintiffs' motion for a temporary injunction granted, and defendant's motion to discharge receiver and dismiss bill denied.

On May 25, 1910, Stevens and 52 others presented their bill against the Empire Casualty Company, in which they allege themselves to be citizens of Maryland, Virginia, Illinois, Minnesota, and Massachusetts, and the defendant to be a corporation organized under the laws of West Virginia under charter of date December 17, 1904, with an authorized capital of \$150,000 subsequently, on September 9, 1908, increased to \$250,000, to be divided into 25,000 shares of par value of \$10 each, and empowered to transact a general casualty, accident, and industrial insurance business; that plaintiffs were the owners of full-paid stock in defendant in the aggregate sum of \$40,725, having paid \$15 per share therefor; that the total of defendant's stock subscribed for and issued was \$106,000; that prior to March, 1908, defendant attempted to carry on business in West Virginia and issued a small number of casualty policies under the laws then existing in that state permitting a corporation with a capital of \$30,000 to do such business, but that on February 25, 1907, the Legislature of the state forbade any corporation from writing casualty policies without a cash capital of \$100,000 invested in securities with market value at par, but permitted health and accident insurance companies with a capital of \$10,000 to write certain small policies; that defendant continued under its license to carry on busi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ness until 1908, when, being unable to comply with the new statute as to casualty companies, it received then a license to write the small policies provided for companies with \$10,000 capital good until March, 1909; that it was found impracticable to carry on a successful business on this restricted basis and renewal of this license was not secured, and since that time defendant has written no insurance of any kind in West Virginia or elsewhere and for more than two years past has suspended its proper corporate business, ceased to maintain any place of business in the state, removed all of its assets of every kind to the city of Philadelphia, Pa., where expensive offices are maintained, but without doing any insurance business there or being in condition to comply with the laws of Pennsylvania permitting it to do business there; that its officers for more than two years have been seeking to sell sufficient capital stock to enable it to resume its corporate business, but all such efforts made at large expense have failed and have been abandoned as hopeless; that on March 17, 1910, a proposition was submitted to defendant's stockholders by the Columbus Securities Company for the exchange of all defendant's outstanding full-paid stock for an equal amount of the paid-up stock of the securities company, the latter to deposit in defendant's treasury a sum sufficient to enable it to do business; that this securities company was purely a holding company, having no substantial assets, interested in two other small casualty companies, and its purpose is alleged to be to effect a consolidation of the three; that plaintiffs as stockholders were unwilling to exchange their stock for that of the securities company or to be parties to the scheme, and the officers and directors of defendant are charged with violating their trust obligations to plaintiffs and other stockholders by seeking to consummate it. It is then charged that the officers and directors of defendant have no other feasible plan for financing it, that they have grossly mismanaged its affairs, have expended large sums in expensive offices, for salaries, supplies, printing, stationery, furniture, fixtures, since the suspension of business, amounting to nearly \$7,000, without benefit to the company and to the depletion of its assets, and, further, have invested considerable sums received from stock subscribers in securities with an admitted market value less than par in express violation of the laws of West Virginia in that behalf made and provided, have refused to pay valid claims reduced to judgment until threatened with the appointment of a receiver by the insurance commissioner of West Virginia, and have refused owners of nearly 35 per cent. of defendant's stock to examine and audit its books and accounts. The prayer of the bill was for a winding up of the affairs of defendant, its dissolution, a distribution of its assets, an injunction against it, its officers and agents, from making further depletion and disposition of the assets, and for immediate appointment of a receiver to take possession of and preserve the same.

Upon presentation of this bill, an order was entered by this court setting the cause down for hearing upon the motion for injunction on June 14, 1910, the first day of the next term at Parkersburg, requiring five days' notice to be given of such hearing, and, deeming necessity existing therefor, appointing a receiver to take immediate charge of and to preserve the property and assets of defendant, but reserving the right to it to move for the discharge of such receiver at said hearing on June 14, 1910, without further notice to plaintiffs, if it could show cause therefor. On June 14, 1910, the day set for such hearing, the defendant tendered its answer, the affidavits of J. D. Hendrickson and Lee J. Fristoe, moved the discharge of the receiver, and the dismissal of the bill. Two days after, the plaintiffs tendered the affidavit of R. Nelson Stevens to the filing of which objection was made by defendant, and also filed a general replication to defendant's answer. The several motions for injunction, for the discharge of the receiver, and for dismissal of the bill were fully argued and submitted.

By its answer the defendant admits its incorporation as charged, the change in the law requiring an increased capital of \$100,000 in order to do casualty business, its determination to increase its capital to \$250,000; denies that certain named ones of plaintiffs are stockholders; sets forth

that others of the plaintiffs claim more stock than they are entitled to, and what is alleged to be the true holdings of those plaintiffs, who are stockholders, aggregating 2,265 shares of the par value of \$22.650 of a total of 12,268 shares of par value of \$122,268 issued and outstanding; charges it carried on a profitable business until the law was amended in 1907; admits that its business thereafter was limited, and that as a matter of wise business policy no license was taken out after March, 1909, but effort was made at once to secure by subscriptions the increased capital required by the new law, that sufficient subscriptions were obtained practically, were called to be paid in, which payments were, by many stockholders, including a number of the plaintiffs, delayed in payment, whereby the company was hampered in its effort to meet the requirements of the law; denies that it has suspended business for more than two years; denies that it has ceased doing business in West Virginia and removed all its assets to Philadelphia, but alleges it has for some months maintained offices there; admits it has not applied for the right to do business in Pennsylvania under her laws, but charges it has done business in West Virginia down to March, 1909; alleges that in March, 1910, by reason of the default of the stockholders in paying subscriptions, at a stockholders' meeting it was determined by a vote of 8,848 shares, more than 60 per cent. of the whole, to accept the proposition of the securities company to exchange stock, the latter's agreement to deposit in defendant's treasury a sum sufficient to enable it to do business; denies the securities company's purpose to be to consolidate it with the other two companies in which such securities company was interested; denies all charges of mismanagement and excessive expenses, and also denies the investment of its funds "knowingly or purposely" in securities at less than par contrary to the laws of West Virginia; denies the refusal to pay valid claims; admits the auditor and insurance commissioner of West Virginia threatened through mistake to have a receiver appointed, but afterwards declared himself mistaken and deplored it, and generally denies all charges of having abandoned business and of misconduct or abuse of power charged in the bill. This court by reason of stress of court work being unable to pass immediately upon the questions involved, an appeal within 30 days from the appointment of the receiver to its action in making such appointment has been granted and perfected, but with understanding with counsel that, if this court should determine that the motion to discharge the receiver should be sustained, such appeal would be dismissed.

John Marshall and Luther E. Mackall, for plaintiffs.

H. F. Stockwell and W. W. Van Winkle, for defendant.

DAYTON, District Judge (after stating the facts as above). The motions to discharge the receiver and dismiss the bill must be considered as equivalent to a demurrer alleging in effect that no equity appears on the face of the bill. The affidavits and answer can properly be considered the answer in the nature of an affidavit upon plaintiffs' motion for preliminary injunction.

The defendant insists that the receiver be discharged and the bill dismissed: First. Because not complying with equity rule 94 in failing to allege "that the suit is not a collusive one to confer jurisdiction," and omitting to allege with particularity the efforts of plaintiffs to secure such action as they desire on the part of managing directors, or "if necessary of the shareholders and the cause of failure to obtain such action." Second. Because by equity rule 94 the bill is required to be verified by oath, which must be positive, and not upon information and belief. Third. Fraud, mismanagement, and misappropriation is stated upon information and belief with no

positive statement of any act or circumstance positively and specifically sworn to.

It does not seem to me that this case is one coming within the scope of equity rule 94, which is restricted to suits "founded on rights which may properly be asserted by the corporation." On the contrary, it seems to me the case is founded upon section 57 of chapter 53 of the Code of West Virginia (section 2285) 1906, providing that, at the instance of not less than one-third in interest of the stockholders of a corporation desiring to wind up its affairs, appeal may be made to a court of equity for the purpose, and, "if sufficient cause therefor be shown," such court may decree such dissolution, make such orders and decrees and award such injunctions as justice and equity may require, and upon section 58, c. 53 (Code 1906, § 2286), which provides:

"When a corporation expires, or is dissolved or before its expiration or dissolution, upon sufficient cause being shown therefor, such court * * * may on application of a creditor or stockholder, appoint one or more persons to be receivers to take charge of and administer its assets; and whether such receiver be appointed or not, may make such orders and decrees and award such injunctions in the cause as justice and equity may require."

Under the first section cited, it would seem that the power is vested in courts of equity at the instance of stockholders holding one-third of the stock "if sufficient cause therefor be shown" to wholly dissolve the corporation. Under the second section quoted, it would seem that such court of equity is vested with power at the instance of a single creditor or stockholder, before or after dissolution "upon sufficient cause being shown therefor," to appoint "receivers to take charge of and administer its assets," and "make such orders and decrees and award such injunctions as justice and equity may require." Looking to the allegations of the bill alone and taking them to be true, as I must do upon the determination of these motions to dismiss it for want of equity apparent on its face and to discharge the receiver, I am constrained to hold its allegations to be sufficient to bring it within the scope of both of these statutory provisions.

Construing the latter section, the Supreme Court of Appeals of West Virginia in *Crumlish, Adm'r, v. Shen. Val. Railroad Co.*, 28 W. Va. 623, held:

"It is ordinarily necessary, before a court of equity can interfere with the management of a corporation at the suit of a stockholder, to show that the directors or managing officers having control of it have refused to act in its behalf. But, if it be made to appear in any manner that the corporation cannot safely be left to obtain relief through the action of its officers, equity will interfere at the suit of a stockholder without proof of a demand upon the managing agents and their wrongful refusal or neglect to proceed on its behalf.

"When it is shown that the corporation has ceased to exist either in law or in fact, or that it has abandoned its corporate existence by the election of directors and the appointment of officers to manage its affairs, a stockholder may without showing more bring suit on behalf of himself and the other stockholders against the corporation or others having assets belonging to it for the protection of his rights."

In this bill it is alleged that plaintiffs in the aggregate hold \$10,725 of the total of \$106,000 capital stock actually subscribed for and

issued; that the corporation has suspended its corporate business for more than two years continuously, which, if true, would warrant its dissolution at the instance of the state; that it has not sufficient assets to meet the requirements of the laws of the state permitting it to do business; that it has practically abandoned, as hopeless, the effort to sell sufficient stock to enable it to do so; that in consequence it has sought to secure the turning over to another company by its stockholders of their stock in exchange for that of this other company; that it has invested a considerable portion of the money secured from stock subscriptions in securities with a market value admitted to be less than par and of doubtful value, contrary to the express law of the state, governing insurance companies; that the capital of the company subscribed for investment in what was presumed would be a going, dividend paying company is being dissipated in payment of large salaries and excessive expenditures for office rents, stationery, printing, furniture, and fixtures, aggregating approximately \$7,000 annually, with no business done and no hope of doing business in the future wherefrom income would be derivable.

All these facts may be wholly refuted by evidence hereafter taken in the cause, but so long as they are admitted to be true, as they must be upon this motion to discharge the receiver and dismiss the bill, I think they fully disclose the necessity for the intervention of this court of equity. These motions must therefore be overruled. The temporary injunction prayed for will be granted, restraining defendant, its officers and agents, from making any further disposition of the assets of the company until the further order of this court, upon execution of bond in the penalty of \$20,000.

THE P. P. MILLER et al.

(District Court, W. D. New York. May 9, 1910.)

1. SEAMEN (§ 29*)—PERSONAL INJURIES—SAFE PLACE TO WORK.

Where libellant had had an extended experience of eight or nine years as fireman on ocean steamers, and had been an employé of vessels in various capacities since boyhood, though probably not as a deck hand, when he took employment on a vessel as deck hand, and was an intelligent workman, and knew enough about the handling of tow lines to understand the obvious dangers of such employment, there was no duty on the vessel to warn or instruct him against obvious dangers in respect thereof; she not having insured his safety, and her obligation to him being fulfilled when a reasonably safe place was provided for him to work in, and the vessel was not liable for injuries to him from becoming entangled in a tow line drawn through the chock by a tug.

[Ed. Note.—For other cases, see Seamen, Dec. Dig. § 29.*]

2. NEGLIGENCE (§ 5*)—ACTS CONSTITUTING—CUSTOM.

One committing apparently negligent acts is not relieved from liability therefor, though such acts constituted a custom or practice.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 7; Dec. Dig. § 5.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. MASTER AND SERVANT (§ 150*)—NEGLIGENT ACTS OF EMPLOYÉS—DUTY OF MASTER.

Where a custom or practice is adopted by employés from which it is likely that injuries may result, it becomes the employer's duty to exercise reasonable precaution to prevent the continuance of such practice.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 150.*]

4. SEAMEN (§ 29*)—INJURIES TO EMPLOYÉ—NEGLIGENCE.

A custom of employés of a tug, which was not a general custom, of suddenly and forcibly moving the tug ahead which had just taken the tow line of a tow and without notice to the tow, or the seamen on board thereof having charge of the line as it runs out through the opening, where such employés were stationed where they could not see the tug, was an act apparently fraught with danger; and it was an omission of duty of the tug not to warn the tow and the servant having charge of the line thereof of her intention to pull on the tow line rendering the tug liable for injuries to such an employé of the tow proximately resulting therefrom, in the absence of his contributory negligence.

[Ed. Note.—For other cases, see Seamen, Dec. Dig. § 29.*]

5. SEAMEN (§ 29*)—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.

Where a steamer which was to be towed was not at the time ready to leave the dock, she not having released the dock lines, or signaled the tug to proceed ahead as was customary, and an employé on the tow had no reason to suppose that the tug would suddenly start immediately after enough of the tow line had been passed out and wound around the post of the tug, which the tug did, injuring such employé, his failure to stand away from the tow line while it was passing out did not constitute contributory negligence.

[Ed. Note.—For other cases, see Seamen, Dec. Dig. § 29.*]

In Admiralty. Libel by Thomas McQueen against the steamer P. P. Miller, her engines, etc., and another. Libel dismissed as to the mentioned respondent, and a decree for libelant as to the other.

Gorman & Harwood and George Clinton, Jr., for libelant.

Goulder, Holding & Masten, for steamer P. P. Miller.

Hoyt & Spratt and Alfred L. Becker, for tug Yale.

HAZEL, District Judge. This is a libel in rem against the steamer P. P. Miller and the steamtug Yale to recover damages for injuries sustained in November, 1908, by the libelant, who was employed as a deck hand on board the steamer through the asserted negligence of both the steamer and the tug. The steamer was tied fast to the Lackawanna coal dock at Buffalo preparatory to departing on a trip up the lakes, and just before the accident the libelant and two other seamen were directed by the mate of the steamer to pass the harbor line to the tugboat Yale, which had been engaged to tow the steamer out to the open lake. One of the seamen sent forward to handle the lines lifted the tow line from the breast hook, and thrust the end through the forward chock on the right-hand side of the vessel, and about 40 or 50 feet of the line had been passed out. Meanwhile the libelant was directed by the mate to unhook the chain bridle, which was at the inboard end of the tow line, when suddenly, and while thus engaged, the tow line without warning forcibly and rapidly ran out through the starboard chock. The libelant in an endeavor to escape the entanglement had his left leg severed from his body in the bight of the line,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 180 F.—19

and it was carried with the line through the chock. It is conceded that the sudden running out of the tow line was due to the movement ahead of the tug and consequent strain on the line. The asserted negligence of the steamer is principally predicated upon her failure to instruct the libellant as to his duties and for omitting to properly acquaint him with the dangers and risks attending work of this character. The negligence of the tug Yale is charged owing to her quick movement ahead, causing the tow line to strain and run out through the chock of the steamer without giving notice of her movement to the libellant and those handling the line.

As to the responsibility of the steamer: The testimony of the libellant that he informed the mate of the P. P. Miller who employed him that he was inexperienced, and not familiar with the duties of deck hand, or with handling the lines, is contradicted by the mate. Libellant admits that he expressed a wish to ship as a common seaman, and also that he had an extended experience of eight or nine years as fireman on ocean steamers. Indeed, his testimony shows that he had been an employé of vessels in different capacities since boyhood, though probably not as deck hand, having sailed to India, South America, around the Horn and generally around the world. It is not conceivable that his ignorance of the duties of deck hand extended to his utter inability to properly handle a tow line so as to entitle him to invoke the rule of negligence of the vessel for failure to properly instruct him in the dangers of the employment. He is an intelligent workman, and knew enough about the handling of lines to understand the obvious dangers from employment of this description. Hence there was no duty on the steamer to warn or instruct him against any obvious dangers. She did not insure his safety, and her obligation to him was fulfilled when a reasonably safe place was provided for him to work in. True, the vessel under certain circumstances is obliged to care for a seaman injured in its service while sick, to cure him, and furnish maintenance so long as the voyage continues (*The Osceola*, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760), but no recovery is sought on that ground, and, in view of what follows regarding the sole liability of the tugboat, this rule has no application. In my judgment there was no negligence on the part of the steamer contributing to libellant's unfortunate injury, and as to her the libel must be dismissed.

The case, however, as to the Yale stands differently. It is clearly shown that the master of the tug should have known that there were seamen handling the line in the windlass room of the steamer at the time the tug took a quick pull on the line. He could not see the libellant or his associate, and they were unable from where they stood to see the tug without first looking through the port light. The witnesses for the respondent, Hazen and O'Neil, testified that the line became jammed in the chock of the steamer, but the master of the tug testified that he was not so informed. His version is that, as soon as the line was made fast on the timber head of the tug, he started ahead a short distance without giving notice to the steamer because it was his custom to take the tow line of the steamer in that way; that customarily a slack was taken on the line by working the engine ahead; that whenever the line became jammed in the chock it was his custom

to warn the men on board the vessel to clear the line. Five expert witnesses for the Yale substantially testified that it was customary to propel the tug ahead a short distance without giving notice to the steamer or the linesmen directly after taking the line, and making it fast to the tow post so as to straighten out kinks or keep the line from trailing in the water, and then remain inactive, but in readiness to tow out the vessel on the instant the "all right" signal is given. This testimony, however, was contradicted by witnesses sworn in behalf of the libelant and of the steamer Miller, which indicates a different and safer practice. The weight of the evidence supports the claim that there was no such general custom as claimed by the tug Yale. The master of the Miller had never heard of it, and did not know that such was the custom of the Yale. The law is well settled that a course of conduct which is apparently negligent cannot relieve the wrongdoer from the consequences of his act. *Fletcher v. Baltimore & P. R. Co.*, 168 U. S. 135, 18 Sup. Ct. 35, 42 L. Ed. 411; *Wright v. Boller*, 42 Hun, 77. Where a custom or practice is adopted by employes from which it is likely that injuries may result, it becomes the duty of the employer to exercise reasonable precaution to prevent the continuance of such practice; hence the custom of suddenly and forcibly moving the tug ahead which had just taken the tow line of the steamer and without notice to her or the seamen on board the steamer having charge of the tow line as it runs out through the opening and who are stationed where they cannot see the tug was an act apparently fraught with danger, and it was an omission of duty not to warn the steamer and the libelant of her intention to pull on the tow line. The witness Hazen testified that, after taking the tow line and tying it around the tow post on the tug, some one engaged in handling the line on the steamer called out to "go ahead" and that he repeated the call to Capt. Green of the tug or to the engineer, but as neither Capt. Green nor the engineer nor any other witness gives corroborative testimony, and as the libelant denies hearing it and disclaims hearing Davidson, his associate (who was not interrogated on this point), do so, I cannot give such testimony full credence. Considering all the evidence, it is not thought improbable that, as claimed by the witnesses Hazen and O'Neil, the line was jammed in the chock and did not run out freely, and that an admonition was given by Hazen to the engineer, who was not called as a witness, to go ahead, which he did with alacrity, and before the master of the tug knew of the jamming and before warning was given to the steamer. I am satisfied that the quick starting ahead of the tug without warning libelant of her intention was the approximate cause of the accident, and the tugboat was negligent as a result of which libelant without fault on his part sustained the injuries complained of. The steamer was not at this time ready to leave the dock. She had not released the dock lines nor signaled the tug as was customary to proceed ahead, and libelant had no reason to suppose that the tug would suddenly and forcibly start immediately after enough of the tow line had been passed out to wind around the post of the tug. Under the circumstances, the claim of contributory negligence based upon libelant's failure to stand away from the tow line is not proven, and I think he was without fault.

As to the damages: Libellant lost his left leg just above the knee, and, as may well be supposed, suffered great pain. He was 42 years old, unmarried, strong, athletic, and robust, and has now become crippled and manifestly will be hampered in the performance of his vocation as a fireman of engines and also in the ordinary work of a laborer. He will probably always have some difficulty in securing remunerative employment.

Under the circumstances I think an award of \$5,500 for the injuries he has sustained, the pain and suffering, the expense of his cure, the loss of time, and his inability to earn his usual wage would not be unreasonable.

A decree may be entered accordingly.

COMMONWEALTH OF PENNSYLVANIA, to Use of HUIDEKOPER, v.
FIDELITY & DEPOSIT CO. OF MARYLAND.

(Circuit Court, W. D. Pennsylvania. April 29, 1909.)

No. 125.

1. COURTS (§ 356*)—FEDERAL COURTS—PROCEDURE.

A suit in a federal court on a supersedeas bond given under the Pennsylvania statute of May, 1897, regulating practice on appeals to the supreme and superior courts, is governed by the laws and decisions of that state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. § 356.*]

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 533.]

2. APPEAL AND ERROR (§ 1106*)—DISPOSITION—INTERLOCUTORY JUDGMENT.

Under Act Pa. May 20, 1891 (P. L. 101), empowering the Supreme Court to enter such judgment as may be deemed proper, on appeal in a suit for an accounting the Supreme Court could make an interlocutory order remitting the record for a finding by the referee on a particular point.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4392-4393; Dec. Dig. § 1106.*]

3. APPEAL AND ERROR (§ 1232*)—DISPOSITION—INTERLOCUTORY JUDGMENT.

An order of the Supreme Court of Pennsylvania, on appeal in a suit for accounting, remitting the record for a finding by the referee respecting a credit claimed by defendant, was an interlocutory and not a final judgment, as affecting the liability of the surety on a supersedeas bond.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1232.*]

4. PRINCIPAL AND SURETY (§ 145*)—SUPERSEDEAS BOND—LIABILITY.

The surety on a supersedeas bond is concluded by decisions and orders of the appellate court.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 397-401; Dec. Dig. § 145.*]

Action by the Commonwealth of Pennsylvania, to the use of Arthur C. Huidekoper, against the Fidelity & Deposit Company of Maryland. Judgment for plaintiff.

S. S. Mehard and John O. McClintock, for plaintiff.

Charles F. Patterson (Edgar H. Gans and Thomas A. Whelan, of counsel), for defendant.

YOUNG, District Judge. In pursuance of a stipulation in writing waiving a jury this cause was tried by the court without the intervention of a jury on the 9th day of February, 1909. And now, April 29, 1909, upon due consideration the court finds the facts to be as follows:

First. The bond sued on in this case was given by Samuel B. Dick upon taking an appeal to the Supreme Court of Pennsylvania in the case of Samuel B. Dick v. Arthur C. Huidekoper from the final decree of the court of common pleas of Crawford county, at No. 1, November term, 1900, in equity. By that bond the defendant, the Fidelity & Deposit Company of Maryland, a corporation, undertook "that if the said appellant will prosecute this appeal with effect, and will pay all costs and damages awarded by the appellate court, or legally chargeable against him, then this obligation to be void; otherwise to remain in full force and virtue." Thereupon the record was sent to the Supreme Court of Pennsylvania and docketed at No. 283, January term, 1905, and on April 24, 1906, the cause was argued upon the appeal in the appellate court and thereafter, a question having arisen as to certain shares of stock which it was alleged might be a credit to the appellant, the appellate court ordered briefs to be filed by counsel for the parties and upon the filing of briefs the court ordered a reargument.

Second. In the meantime Samuel B. Dick, the plaintiff, having died, Harriet D. Speer, executrix of his last will and testament, was substituted as plaintiff.

Third. The appellate court on May 27, 1907, filed the following opinion:

"In this case we have not discovered error in connection with any question of fact or of law that was raised and passed upon below. On the material question of fact as to whether Dick advanced for Huidekoper, in the nature of a loan, three thousand shares of the capital stock of the Pittsburgh, Shenango & Lake Erie Railroad Company, in what is known as the Carnegie deal, there is no distinct finding, and the record is remitted with direction that the court recommit the case to the referee, that he may pass upon, subject to its review, this one question, on the evidence already taken before him; and, if there should be a finding that such stock was advanced for Huidekoper, in the nature of a loan, Dick is to be credited with the same, at its market value at the time of the trial before the referee, December 9, 1901, together with interest."

Fourth. Thereupon the record was remitted to the court of common pleas of Crawford county, and that court upon June 8, 1907, made the following order:

"June 8, 1907. Pursuant to the foregoing it is hereby ordered that the record in this case be and is hereby recommitted to the referee for the purpose of carrying out the directions contained in the foregoing order."

Fifth. Pursuant to that order the referee passed upon the question set out in the order of the Supreme Court which had been referred to him and made the following conclusion:

"My conclusion is that there never was any agreement by Huidekoper to deliver 3,000 shares of the stock of the Pittsburgh, Shenango & Lake Erie Railroad Company, for the one-half of the stock delivered by Dick of his own shares to make up the amount of stock going to the Carnegie Steel Company;

but that Huidekoper was liable only to account to Dick for the value of the stock held by him in excess of that held by Dick in the final settlement, at the value of fifteen dollars per share, as the account between them has already been stated by me."

Sixth. Thereupon the court of common pleas of Crawford county reviewed the report and finding of the referee upon the exceptions filed thereto by the respective parties, and on March 27, 1908, affirmed and confirmed the report of the referee.

Seventh. Upon April 9, 1908, Arthur C. Huidekoper, the defendant, filed his petition in the Supreme Court, at No. 283, January term, 1905, reciting that the appeals in the above case were argued on April 24, 1906; that the question of credit for certain stock had arisen; that the court had ordered the record to be remitted to the referee of the lower court upon that question, the proceedings before the referee and the review thereof by the lower court, and the confirmation of the report of the referee; and, further, that the proceedings directed by the appellate court in its order of May 27, 1907, had been completed, and that the record was now ready for final action by the appellate court, and praying that the record be returned and a time fixed for argument.

Eighth. To this petition, on April 9, 1908, Harriet D. Speer, executrix of Samuel B. Dick, the plaintiff, filed an answer reciting that the case, by writ of remittitur on the 27th day of May, 1907, had been sent to the court of common pleas of Crawford county, directing that court to pass upon a question which in the previous hearing had been overlooked; that the case was duly heard by the referee, and his report thereon confirmed absolutely by the lower court; and that the same now remained of record in that court. The answer concludes as follows:

"That no appeal has been taken from the decree entered in said court, and your respondent respectfully suggests that this court has no jurisdiction of the said cause at this time nor power to make the order prayed for in the said petition of the said Huidekoper, and will not have any power or control of the said record until and unless an appeal be taken to this court from the decree of the court below."

Ninth. Thereupon the Supreme Court on April 21, 1908, made the following order:

"Petition granted, and it is ordered that the record be returned to this court and the case placed on argument list for week commencing April 27, 1908, that counsel for estate of S. B. Dick, deceased, may be heard, if they desire, on the question passed upon by the court below in pursuance of order of May 27, 1907."

Tenth. Thereupon, on May 18, 1908, the appellate court filed the following opinion at No. 283, January term, 1905, of said court:

"The appeal in this case was from an order confirming the report of a referee appointed to state an account between partners. Upon the argument of the appeal in this court, it appears that there was a material matter as to which there was no distinct finding, and the case was recommitted to the referee. On all other questions the opinion of the court was expressed in the order filed, in which it was said: 'In this case we have not discovered error in connection with any question of fact or of law that was raised and passed upon below. On the material question of fact, as to whether Dick

advanced for Huidekoper in the nature of a loan 3,000 shares of the capital stock of the Pittsburgh, Shenango & Lake Erie Railroad Company, in what is known as the "Carnegie deal," there is no distinct finding, and the record is remitted with direction that the court recommit the case to the referee, that he may pass upon, subject to its review, this one question, on the evidence already taken before him.' The referee, after a careful consideration of this question, reported that Dick had not advanced stock for Huidekoper, and his report was confirmed by the court of common pleas. The only open question in the case is one of fact as to the correctness of the referee's finding. We see nothing in the evidence that would warrant a reversal of the decree. The decree is affirmed."

Eleventh. From the order or decree of the court of common pleas of Crawford county confirming the report of the referee an appeal was taken by Harriet D. Speer, executrix of Samuel B. Dick, deceased, against Arthur C. Huidekoper, and the record was returned to the Supreme Court of Pennsylvania, where the case was docketed at No. 159, January term, 1908, which was disposed of on May 18, 1908, by the court making the following order:

"The decree is affirmed. Per curiam."

Twelfth. Thereupon, upon the 1st day of June, 1908, the Supreme Court of Pennsylvania, by its writ of remittitur, directed the record at No. 283, January term, 1905, and the record at No. 159, January term, 1908, to be remitted to the court of common pleas of Crawford county for execution or otherwise.

Thirteenth. Neither the said Samuel B. Dick nor Harriet D. Speer, executrix, has paid the costs or damages awarded by the decree of the court of common pleas of Crawford county and affirmed by the appellate court.

Fourteenth. That the true and correct amount of costs as duly taxed and entered of record in said case at No. 1, November term, 1900, in the court of common pleas of Crawford county, in equity, is the sum of \$6,463, one-half of which amount being the sum of \$3,231.50.

Fifteenth. That the claim and demand made in this case on behalf of Arthur C. Huidekoper, the use plaintiff, is therefore the sum of \$184,839.69, together with interest thereon from the 11th day of September, A. D. 1905, being the debt and interest, and the further sum of \$3,231.50, being one-half of said costs, and together being the amount of the decree and judgment in favor of said Arthur C. Huidekoper and against said Samuel B. Dick and one-half of the costs of said case, so as aforesaid recovered at No. 1, November term, 1900, in the court of common pleas of Crawford county, in equity, and affirmed by the Supreme Court of the state of Pennsylvania, as aforesaid.

Sixteenth. That the said Fidelity & Deposit Company of Maryland, surety on said supersedeas bond as aforesaid, having likewise neglected and refused to pay to the use plaintiff, Arthur C. Huidekoper, the said debt and interest and said one-half of said costs, this suit was brought upon said supersedeas bond in the name of the commonwealth of Pennsylvania, for the use of Arthur C. Huidekoper, plaintiff, against the Fidelity & Deposit Company of Maryland, the defendant,

in the court of common pleas of Crawford county, Pa., at No. 129, September term, 1908, and after service of process in said suit upon said defendant the said cause, upon the petition of said defendant, was removed from said court of common pleas of Crawford county, Pa., into this the Circuit Court of the United States for the Western District of Pennsylvania.

Opinion.

This case turns upon the question of law whether the order of the Supreme Court of Pennsylvania, made on May 27, 1907, by which the record in the case then pending at No. 283, January term, 1905, of said court, wherein Samuel B. Dick was plaintiff and Arthur C. Huidekoper was defendant, was a final disposition of that case, and that thereby the condition of the bond given by the appellant upon which the Fidelity & Deposit Company of Maryland was surety, that the appellant should prosecute his appeal with effect, had been performed and the surety no longer bound. This being a suit upon a supersedeas bond given under the Pennsylvania statute of May, 1897, regulating the practice, bail, costs, and fees on appeals to the Supreme and superior courts of the state is to be determined by the laws and decisions of that state. This position is supported by a long line of cases decided by the Supreme Court of the United States. It is sufficient to refer to the case of *Elmendorf v. Taylor*, 10 Wheat. 159, 6 L. Ed. 289, where Chief Justice Marshall said:

"The judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe which professes to be governed by principle, would, we presume, undertake to say that the courts of Great Britain or of France or of any other nation had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation, as the true sense of the law, and feel ourselves no more at liberty to depart from that construction, than to depart from the words of the statute. On this principle, the construction given by this court to the Constitution and laws of the United States is received by all as the true construction; and, on the same principle, the construction given by the courts of the several states to the legislative acts of those states, is received as true, unless they come in conflict with the Constitution, laws, or treaties of the United States."

In this case the bond was executed and delivered and to be performed in the state of Pennsylvania, pursuant to the requirements of the act of Assembly of 1897 of that state, regulating practice upon appeals, and entered as a supersedeas bond upon an appeal from a decree of a lower court to the Supreme Court of that state.

The Supreme Court of Pennsylvania has considered and decided that its order of May 27, 1907, was not a final order, but only interlocutory. It has done this as appears by the words of the order itself. These words are:

"And the record is remitted with direction that the court recommit the case to the referee, that he may pass upon, subject to its review, this one question, on the evidence already taken before him; and, if there should be a finding that such stock was advanced for Huidekoper, in the nature of a loan, Dick is to be credited with the same, at its market value at the time of the trial before the referee, December 9, 1901, together with interest."

That court had power to make such an interlocutory order under the act of Assembly of May 20, 1891 (P. L. 101), which provides:

"The Supreme Court shall have power in all cases to affirm, reverse, modify, or amend, a judgment, order or decree appealed from, and to enter such judgment, order or decree in the case as the Supreme Court may deem proper and just without return of record for amendment or modification to the court below."

It was not a return of the record, but simply a recommitment of the record to the lower court so that the appellate court might be advised by a distinct finding of the fact which, while it has been passed upon as we view it, had not been separately and distinctly found. After argument of the appeal, it having been brought to the attention of the appellate court that there was a question concerning certain stock which the appellant claimed should be credited to him by the appellee, the court ordered briefs to be filed and afterwards that the case be reargued and reargument was made in the appellate court on January 21, 1907. After that argument the court made the order of May 27, 1907, recommitting the case to determine that question alone, still retaining the case and refraining from making a final decree until its order was complied with. It having then been brought to the attention of the appellate court by the petition of the appellee that its order had been complied with and praying that the record might be sent up for final disposition of the appeal, to which appellant filed an answer denying the jurisdiction of the court to consider and pass upon the appeal unless an appeal was taken from the decree of the lower court confirming the report of the referee upon the question committed by the order of the appellate court on May 27, 1907, such appeal not yet having been taken, the appellate court, upon April 21, 1908, granted the petition, ordered that the record be returned, ordered a reargument, which was had on April 28, 1908, and thereafter, on May 18, 1908, not only filed an opinion and affirmed the decree at No. 283, January term, 1905, which was the original appeal, but also disposed of the record at No. 159, January term, 1908, by marking the decree again affirmed, and caused its writ of remittitur to be issued and the record sent down for execution or otherwise, in both the case at No. 283, January term, 1905, and No. 159, January term, 1908. All these proceedings subsequent to the raising of the question after the argument in the appellate court upon April 24, 1906, until the final order of affirmance on May 18, 1908, show that the court had presented to it, considered and decided that the order of May 27, 1907, was only an interlocutory order, and one which it had power to make under the act of 1891.

Were we required to pass upon the question presented by this record we should unquestionably reach the same conclusion. From an inspection of the whole record, viewed in the light of the statutes of Pennsylvania regulating appeals to the Supreme Court, we would unhesitatingly conclude that the order of May 27, 1907, was only an interlocutory order and made for the purpose of advising the court having the appeal upon a single question so that it might, as provided by the act of 1891, either affirm, reverse, modify, or amend the decree of the court below.

The Supreme Court of Pennsylvania having finally disposed of the case by its order of affirmance of May 18, 1908, that case was at an end, and the appellant had failed to prosecute his appeal with effect and was therefore bound to pay the costs and damages awarded by the appellate court. Neither the appellant nor his executrix having paid the costs and damages awarded, the defendant in this suit is bound as surety to do so. The defendant in this case having been the surety upon the supersedeas bond was not a stranger to the proceedings thereafter conducted by the appellant in the Supreme Court of Pennsylvania, but is concluded by the decisions and orders of that court. This has been decided not only in Pennsylvania and many other of the states of the Union, but by the Supreme Court of the United States, notably in the case of *Stovall v. Banks*, 77 U. S. 583, 19 L. Ed. 1036, where Mr. Justice Strong said:

"It has been argued on behalf of the defendants in error that the decree of the superior court, if admitted, would have been only *prima facie* evidence against the sureties in the bond. Were that conceded it would not justify the exclusion of the evidence. But the concession cannot be made. The decree settled that the administrator of the estate, Alfred Eubanks, held in his hands sums of money belonging to the equitable plaintiffs in this suit, as distributees of the intestate's estate, which he had been ordered to pay over by a court of competent jurisdiction, and the record established his failure to obey the order. Thereby a breach of his administration bond was conclusively shown. Certainly the administrator was concluded. And the sureties in the bond are bound to the full extent to which their principal is bound. A principal in a bond may be liable beyond the stipulations of the instrument, independently of them, but so far as his liability is in consequence of the bond, and by force of its terms, his surety is bound with him. There may be special defenses for a surety arising out of circumstances not existing in this case, but in their absence, whatever concludes his principal as an obligor concludes him. He cannot attack collaterally a decree made against an administrator for whose fidelity to his trust he has bound himself." *Moore v. Huntington*, 84 U. S. 417, 21 L. Ed. 642, and many others.

Upon the facts and law of the case as above stated the court finds that judgment should be rendered in this case, first for the commonwealth of Pennsylvania in the amount of the obligation of said bond, to wit, in the sum of \$380,000; and, second, for Arthur C. Huidekoper, the use plaintiff, and against the Fidelity & Deposit Company of Maryland, defendant, for the amount shown by the said decree of the 18th day of September, A. D. 1905, in the court of common pleas of Crawford county, Pa., in equity, at No. 1, November term, 1900, as affirmed by the Supreme Court of Pennsylvania at No. 283 of January term, 1905, Eastern district, to wit, for the sum of \$184,839.69, with interest thereon from the 11th day of September, A. D. 1905, being the debt and interest, and for the further sum of \$3,231.50, being one-half of the costs of said case in the lower court.

THE OREGON.

(District Court, E. D. New York. July 27, 1910.)

1. COLLISION (§ 37*)—VESSELS MEETING.

A boat, having accepted the two-whistle signal of a ferryboat approaching on the port side, and knowing that the ferryboat intended to pass down the river, and was compelled to turn to starboard on account of projecting pierheads, was bound to maintain her own course, so as to allow the ferryboat room to proceed.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 34-36; Dec. Dig. § 37.*]

Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

2. COLLISION (§ 108*)—VESSELS MEETING—MANEUVERS IN EXTREMIS.

Where collision was imminent, a ferryboat was not negligent in making an incorrect maneuver, where it did what seemed to be best.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 225-231; Dec. Dig. § 108.*]

3. COLLISION (§ 123*)—NEGLIGENCE—BURDEN OF PROOF.

On libel against a ferryboat for a collision, the burden was on libellant to show negligence on the ferryboat's part.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 123.*]

4. COLLISION (§ 125*)—NEGLIGENCE—EVIDENCE—SUFFICIENCY.

Evidence in libel against a ferryboat for a collision *held* insufficient to show that the captain of the ferryboat was negligent.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 266-279; Dec. Dig. § 125.*]

In Admiralty. Libel by United States against the ferryboat Oregon. Libel dismissed.

William J. Youngs, U. S. Atty.
Herbert Green, for claimant.

CHATFIELD, District Judge. The United States boat Traffic, while proceeding up the East River to the Brooklyn Navy Yard, passed about midway under the Brooklyn Bridge, and shaped her course somewhat toward the eastern side of the river, so as to round in to the Navy Yard at a reasonable distance from the pierhead upon the down-river side of the yard. Some distance up the river from the point where the Traffic would turn in to the Navy Yard was the ferryboat Oregon, proceeding down the river at a distance of 300 or 400 feet from shore, and following the general line of the pierheads, while an Erie Railroad tug was between the Oregon and the shore. According to the captain of the Traffic, another boat coming down the river, not far astern and to the starboard of the Oregon, passed to port of the Traffic as she reached the neighborhood of the collision, which was just below the Navy Yard and some 400 feet from shore.

The Traffic was going at about 9 knots speed, which with the flood tide would give her a total speed over the ground of probably 11 knots, and the Oregon proceeded at about an equal rate against the tide. But the speed of the vessels does not seem to have entered into the situation. The Oregon blew two whistles when the Traffic was some half a mile away, which were answered by the Traffic when

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

repeated by the Oregon, and the Traffic, in so far as she changed her course, ported her helm and turned to starboard.

It is evident from the testimony that the intention of the captain of the Traffic was to pass close to the starboard of the Oregon, unless the Oregon should first turn across toward midstream, when it would become proper for the Traffic to change to a one-whistle signal and pass to port. The distance between the boats was sufficient to make such a maneuver safe if properly carried out. The captain of the ferryboat, however, as he neared the southern side of the Navy Yard, was compelled to turn to starboard because of the projection of the pierheads, and his course, under the two-whistle signal, necessarily approached that of the Traffic. This was seen by the captain of the Traffic, who also noted the Erie Railroad tug coming down inshore of the Oregon, thus making it all the more necessary for the Traffic to keep to starboard and away from the Oregon.

Under these circumstances, and having accepted the signal of the Oregon, the Traffic, knowing the configuration of the shore, and that the Oregon was intending to pass down the river, was bound to maintain her own course in such a way as to allow the Oregon room to proceed. The testimony of the captain of the Traffic was that just before the collision the Oregon sheered sharply to starboard and came out into the river sufficiently to strike the Traffic upon her starboard bow, causing some injury to the Traffic, which, however, did not interfere with her progress into the Navy Yard, but did put her in danger of sinking.

The testimony of the captain of the ferryboat and its officers shows that the Traffic, coming up the river with the flood tide and continually bearing in, gave them reason to think that she was not going to follow the two-whistle signal which had been exchanged. The captain of the Oregon, under these circumstances, seeing that the distance between the boats was so small that danger was likely to result, blew an alarm and reversed his engines. He could not proceed further to port because of the presence of the Erie tugboat. He properly reversed his engines. And, even if this were an incorrect maneuver, things were at that time in extremis, and the ferryboat cannot be blamed for doing what seemed to be best at such a moment. As a matter of fact, if the ferryboat had held her course, the boats might have cleared by a distance, as estimated by the captain of the Traffic, of 15 to 25 feet. The effect of the reversed engine and the flood tide threw the bow of the ferryboat enough over to starboard so that the collision resulted.

The libel has been brought by the United States against the ferryboat for injuries to the Traffic. No fault can be found against the ferryboat for being in that particular locality, or on the port side of the river, as the lines of traffic are recognized by all navigators, and even the captain of the Traffic testified that he expected the ferryboat to come down on that side of the river against the flood tide, and she would have been out of her usual place if she had been coming down on the starboard side of the channel. See *The Lowell M. Palmer*, 142 Fed. 937, 74 C. C. A. 107. The narrow channel rule, therefore, does not apply, as has been held in the case of *The Islander*, 152 Fed.

385, 81 C. C. A. 511, and *The C. W. Morse*, 161 Fed. 847, 88 C. C. A. 665, and the only fault which could be imputed to the *Oregon* was that she did not expect the *Traffic* to take the risk of passing so close as 15 feet, and that, when her captain perceived the proximity of the *Traffic*, he undertook to keep out of danger by reversing. The boats were not meeting head on at the first exchange of signals, but would have passed starboard to starboard, and the signal recognized the fact.

The burden is on the libelant, that is the United States, to show that there was negligence on the part of the *Oregon*. It is evident from the testimony that the pilot of the *Traffic* estimated his distances with great accuracy, and that the *Traffic* would have passed the *Oregon* by a very narrow margin, if each boat had continued its exact course; the *Traffic* being under a helm which would have carried it sufficiently to port to have passed the *Oregon* without collision. But to hold that the captain of the *Traffic* was not at fault to the extent of getting his boat in collision does not mean that the captain of the *Oregon* can be held at fault for misunderstanding the movements of the *Traffic* at the time. If the ferryboat were attempting to prove liability upon the part of the *Traffic*, the situation would be different. But it does not seem to the court that the government has sustained the burden of proof to the extent of showing that under all the circumstances the captain of the *Oregon* was negligent in attempting to sound an alarm and get out of the way; and there is no other ground presented from which any argument of negligence on the part of the *Oregon* has been shown.

The libel should be dismissed.

KEYSTONE TYPE FOUNDRY v. PORTLAND PUB. CO.

(Circuit Court, D. Maine. July 16, 1910, and August 11, 1910.)

No. 628.

1. TRADE-MARKS AND TRADE-NAMES (§ 67*)—UNLAWFUL COMPETITION.

The manufacturers of a peculiar style of type, unpatented, which is marketable only on account of its utility, cannot restrain another from producing type of the same character.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Dec. Dig. § 67.*

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

2. TRADE-MARKS AND TRADE-NAMES (§ 71*)—USE OF NAMES—INFRINGEMENT.

Where complainant produced a peculiar style of type, which it sold under the name of "Caslon Bold," devised by the complainant to indicate its own goods, another manufacturer may be restrained from making use of that name.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. § 81; Dec. Dig. § 71.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 99*)—RELIEF.

Where, on a bill in equity asking restraint of the unlawful use of a trade-mark, there was in neither the record nor the presentation of the case any suggestion of any damages which would justify the expense of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

an accounting, a master will not be ordered. *Ludington Co. v. Leonard*, 127 Fed. 155, 157, 62 C. C. A. 269, and other like cases, applied.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 100.*]

Bill by the Keystone Type Foundry against the Portland Publishing Company. Decree for complainant.

E. W. Bradford and Wilford G. Chapman, for complainant.

N. & H. B. Cleaves, S. C. Perry, and Venable, Baetjer & Howard, for respondent.

PUTNAM, Circuit Judge. This is a bill in equity, resting entirely upon alleged common-law rights, and claiming jurisdiction in this court simply on account of the variance of citizenship between the complainant and respondent. The complainant is a well-known type founder, and the respondent is alleged to be, to a certain extent, engaged in the same business, either as a founder or as a seller of type. At this point we will say that, while for certain purposes there may be a difference between type as type and the faces of type, we use the word "type" to cover the entire thing to which this proceeding relates. The complainant devised a style of printing, using peculiar type therefor, of which the following is an example:

A B C D E F G H I J K L M N O P
Q R S T U V W X Y Z Æ Œ
a b c d e f g h i j k l m n o p q r s t u v w x
y z æ œ c t s t . , ; - ' ! ? & £ \$

For the purpose of doing printing according to the foregoing design, the complainant devised and manufactured type adapted thereto. The whole topic, including the invention of the style of printing shown, and of producing the type to accomplish the printing, involved a very considerable expense, and, undoubtedly, a large degree of ingenuity and care. The type as manufactured by the complainant was known in the market as "Caslon Bold." The respondent put on the market type corresponding to that made by the complainant, and for the same purpose for which the complainant made their type. In some instances, at least, the respondent in its correspondence, and perhaps otherwise, spoke of its type as "Caslon Bold." This may have been without any special intention in reference thereto; but such is the fact which we are bound to consider. The complainant further maintains that the type manufactured by the respondent is of inferior quality, which is immaterial as this case is presented.

There is no claim on the part of the complainant to be protected

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

with reference to the style of typography produced by the type. Whether it has a right to maintain a claim of that sort we do not consider. So far as that is concerned, the present case is purely negative. In the same line, the plaintiff does not seek to restrain printing by the respondent, although it is apparent that the printing which we exhibit could not be produced except by type as manufactured and devised by the plaintiff, or something substantially the same. Neither does it claim any trade-mark whatever, except so far as contained in the words "Caslon Bold"; neither does it prove any "dressing up" by the respondent for the purpose of passing off inferior type, or any type, as the type of the plaintiff. The fact is that, as the case stands, the style of typography shown having been devised, the matter of producing the type to accomplish it was a mechanical detail, which could in no way involve anything colorable, or anything indicating especially an attempt to imitate in any direction.

Under the circumstances, the case seems very simple. The type in question has no characteristics in particular, except that of utility; and, if the bill could be sustained, the plaintiff would obtain a perpetual patent for a useful article, running indefinitely, without any assistance from the Patent Office of the United States. On putting the proposition in this form, it is so clearly met by the law that it needs no discussion.

Among all the cases cited by the complainant the one which it apparently urges on us with the most confidence, and the one which at first sight comes the nearest to its propositions, is *Estes v. Frost Company*, decided by the Circuit Court of Appeals for this Circuit on February 8, 1910, reported in 176 Fed. 338. *Estes v. Frost Company*, however, belongs to an ordinary class of cases involving a purpose to deceive, and is broadly distinguished from the case at bar by the closing sentence, as follows:

"It is understood that the decree of the Circuit Court directed itself against making and selling, for use in hose supporters, wooden buttons made in imitation of rubber."

Hesseltine's *Law of Trade-Marks and Unfair Trade* (1906) 198, in so far as it distinguishes between the imitation of structural features and ornamental features, points out what is ordinarily the true rule. In whatever manner a case may be "dressed up," if a close analysis brings the alleged offense down to a mere reproducing of a useful manufacture which has not been patented, a bill of this character cannot be sustained. On the plain facts, however, in that the respondent has gone beyond this and used the words "Caslon Bold," it has so far violated the law, and the plaintiff is entitled to relief.

Let the complainant file a draft decree in accordance with the opinion passed down the 16th day of July, 1910, within 10 days, and the respondent file corrections thereof within the next ensuing 10 days, all in accordance with rule 21.

August 11, 1910.

In accordance with the opinion passed down in this case on July 16, 1910, the court has received a draft decree, and also proposed corrections thereof by the respondent. The court finds nothing in

the latter which requires it to modify the decree as submitted by the complainant. The decree as submitted provides that the complainant shall recover "such damages as it may prove it has suffered because of the use by respondent of the name 'Caslon Bold' to designate its type products." This is not a proper method of directing an accounting, and for that reason the court might strike it out; but the court prefers not to leave it in such an unsatisfactory manner. It is true that the bill claimed damages, and that the complainant in its opening brief may have referred to the fact of the use by the respondent of the words "Caslon Bold" as pointed out in the closing paragraph of the opinion referred to. Nevertheless, quite the entire discussion of the case by the complainant related to alleged unlawful manufacturing and selling type of the peculiar style which the complainant described. In no manner was the court enlightened on any question of damages, and in no place was the claim of damages formally made; and far less was there any exposition of such claim which the court could understand. Moreover, in the conclusion of the complainant's brief in rebuttal, the relief that it asked was an injunction against manufacturing and selling type of the class referred to, and from using the form of type referred to; and no other expected remedy was suggested.

On an examination of the record out of which arose the opinion of July 16, 1910, the court found a letter from the respondent to one of its customers in which the term "Caslon Bold" was used; and what the court said in the closing paragraph of its opinion was based entirely on what it thus incidentally discovered.

Under the circumstances, nothing has been brought to the attention of the court to enable it to apprehend that there could any advantage come from the appointing of a master which would offset the delay and expense involved in an accounting. Therefore the court follows the practice approved in *American Box Co. v. Crosman* (C. C.) 57 Fed. 1021, 1029; *Bradford v. Belknap Co.* (C. C.) 105 Fed. 63, 66; *Ludington Co. v. Leonard*, 127 Fed. 155, 157, 62 C. C. A. 269; *Merriam Co. v. Ogilvie*, 170 Fed. 167, 169, 170, 95 C. C. A. 423, and *Kessler v. Goldstrom* (C. C. A.) 177 Fed. 392, 394; and in a general way in *Saxlehner v. Siegel-Cooper Co.*, 179 U. S. 42, 43, 21 Sup. Ct. 16, 45 L. Ed. 77. Therefore there will be no decree for an account.

In re CHAMBERLAIN.

(District Court, N. D. New York. July 25, 1910.)

1. BANKRUPTCY (§ 414*)—DISCHARGE—SPECIFICATIONS OF OBJECTION—FALSE OATH.

Evidence in aid of specifications of objection to a bankrupt's discharge on the ground that he had made a false oath in and in relation to his proceedings in bankruptcy held insufficient to establish the making of certain of the false statements alleged.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 414.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. BANKRUPTCY (§ 408*)—DISCHARGE—OBJECTIONS—FALSE OATHS.

Where certain creditors of a bankrupt claimed that they had been induced to extend credit by reason of the bankrupt's false representations as to his property, but they waived the tort and filed their claims against the bankrupt's estate, which were allowed, the bankrupt's denial under oath during his examination in the course of the bankruptcy proceedings that he had made such statements, even if false, was immaterial to any issue or question in the bankruptcy proceeding, and was therefore no ground for denying his discharge on the ground that he had made a false oath in and in relation to the proceeding in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732-734; Dec. Dig. § 408.*]

In the matter of Walter W. Chamberlain, bankrupt. On motion to confirm the report of a special master overruling specifications of objections to the bankrupt's discharge, and recommending that a discharge be granted. Motion allowed.

A. F. Saunders and Geo. W. Reeves, for bankrupt.

A. L. Chapman, for objecting creditor.

RAY, District Judge. Section 14 of the bankruptcy act provides that:

"The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by parties in interest * * * and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided. * * *" Act July 1, 1898, c. 541, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427).

The objections here are that the bankrupt has committed such an offense, viz., that such bankrupt "knowingly and fraudulently," when under examination at a meeting of his creditors held in the bankruptcy proceedings, made a false oath in and in relation to such proceeding in bankruptcy; that is, that he had committed the offense specified in subdivision "b" (2) of section 29 of the bankruptcy law. The specifications are that when examined at a meeting of creditors in his bankruptcy proceedings the bankrupt knowingly and fraudulently testified under oath that he did not make certain oral representations as to his financial condition and property and ownership of property for the purpose of obtaining credit which certain creditors now testify he did make. It is alleged that on six or seven different occasions, not long prior to his bankruptcy, Chamberlain orally stated to the person of whom he desired to obtain credit and of whom he did obtain credit (there being seven such persons) for property sold or by indorsement that he owned or had an interest in property which he did not own. The statements alleged to have been made differed substantially in each of the cases. If made, they tended to show that Chamberlain was going about and obtaining credit for property sold him or obtaining the indorsement of his paper by making false statements orally as to his financial condition. At the time Chamberlain was examined, these creditors had proved their claims in bankruptcy, respectively, as for an ordinary debt, waiving the tort if any. He was asked if he made such and such statements and denied making them. There was no pretense

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

or claim he then had the property or was concealing it, etc. Having denied making the statements, and having applied for a discharge, specifications of objections were filed charging that he had knowingly and fraudulently made a false oath in or in relation to the proceeding in bankruptcy. It was entirely immaterial to the bankruptcy proceedings, or any issue or question therein, whether or not Chamberlain made the representations except as it bore on his methods of doing business and general character. If the questions were asked as a basis for impeachment, they were on collateral matters and his answers were conclusive. There was no pretense the statements were made in writing.

In all but two instances, as the special master finds and as the record discloses, it was oath against oath as to each alleged transaction, and the special master says that the commission of the offense was not proved. In two of the cases the special master finds that Chamberlain did make the representations alleged, but also says that he is not willing to find that Chamberlain made a false oath in relation to any proceeding in bankruptcy. One of these statements relied on was made, it is alleged, to one Mrs. Maxwell, January 28, 1909, and she says Chamberlain told her he would like a couple of cows for his dairy, and could pay the note (which he gave for the cows) with money that was coming from the dairy. He got the cows. In the bankruptcy proceedings (Mrs. Maxwell having proved her claim and procured its allowance) how was it material whether Chamberlain did or did not make the statement alleged? How could it affect the proceeding or any question arising therein? No question, so far as appears, did arise in that proceeding in which his making or not making that statement to Mrs. Maxwell had the slightest materiality or on which it had the slightest bearing. True, it related to his prior dealings with one of his creditors and the transaction with her in which he became her debtor.

Clause 9 of section 7 of the bankruptcy act requires the bankrupt to submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate. It is asserted that the questions and answers referred to in answer to which it is claimed the false statements were made related to and constituted a specific matter in regard to which the creditors had a right to inquire fully, and in regard to which the bankrupt was required to answer fully and truthfully, inasmuch as the questions and answers involved directly his "dealings with his creditors." The contention is that this makes all his dealings with his creditors not only a proper, but a material, subject of inquiry, and that, being a material subject of inquiry, false statements as to what occurred are presumed to have been fraudulently made, made with a purpose to deceive, mislead, and defraud the creditors or some of them of their rights. There is force in this contention. However, this objection to the discharge of the bankrupt charges a crime, and, while the objector is not bound to prove his allegation beyond a reasonable

doubt, he is bound to prove the same by "clear and convincing testimony." In *Re Howden* (D. C.) 7 Am. Bankr. Rep. 194, 111 Fed. 723, 725, Judge Coxe, now of the Circuit Court of Appeals, said:

"The authorities are unanimous in holding that the burden is on the opposing creditor to prove his objection, not necessarily beyond a reasonable doubt, but by clear and convincing testimony."

This is quoted and approved by the Circuit Court of Appeals, First Circuit, in *Re Troeder*, 17 Am. Bankr. Rep. 723, 150 Fed. 710, 80 C. C. A. 376, where it was also held:

"A creditor, opposing a bankrupt's discharge, because of the alleged commission of offenses punishable under section 29b, need only establish his allegations by evidence that is clear and satisfactory. On such hearing, the question is not as to the general truthfulness of the bankrupt, but as to some specific matter which can be framed into an issue material to his bankruptcy."

Now, I do not see how the matter of the purchase of these cows of Mrs. Maxwell and the representations made to her could have been framed into an issue material to the bankruptcy of Chamberlain. It was conceded that he got the property, and did not pay therefor. The claim was proved by Mrs. Maxwell and allowed by the referee. She did not assert fraud, and Chamberlain's fraudulent representations in incurring the debt were not in issue or question in the bankruptcy proceeding. As said by the Circuit Court of Appeals in *Re Troeder*, supra: "On such hearing the question is not as to the general truthfulness of the bankrupt." So far as the bankruptcy proceedings were concerned, it was utterly immaterial what representations the bankrupt made as to how he could pay the note given Maxwell or from what fund. I do not see how I can hold on this record, in face of the findings of the special master who saw and heard the witnesses and noted their manner, etc., and of the authorities cited, that Chamberlain "knowingly and fraudulently" made a false oath in or in relation to any proceeding in bankruptcy within the meaning of the bankruptcy act. The special master has declined to find that he did.

Now as to the transaction with Kennedy. On his examination in the bankruptcy proceedings Chamberlain was asked: "On the occasion when Edwin Kennedy indorsed the note for you did he ask you if you owned one-third of the farm or that in substance?" The bankrupt answered, "He did not." He was asked, "Did you say you owned one-third of the farm, or that in substance?" He answered, "No, sir." He was also asked, "Did you make any reference to what property you owned?" He answered, "No, sir." Also: "Q. He did not ask you anything of that kind in any way, shape, or manner?" The answer was, "No, sir." It is alleged in the specifications of objections that in so testifying Chamberlain was guilty of knowingly and fraudulently making a false oath in or in relation to a proceeding in bankruptcy. There was no claim or pretense that the bankrupt did own a third interest or any interest in the farm, the one he was on. The questions were not directed to an attempt to prove the bankrupt did own an interest in the farm at the time of the transaction with Kennedy, or that he had transferred any interest therein in fraud of creditors or as a preference. The object was to show he had procured Kennedy to

indorse his note by the oral, false representations that he did own such an interest in the farm when he did not.

On the hearing before the special master on the objections to a discharge, Kennedy was called as a witness, and testified that February 5, 1909, he indorsed a note for Chamberlain at his request in Balch's blacksmith shop, and that Fred Balch was present, and that, before the note was indorsed, "I asked him if he owned a third of the farm, and he said he did and two horses and twelve cows. He said it wouldn't make me any trouble, and that, when this note was due the 5th of May, he would pay it. He said he was good for the amount and had a chance to buy cows at reasonable prices and had plenty of hay." Kennedy was compelled to pay the note, and in the bankruptcy proceedings proved his claim on the note and had it allowed. Kennedy was 71 years of age, is and had been hard of hearing since he came out of the Civil War, and is drawing a pension of \$22 per month for deafness. On cross-examination he was asked, "Suppose you drop it now," referring to his ear trumpet. "I can speak louder. Is your hearing any better than it was last February?" His answer was, "I do not understand; yes, he is a farmer." He did not have his hearing apparatus at the time of the conversation about the note and property in the shop. He also testified on his cross-examination as to this transaction, "Q. You indorsed his note? A. Yes. Q. Did you know he owned the farm? A. He told me his mother owned it." Fred Balch, the blacksmith, was called to corroborate Kennedy, and his testimony was as follows:

"What, if anything, did you hear on that occasion with reference to Chamberlain's financial condition? A. He said that— "Q. Who said? A. Mr. Chamberlain, that he owned one-third of the farm, or something. I was pounding on the anvil. I did not understand the last end of what it was."

On cross-examination he said that he could not hear Kennedy talk or what he said, but heard Chamberlain say "he owned one-third of the farm," and that there was more said which he could not hear. Now, Kennedy said he asked Chamberlain if he owned a third of the farm and Chamberlain said he did. Kennedy and Balch put different words in Chamberlain's mouth, and Balch was pounding on the anvil so he could not hear Kennedy at all, and Kennedy was very deaf. I do not think the charge of knowingly and fraudulently making a false oath is sustained by this evidence. The evidence is not clear, convincing, and satisfactory. First. Kennedy was an old man and quite deaf, and did not have his hearing apparatus. Second. Balch was pounding on his anvil and could not hear Kennedy at all, and only heard one sentence used by Chamberlain. Third. Kennedy says Chamberlain told him his mother owned the farm. The contradictions between Kennedy and Balch, both contradicted by Chamberlain, together with the deafness, the absence of the hearing apparatus, the pounding on the anvil, and the interest of Kennedy and his admission that Chamberlain told him his mother owned the farm, leaves the mind in grave doubt as to what was actually said. It cannot be fairly said the evidence clearly preponderates in favor of Kennedy. However, seven wit-

nesses testify that Chamberlain made untrue statements as to his financial condition for the purpose of obtaining credit at about this time, but this does not prove that he stated to Kennedy that he owned a third interest in the farm, and knowingly and fraudulently made a false oath when at a later time he testified he did not so state. It is not claimed he made any such statement or similar statement to any other person. In regard to this alleged statement, I do not see how any issue material to the bankruptcy proceedings could have been made or raised. If the object was to obtain an admission from Chamberlain to use against him in a civil suit for obtaining property of these various persons or one or more of them by false and fraudulent representations, it was clearly immaterial to the proceedings in bankruptcy. The examination of the bankrupt is not properly used for such a purpose. These inquiries threw no light on the amount of his property or its value, or the proper mode of administering his estate, or the disposition he had made of his property, and no one was seeking to reclaim the property from the estate on the ground of fraud. They threw no light on the question whether or not he would be entitled to a discharge, as section 14 of the act provides that to bar a discharge the bankrupt must have (3) "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit." However, inasmuch as the special master has refused to find that Chamberlain knowingly and fraudulently made a false oath when under examination in the bankruptcy proceeding in denying that he made the statements which the special master finds he did make to Kennedy and Mrs. Maxwell, and I am not satisfied that he did, I think the report and findings of the special master should be confirmed, and it follows that a discharge will be granted. I am far from satisfied that Chamberlain was or is a strictly honest man, or that he had dealt squarely and fairly with these creditors, but the grounds of refusing a discharge in bankruptcy are statutory and limited, and do not cover general dishonesty or unfair and sharp dealing with creditors, or oral misrepresentations made in obtaining property on credit, or even false oaths unless they relate to matters material to the bankruptcy proceedings. See cases cited and *Bauman v. Feist*, 5 Am. Bankr. Rep. 703, 107 Fed. 83, 46 C. C. A. 157.

The report of the special master is confirmed and a discharge granted.

UNITED STATES v. WATERS-PIERCE OIL CO.

(Circuit Court, E. D. Missouri, E. D. April 27, 1910.)

No. 5,753.

1. PUBLIC LANDS (§ 8*)—TRESPASSES—RECOVERY FOR PROPERTY UNLAWFULLY REMOVED—INNOCENT PURCHASERS.

The United States cannot recover in conversion the value of property unlawfully taken from public land from the second innocent purchaser of such property after its sale by the trespasser.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 8.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. PUBLIC LANDS (§ 8*)—BOXING TREES FOR TURPENTINE—RECOVERY FOR GUM REMOVED—INNOCENT PURCHASERS OF PRODUCT.

Where gum taken from trees on public land under homestead entry, in violation of law, was sold to distillers, and by them manufactured with gum obtained from others into turpentine and resin, and such products were sold to a purchaser, who had no knowledge of the source from which the gum was obtained, the United States has no title to such turpentine or resin which will support an action of conversion against the purchaser.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 8.*]

Actions by the United States against the Waters-Pierce Oil Company. On motions to direct verdicts for defendant. Motions sustained.

Charles A. Houts, U. S. Atty., and T. P. Young, Asst. U. S. Atty. J. D. Johnson and Loomis C. Johnson, for defendant.

PER CURIAM. This has been a most interesting trial to the court. The cases here are not particularly important from the amounts involved, either to the government, with its great wealth, or to the defendant, with its supposed great wealth. The principles, perhaps, are.

Now, in disposing of this matter, I wish to commence at the end, instead of at the beginning. In the case last tried, in the year 1905, a woman had made an entry on this quarter section of land; that is, the government had segregated it through its appropriate officials from the great body of the public domain, and had agreed, on the performance of certain conditions, to convey the title to this woman. During that time she, as she states, to improve the homestead, tapped or boxed certain of these trees, and took therefrom some of the crude gum, and sold it to a distillery. The distillery had no knowledge of her whatever. After distilling it, the distillery sold the rectified spirits of turpentine and resin to defendant. At that time, of course, the act of 1906 had not been passed. It was not in violation of law. Whether, prior to Act June 4, 1906, c. 2571, 34 Stat. 208, one having a mere entry of a portion of the public domain had the right to box the trees for crude gum, need hardly be settled. At least, in that case there is no question but that the company distilling it distilled it along with other gum purchased, and sold it to the defendant, Waters-Pierce Oil Company; both of them being altogether ignorant of the source from which it came, or any other wrong. In such case, that the government may not prosecute successfully its action for conversion of its property is apparent, and the motion for an instructed verdict in that case will be sustained.

The other case is, to the mind of the court, a much closer proposition. In that case a man by the name of Denmark had, on his application to the government, segregated from the public domain and acquired an interest in 160 acres of the land. So long as the public domain remains untouched, the government is the full, legal, and equitable owner of the property. Whenever under any grant, or under any contract to grant, the government passes the possession of a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

certain tract or tracts of property to a citizen, with the promise that under the law it will convey the full title to the applicant on his fulfilling certain conditions, the grantee immediately becomes interested in such property. Of course, the government retains the legal title; but the party entering upon such property obtains certain rights therein, as did Denmark in this case. He appears to have erected improvements on this property of the value of some \$200 or more and, under some kind of an arrangement with Painter he released his homestead right, and Painter paid his filing on the property, and by some kind of a deal Painter succeeds to whatever rights Denmark had in the property. Now, at the time this property was segregated from the great mass of the public domain by this filing, at the time when Painter was rightfully in possession of the property under his entry, and by the performance of certain conditions required by law would succeed to all of the title, both legal and equitable, fully, and all of the appurtenances, timber, and everything that goes to make up the property, at this time the government, perhaps to remedy the very evil here complained of, passed an act making it a misdemeanor for any one in possession of a homestead under this kind of a right, or any one else when in possession of this kind of government land, to box this timber and take away and sell crude gum. However, Painter, in violation of this law, after having been notified by the agent of the government to the contrary, and after repeated notifications, did box this timber, and did, contrary to the law, remove from this homestead this crude gum. Berea knew this, and Berea assisted. The property was regarded as Painter's property; but Berea knew the circumstances, and there is no question whatever but the government could have recovered from Berea what this property, this gum, was worth as it left Berea's hands, no matter what improvements he put into it. They were the government's trees, and it had a title to the gum taken from its trees; and the evidence also shows that an agent of the government there notified Berea of the fact.

This action is for conversion. The government says in this case it is entitled to recover as for a willful trespass, because the defendant in this case converted its property. The distilling company, by the process of distillation, whatever that may be, reduced this property from the state in which it was taken from the homestead into articles of general commerce in the markets of the world and in general use. Defendant in this case, Waters-Pierce Oil Company, had a contract to purchase the property from this still. This concern, as was said of the one distilling the gum in the other case, it is clearly shown, distilled more than the product from this homestead. Now the act of conversion is a wrong, a tort. The Waters-Pierce Company, on being appealed to in this matter, the government saying to it, "You have secured my property," under the law would have a right to say to the government, "What property do you claim?" in order that, if the government could distinguish its property, it might return it back to the government, and relieve itself if it believed itself guilty of the wrong, or that it held property that belonged to the government. That could not have been done in this case. The Waters-Pierce Oil Company never could, on any demand being made, have returned what it

got. The government never had any title to what the Waters-Pierce Oil Company purchased. True, it had title to this gum. It might have recovered it from the trespasser or the distillery; but it never had title to the turpentine and resin. It never could have recovered the property after it went into Waters-Pierce Company's hands, except in bulk, as a man would his grain going into an elevator. It never could distinguish it after having been mingled.

Taking that into consideration, taking further into consideration the fact that the Waters-Pierce Oil Company entered into a contract in this matter, long before these matters occurred, and could have been forced to take the products from the distillery, because it was under contract so to do, and, further, while we do not believe that it devolved upon the government, knowing this violation of the law, to bring an injunction suit, still I do not believe that the government may, knowing that its criminal statutes are being violated, as in this case by Painter and the distilling company, sit still and not prosecute these parties in any way, and allow the property in a changed condition to come into the hands of a wholly innocent third party, and then, these things happening with the knowledge of the government's agent, be allowed to recover.

So far as the remainder of the defense is concerned, I cannot consider that. Simply on the entire evidence in the case, conceding, as must be done, that there was no fraud or wrongdoing by the defendant in this case, and that the government, knowing that wrong was being committed, stood by and allowed it, and considering the nature of the action, I shall have to sustain this motion.

In re RUDD.

(District Court, E. D. New York. July 6, 1910.)

1. PAWNBROKERS (§ 7*)—REDEMPTION OF PLEDGE—PAWNBROKERS' LIENS.

A pledge, redeemed from a pawnbroker by a third person, is no longer subject to the pawnbroker's lien; the redemptioner not being qualified to act as a pawnbroker.

[Ed. Note.—For other cases, see Pawnbrokers, Cent. Dig. § 6; Dec. Dig. § 7.*]

2. LIENS (§ 8*)—STATUTORY LIENS.

The laws of New York do not give a statutory lien to a person who pays something for the account of another, though personal property may pass as security for the account.

[Ed. Note.—For other cases, see Liens, Cent. Dig. § 2; Dec. Dig. § 8.*]

3. SUBROGATION (§ 23*)—PAYMENTS FOR BENEFIT OF ANOTHER—DISCHARGE OF INCUMBRANCE.

Where a third person pays a debt, and takes into his possession personal property of the debtor held by the creditor as security, the payor thereby obtains a counterclaim, which he may use as a set-off in any proceeding or action brought by the debtor to recover the property held as security.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 62; Dec. Dig. § 23.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. BANKRUPTCY (§ 308*)—PLEDGES—REDEMPTION—CLAIMS.

Where a bankrupt's assignee for the benefit of creditors with his own funds redeemed a diamond, which the bankrupt had pawned, and thereafter surrendered the diamond to the bankrupt's trustee, such assignee thereby acquired a claim against the bankrupt's estate for the amount so advanced.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 308.*]

5. BANKRUPTCY (§ 323*)—SECURED CLAIMS.

Where a bankrupt had pledged a diamond belonging to his estate, a creditor was authorized by Bankr. Act, July 1, 1898, c. 541, § 57, subds. "a," "h," 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), to present a claim against the bankrupt's estate for the balance of his debt, if it exceeded the amount applicable to its payment received from a sale of the diamond, or, in case the amount realized exceeded the debt, he was authorized by section 68 to deduct the amount of the debt therefrom and account to the bankrupt's trustee for the balance.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 505; Dec. Dig. § 323.*]

6. BANKRUPTCY (§ 323*)—CLAIMS—REDEMPTION OF PROPERTY.

Where a bankrupt's assignee for the benefit of creditors redeemed a pawned diamond with his own funds, and later under compulsion delivered the diamond to the bankrupt's trustee, who sold the same as a part of the bankrupt's estate for more than the amount advanced to redeem it, the assignee was entitled to receive the amount so advanced from the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 323.*]

In the matter of William W. Rudd, bankrupt. Application by the bankrupt's assignee for the benefit of creditors as an individual for payment of the amount advanced by him to redeem a pledged diamond, which belonged to the bankrupt and was surrendered by petitioner to the bankrupt's trustee. Granted.

Benjamin F. Norris, for petitioner.

Mitchell May, for trustee.

CHATFIELD, District Judge. According to the facts shown by the record, the bankrupt was the owner of a large diamond, which some time previous to the bankruptcy proceedings had been pawned for a considerable amount. Just prior to the filing of the petition in bankruptcy an assignment for the benefit of creditors, under the state statutes, was made by the bankrupt, and during the time between that assignment and the filing of the petition the assignee redeemed the diamond in question from the pawnbroker, but used his own funds therefor, instead of the moneys of the insolvent estate. The trustee in bankruptcy applied to this court and obtained the diamond in question from the assignee, who still had it in his possession. After appraisal, the diamond was duly sold as a part of the assets of the bankrupt estate, and the trustee has the proceeds. The assignee now comes forward as an individual and asks that the amount advanced by him to redeem the diamond from the pawnbroker be repaid, inasmuch as whatever rights he had were preserved at the time the diamond was taken from him by the order of this court. The trustee in bankruptcy opposes, on the ground that no statutory lien and no pawnbroker's lien could be claimed by the assignee, who merely is

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

alleged to have made a loan to the bankrupt for the purpose of redeeming the diamond.

It would seem that on this point the trustee is correct. A pledge redeemed from a pawnbroker by a third party is no longer the subject of the pawnbroker's lien, as the person redeeming is not qualified to act as pawnbroker. Nor do the state laws give a statutory lien to any person who may pay something for the account of another, even if personal property may pass as security for the account. But the doctrine of subrogation is well established, and a court of equity, or even a court of law, would accept the proposition that if a third party pays a debt, and takes into his own possession personal property which has been held as security, he has a counterclaim which can be used as a set-off, and which is perfectly good in any proceeding or action brought by the debtor to recover the property held as security. That is the exact situation in the present case. The bankrupt estate is entitled to the personal property involved, namely, the diamond, which was originally held as security for the debt. The individual who redeemed it has a claim against the bankrupt estate for the amount advanced by him, and under section 57, subds. "a" and "h," of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]), the creditor may present a claim for the balance of his debt, if it exceed the amount applicable to its payment; or, if the matter be considered solely from the standpoint of set-off, under section 68, the creditor would have been entitled to deduct the amount of his debt from the fund in his hands (which in this instance is the sum realized from the sale of the diamond) accounting for the balance to the estate.

Under such circumstances, it must be held that, the property having been sold by direction of the court, for the purpose of creating a fund as to which the rights of the parties might be determined, and this fund exceeding the sum advanced to redeem the diamond, the assignee is entitled to be paid by the trustee in bankruptcy the amount advanced by him, namely, \$260.

LEGGETT v. GREAT NORTHERN RY. CO. et al.

(Circuit Court, D. Minnesota, Third Division. June 10, 1910.)

1. REMOVAL OF CAUSES (§§ 18, 19*)—CASES ARISING UNDER CONSTITUTION OR LAWS OF THE UNITED STATES.

A cause cannot be removed from a state to a federal court simply because in the progress of the litigation it may become necessary to construe the Constitution or laws of the United States, but the decision of the case must depend upon such construction.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 36-46, 48, 52, 53; Dec. Dig. §§ 18, 19.*]

2. REMOVAL OF CAUSES (§ 25*)—PROCEEDINGS—ALLEGATIONS OF PETITION.

A case cannot be removed from a state court into the Circuit Court of the United States on the sole ground that it is one arising under the Constitution, laws, or treaties of the United States, unless such appears by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

plaintiff's statement of his own claim; and, if it does not so appear, the want of it cannot be supplied by any statement of the petition for removal, or in the subsequent pleading.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 58, 59; Dec. Dig. § 25.*]

3. REMOVAL OF CAUSES (§ 25*)—CASES ARISING UNDER CONSTITUTION OR LAWS OF THE UNITED STATES—ALLEGATIONS OF COMPLAINT.

Where the complaint alleged facts which brought the suit within the employer's liability act (Act June 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1909, p. 1148]) and the safety appliance act (Act March 2, 1893, c. 198, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), but there was no allegation therein that there was any dispute between the parties as to the construction of such acts, or that there was any controversy over the law applicable to the case, the action was not upon the complaint one arising under a law of the United States, so as to be removable to the United States Circuit Court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 58, 59; Dec. Dig. § 25.*]

At Law. Action by Charles E. Leggett against the Great Northern Railway Company and another. On motion to remand. Motion granted.

S. A. Anderson, for plaintiff.

M. L. Countryman, for defendants.

WILLARD, District Judge. This case stands now upon a motion to remand. It was removed into this court on the ground that it was a case arising under the Constitution and laws of the United States. In the case of Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 203, 24 L. Ed. 656, it was said:

"A cause cannot be removed from a state court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved."

This case was cited and quoted from in the case of Blackburn v. Portland Mining Company, 175 U. S. 571-580, 20 Sup. Ct. 222, 44 L. Ed. 276.

In the case of Devine v. Los Angeles, 202 U. S. 313, 332, 26 Sup. Ct. 652, 657, 50 L. Ed. 1046, the court said:

"There being no diversity of citizenship, the jurisdiction of the Circuit Court could only be maintained upon the ground that the suit arose under the Constitution or laws or treaties of the United States, and a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution or some law or treaty of the United States, upon the determination of which the result depends. And this must appear from the plaintiff's statement of his own claim, and cannot be aided by allegations as to the defenses which might be interposed."

In the case of Macon Grocery Co. v. Atlantic Coast Line, 215 U. S. 501, 30 Sup. Ct. 184, 54 L. Ed. —, the court quoted the following statement from the opinion of Taft, Circuit Judge, in Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co. et al. (C. C.) 54 Fed. 730, 19 L. R. A. 387:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"And any case involving the enforcement of those rights is a case arising under the laws of the United States."

The court, however, said:

"The object of the bill was to enjoin alleged unreasonable rates, threatened to be exacted by carriers subject to the act to regulate commerce. The right to be exempt from such unlawful exactions is one protected by the act in question, and the purpose to avail of the benefit of that act, as well as of the anti-trust act, is plainly indicated by the averments of the bill. Of necessity, in determining the right to the relief prayed for, a construction of the act to regulate commerce was essentially involved."

The complaint in the case at bar alleged facts which brought the suit within the employer's liability act (Act June 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1909, p. 1148]) and the safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]); but there was no allegation in the complaint that there was any dispute between the plaintiff and the defendant as to the construction of those acts, or that there was any controversy over the law applicable to the case. The action, therefore, upon the plaintiff's complaint, was not one arising under a law of the United States simply because it alleged certain facts which showed that the plaintiff was entitled to relief under an act of Congress.

It is said, however, by the defendant, that the petition for removal does state that the action not only was brought under the employer's liability act, and the safety appliance act, but that it involved a controversy between the parties as to the proper construction of these acts. The petition does set forth the facts which show how such controversy arises. That the facts stated in the petition in a case of this kind cannot be relied upon to secure a removal is well settled. In the case of *Arkansas v. Kansas & Texas Coal Co.*, 183 U. S. 185, 188, 22 Sup. Ct. 47, 48, 46 L. Ed. 144, the court said:

"Hence it has been settled that a case cannot be removed from a state court into the Circuit Court of the United States on the sole ground that it is one arising under the Constitution, laws, or treaties of the United States, unless that appears by plaintiff's statement of his own claim; and, if it does not so appear, the want of it cannot be supplied by any statement of the petition for removal, or in the subsequent pleadings."

That such an action as this cannot be removed on the ground that it arises under a law of the United States has been heretofore decided. *Nelson v. Southern Ry. Co.* (C. C.) 172 Fed. 478; *Hubbard v. Chicago, Milwaukee & St. Paul Ry. Co.* (C. C.) 176 Fed. 994.

The motion to remand is granted.

THE HELEN W. MARTIN.

(District Court, D. Rhode Island. July 25, 1910.)

No. 1,226.

1. SEAMEN § 29*)—INJURIES—NEGLIGENCE—EVIDENCE.

In a libel for injuries to a seaman through being carried aloft while endeavoring to hold the forepeak halyard with a stopper, which libelant alleged broke because it was defective, evidence held insufficient to show either that the stopper broke or that it was insecure.

[Ed. Note.—For other cases, see Seamen, Dec. Dig. § 29.*]

2. WITNESSES (§ 317*)—DISCREDITED TESTIMONY—"FALSUS IN UNO, FALSUS IN OMNIBUS."

Where the evidence of witnesses was in irreconcilable conflict, and the difference was unexplainable on the theory of mistake, libelant's testimony in important particulars being completely discredited, the maxim "falsus in uno, falsus in omnibus" would be applied.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1080-1083; Dec. Dig. § 317.*]

In Admiralty. Libel by Charles A. Buncamper against the Helen W. Martin. Dismissed.

A. B. Crafts, for libelant.

Gardner, Pirce & Thornley, for claimant.

BROWN, District Judge. The libelant, Buncamper, suffered personal injuries on September 1, 1905, while on a voyage from Lambert's Point, Va., to Providence, R. I., through being carried aloft while endeavoring to hold the forepeak halyard with a stopper.

The libelant alleges that the stopper broke, and the vessel is charged with fault in not providing a sound and secure stopper for the forepeak halyard.

The principal question in this case is one of fact. Has the libelant established his allegation that his injuries were due to the parting of one of the standing stoppers? The master, mate, and engineer of the Helen W. Martin testify specifically that the stopper did not part, but was subsequently used for a considerable time. Buncamper himself, and members of the crew, Brito, Lima, Santos, Lopes, Pereira, and Gonçalves, testify that the stopper parted, and Gomez testifies that on the next trip there was a new stopper at this place.

The testimony is in direct conflict and is irreconcilable. The difference is unexplainable on the theory of mistake. On one side or the other there is deliberate perjury.

Buncamper's testimony in important particulars, is completely discredited by the master and mate of the Stephen H. Hart, upon which he subsequently made a voyage. These were entirely disinterested and well-appearing witnesses.

The maxim "falsus in uno, falsus in omnibus" must be applied to Buncamper. The Santissima Trinidad, 7 Wheat. 283, 338, 339, 5 L. Ed. 454.

The staleness of Buncamper's claim, first made more than four years after the accident, and after he had acquired experience in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the courts by acting as an interpreter, his appearance as a witness on the stand, together with the artificial aspect of the entire case made by his testimony and that of his witnesses, the various inconsistencies with established fact and the blunder of one of his witnesses in attempting to corroborate Buncamper by palpably false testimony, render it much more probable that his case is of that fictitious class now becoming too common in our courts, whereupon the mere fact that an injury was received is built up false testimony as to its cause and as to its extent, than that the former master, mate, and engineer of the Helen W. Martin were guilty of deliberate perjury. The mate and engineer had long since ceased to have any connection with the Martin, and were entirely disinterested witnesses. On the other hand, all the other witnesses supporting Buncamper were friends of long standing.

Applying the rule that witnesses are to be weighed, and not counted, the preponderance of the case on the question of fact whether the accident was due to the parting of the standing stopper is decidedly for the claimant.

Libel dismissed, with costs to the claimant.

BLACK v. PEOPLE'S COAL CO.

(District Court, W. D. Pennsylvania. May 31, 1910.)

No. 11.

SHIPPING (§ 69*)—EMPLOYMENT—DISCHARGE—RIGHT TO WAGES.

Where libelant shipped as master of a vessel at a monthly salary, and on March 5th at about 2 p. m., without the owner's permission, left the boat and did not return until about 11 a. m., on March 8th, giving no excuse for his conduct, the owner could discharge him upon his return, and libelant could not recover salary for March and April; his faithful services being a condition precedent to his right to wages.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 293-307; Dec. Dig. § 69.*]

In Admiralty. Libel by Harry Black against the People's Coal Company. Libel dismissed.

L. C. Barton, for libelant.

Reed, Smith, Shaw & Beal, for respondent.

ORR, District Judge. This is a libel in personam for wages. The libelant, Harry Black, shipped as master of a steamboat belonging to the People's Coal Company, on or about January 6, 1909, at the wages of \$150 per month. There is some dispute as to whether the time of the employment was definite or indefinite. In our view of the case this is immaterial. It may be assumed that the period of employment contemplated extended beyond the time of filing the libel, to wit, May 4, 1909. The libelant was paid his wages for January and February. On March 5th, at about 2 p. m., he left the boat and did not return until about 10 a. m. or 11 a. m. on the 8th of March fol-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lowing. His absence was without permission from, his presence was greatly desired and he was diligently sought by, and his whereabouts were unknown to, the owner. When he returned to the boat, he was discharged, and properly too. He did not then nor on the witness stand offer excuse for his conduct. He attempted to prove a custom on the rivers for masters to leave their boats for two or three days at a time without the knowledge or permission of the owners. He failed completely. Had he succeeded with the proof, we would hold the custom to be bad. He seeks to recover his salary for March and April. This he cannot do. His faithful services was a condition precedent to his right to wages.

The libel must be dismissed, at the cost of libellant.

PITTSBURGH LAUNCH CLUB v. ALMONO CANOE CLUB.

(District Court, W. D. Pennsylvania. June 16, 1910.)

No. 3.

WHARVES (§ 18*)—WHARFAGE—VESSELS SUBJECT TO.

A floating club houseboat, 40 or 50 feet long, about 14 feet wide, with decks forward and aft, and a cabin containing a kitchen and living room, is not subject to Act Pa. 1858 (P. L. 363), giving a lien for wharfage and anchorage against vessels navigating particular rivers.

[Ed. Note.—For other cases, see Wharves, Dec. Dig. § 18.*]

In Admiralty. Libel by the Pittsburgh Launch Club against the Almono Canoe Club for wharfage. Libel dismissed.

Ralph Strawbridge, for libellant.

L. C. Barton, for respondent.

ORR, District Judge. This is a claim for wharfage. If libellant has a lien, it must rest upon that Pennsylvania act of 1858 (P. L. 363) which provides:

"That all ships, steamboats or vessels navigating the rivers Allegheny, Monongahela or Ohio, in this state, shall be liable and subject to a lien in the following cases: * * * IV. For all sums due for wharfage or anchorage of any such ship, steam or other boat, boats or vessels of whatsoever kind, character or description, as hereinbefore specified."

The vessel is a floating houseboat from 40 to 50 feet long and about 14 feet wide, with decks forward and aft and a cabin erected thereon containing two rooms—a kitchen, equipped with range and cooking facilities, and a living room, used for the purposes of the club and the keeping of canoes by the members of the club.

We are bound by the construction of that Pennsylvania act as determined by the United States Circuit Court of Appeals for the Third Circuit in *Fredericks v. Rees*, 135 Fed. 730, 68 C. C. A. 368, where it was said:

"The statute applies only to vessels engaged in the business or employment of trade or commerce on the rivers named therein."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It is clear that the vessel of the Almono Canoe Club is not engaged in the business or employment of trade or commerce. That it may be navigated is not sufficient under the decision above referred to.

The libel must be dismissed, at the cost of the libellant.

McCLINTOCK v. CITY OF PAWTUCKET.

(Circuit Court, D. Rhode Island. July 26, 1910.)

APPEAL AND ERROR (§ 1202*)—REMAND—PROCEEDINGS IN LOWER COURT—BILL OF REVIEW—LEAVE TO FILE.

Where, after dismissal of an original bill in accordance with the mandate of the Circuit Court of Appeals, complainant's petition to that court for leave to apply to the Circuit Court for leave to reopen the case was denied, complainant's petition for leave to file a bill of review, not preceded by an application to the Circuit Court of Appeals for permission to apply to the Circuit Court to file the same, would also be denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4669; Dec. Dig. § 1202.*]

Action by John N. McClintock against the City of Pawtucket. On motion for leave to file a bill of review. Denied.

John N. McClintock, pro se.

Wm. R. Tillinghast, for defendant.

BROWN, District Judge. This is a motion for leave to file a bill in the nature of a bill of review. The original bill was dismissed in accordance with the mandate of the Circuit Court of Appeals for the First Circuit.

The case relates to the Glover patent, No. 559,522, for sewage apparatus. The prior decisions upon this patent are *American Sewage Disposal Co. v. City of Pawtucket* (C. C.) 132 Fed. 35, 138 Fed. 811, 71 C. C. A. 177, and 146 Fed. 753, 77 C. C. A. 243. The latter opinion shows that the appellant applied to the Circuit Court of Appeals for permission to apply to the Circuit Court for leave to reopen the case, and that that petition was denied. The present motion was not preceded by an application to the Circuit Court of Appeals for permission to apply to this court. Under the circumstances this court is without power to grant the complainant's motion. *Southard et al. v. Russell*, 16 How. 547, 570, 14 L. Ed. 1052; *Kingsbury v. Buckner*, 134 U. S. 650, 670, 672, 10 Sup. Ct. 638, 33 L. Ed. 1047; *In re Potts*, 166 U. S. 263, 17 Sup. Ct. 520, 41 L. Ed. 994.

Motion denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

BRAY et al. v. STAPLES.

GUARDIAN TRUST & DEPOSIT CO. v. GREENSBORO WATER
SUPPLY CO.

(Circuit Court of Appeals, Fourth Circuit. July 13, 1910.)

No. 952.

1. RECEIVERS (§ 60*)—TERMINATION OF RECEIVERSHIP—JURISDICTION—JUDGMENT.

Where a decree provided that in the event the receiver made a report, and no exceptions were filed thereto, the receiver should be discharged, but no report was ever filed, the decree was ineffectual to oust a court of jurisdiction.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 60.*]

2. ATTORNEY AND CLIENT (§ 155*)—ATTORNEY'S FEES—DETERMINATION—JURISDICTION.

Where, by contract between attorney and client, the attorney was only entitled to compensation out of any amount he might recover in the suit, and it was by his skill and ability that a judgment for his client was recovered, which was directed to be paid by a receiver of the corporation defendant in such suit, the court having custody and control of the fund had jurisdiction to determine when it should be disbursed and to whom it properly belonged, and hence had authority to fix the attorney's compensation and direct payment thereof out of the fund.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 316; Dec. Dig. § 155.*]

Dayton, District Judge, dissenting.

Appeal from the Circuit Court of the United States for the Western District of North Carolina, at Greensboro.

Suit by the Guardian Trust & Deposit Company of Maryland against the Greensboro Water Supply Company, in which B. J. Fisher intervened to establish a judgment recovered in the state courts as a prior claim against the assets of the Water Supply Company, to bonds secured by mortgage on the company's plant, etc. A judgment having been rendered sustaining such claim, the amount of the judgment after the death of Fisher was, under order of the Circuit Court, paid to C. A. Bray, trustee of Isabella Fisher and others. On application of John N. Staples to compel payment of his fees out of the fund. From an order granting such relief, Bray, as trustee, and others, appeal. Affirmed.

Originally this was a suit in equity, begun September 29, 1900, in the United States Circuit Court for the Western District of North Carolina, at Greensboro, by the Guardian Trust & Deposit Company of Maryland, versus the Greensboro Water Supply Company.

The purpose of the original suit was to foreclose a deed of trust executed by the Greensboro Water Supply Company on July 1, 1896, to secure 110 mortgage bonds for \$1,000 each; default in the payment of interest and in other respects being alleged.

An amended bill of complaint was filed in said suit on August 8, 1901, setting forth that the city of Greensboro had offered \$75,000 for the property of the Greensboro Water Supply Company, and that there were persons claiming prior liens, and the prayer of the bill was that such persons so claiming liens be brought into court by subpoena and their rights adjudicated.

Prior to the filing of the said original bill of complaint and the amended

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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bill, there had been brought in the superior court of Guilford county, N. C., by B. J. Fisher, a civil action against the Greensboro Water Supply Company, to recover damages alleged to have been suffered by the plaintiff in that action by reason of the alleged wrongful failure of the Greensboro Water Supply Company to supply sufficient water to protect the property of B. J. Fisher from injury by fire. This said action of B. J. Fisher against the Greensboro Water Supply Company to recover damages was tried in the state court, and a judgment for \$25,000 in favor of B. J. Fisher was obtained in January, 1901. That judgment was for breach of contract, and the superior court refused to render judgment for tort. The case was taken by appeal of the plaintiff to the Supreme Court of North Carolina because of the refusal of the superior court to render judgment *ex delicto*. The Supreme Court of North Carolina reversed this ruling of the superior court, and directed that judgment be rendered *ex delicto* for the amount found by the verdict to be due the plaintiff.

At the June term, 1901, of the superior court of Guilford county, a judgment *ex delicto* was rendered in conformity with the opinion of the Supreme Court of North Carolina in favor of B. J. Fisher against the Greensboro Water Supply Company.

On the 29th day of September, 1900, a receiver for the Greensboro Water Supply Company was appointed by the United States Circuit Court in the case of Guardian Trust & Deposit Company against the Greensboro Water Supply Company, and the receiver was directed to operate the property of the Greensboro Water Supply Company, and collect all the rents, profits, and revenues of the said company, and all moneys due or to become due it.

On the 29th day of July, 1901, it was ordered by the United States Circuit Judge, in said suit, that notice issue to B. J. Fisher and others to show cause why the property of the Greensboro Water Supply Company should not be sold to the city of Greensboro for the sum of \$75,000.

On the 29th day of July, 1901, a decree was passed by the United States Circuit Court confirming a sale of said property to the city of Greensboro for \$75,000, and it was further provided in said decree that B. J. Fisher and others have 30 days in which to file pleadings setting up their claims to the funds coming into the hands of the receivers as the proceeds of said sale.

On the 27th day of September, 1901, B. J. Fisher filed an answer to the rule to show cause, in which he reserved to himself all his rights and interests which had theretofore or did then exist or attach by reason of his said judgment obtained in the said court, and by virtue of the laws of North Carolina. In that answer he set out that in June, 1899, his property was destroyed by reason of the failure of the Greensboro Water Supply Company to furnish sufficient water to extinguish the fire, and that this conduct on the part of said water supply company was tortious, negligent, and careless. He alleged further that on the 20th day of July, 1899, he, the said B. J. Fisher, began a civil action in the superior court of North Carolina for damages resulting to him on account of said tort, and that the corporation entered an appearance and filed answer to the complaint of the plaintiff, and that the case was regularly tried at the January term, 1901, of the superior court of Guilford county, and a verdict was obtained for \$25,000. It was further alleged that from this judgment the plaintiff in that case, B. J. Fisher, appealed to the Supreme Court of North Carolina, upon the ground that the court had refused to give him a judgment *ex delicto* against the Greensboro Water Supply Company, and that the contention of B. J. Fisher that he was entitled to such judgment was sustained by the Supreme Court of North Carolina at the February term, 1901.

It is further alleged in that answer that on the 19th day of September, 1900, a receiver was appointed for the Greensboro Water Supply Company, and that prior to the appointment of the receiver he had been the attorney for the defendant, the Greensboro Water Supply Company, in the said suit brought by B. J. Fisher. It was further alleged in said complaint that under section 1255 of the Code of North Carolina mortgages made by incorporated companies upon their property and earnings have no power to exempt the property or earnings thus mortgaged from execution for satisfaction of any

judgment obtained in the courts of this state against such corporation in the courts of the state of North Carolina, for torts committed by such corporation, and that the judgment of B. J. Fisher obtained in the state court was for tort. It was further alleged that the mortgages under which the bondholders claimed, and for foreclosure of which the bill of complaint was filed in the suit brought by the Guardian Trust & Deposit Company against the Greensboro Water Supply Company in the United States Circuit Court, were made and executed by the Greensboro Water Supply Company, subsequent to the legislative enactment referred to, and that the same were by operation of law void as to the said judgment of B. J. Fisher. It was further alleged in said complaint that the judgment of B. J. Fisher was duly docketed, and that the rights of B. J. Fisher were prior to those of the said bondholders.

On the 24th day of March, 1902, a decree was passed by the Circuit Court of the United States for the Western District of North Carolina, at Greensboro, in the suit of the Guardian Trust & Deposit Company giving priority to the judgment of B. J. Fisher against the Greensboro Water Supply Company for \$25,000, as claimed by said Fisher. It was ordered by that decree that the receiver appointed in the suit in the United States court pay out of the \$75,000 which he held "the sum of \$25,000, with interest thereon from the 14th day of January, 1901, the date of the docketing thereof in the superior court of the county of Guilford, N. C.;" and it was further ordered that the costs in the state court and in the United States court incident to and on the said judgment be likewise paid by the receiver out of said funds. It was provided in the said decree that the cause of the Guardian Trust & Deposit Company against the Greensboro Water Supply Company be retained in the Circuit Court of the United States for orders and directions.

On January 9, 1907, another decree was passed in the case of the Guardian Trust & Deposit Company against the Greensboro Water Supply Company in which the following recitals are found:

"It appearing to the court that by the last decree made in this cause directing R. R. King, the receiver of the Greensboro Water Supply Company, to pay out of the funds in his hands as such receiver the judgments of the defendants, B. J. Fisher and others above named in this cause, and to distribute the remainder of the funds in his hands to the bondholders in a manner and form prescribed in the said decree, reserving and holding in his hands the sum of \$5,500 for the purpose of meeting the claim of the Southern Stock Mutual Insurance Company, which had intervened in this cause, claiming to be subrogated to the right of the defendant Helen G. Brown and Charlotte J. Gorrell, to the extent of \$5,000, money paid by it to those parties under its contract of insurance with them on the property claimed to have been lost by fire on account of the negligence of the Greensboro Water Supply Company; the said insurance company having theretofore instituted an action in the superior court of Guilford county in the name of itself against the Greensboro Water Supply Company for the purpose of establishing its right to the said sum of \$5,000 by virtue of its subrogation to the rights of the said Helen G. Brown and Charlotte J. Gorrell, and it now appearing to the court that the said action of the Southern Stock Mutual Insurance Company against the Greensboro Water Supply Company, pending in the superior court of Guilford county, has been compromised and adjusted by the agreement of the said insurance company to accept and receive from the said receiver the sum of \$3,000 in full of settlement of all of its right and claim against the Greensboro Water Supply Company, its receiver or bondholders, or the owner or holders of the said Gorrell judgment.

"It is now, by consent of the parties hereto and of the said bondholders, ordered and decreed that the said receiver, R. R. King, pay to the Southern Stock Mutual Insurance Company out of the money or funds in his hands as such receiver the sum of \$3,000, in full settlement and payment of all right, recourse, or claim which the said insurance company may or might have against the owner or holders of the judgment of Charlotte J. Gorrell, against the said water supply company; and the said receiver is further directed to pay the cost of the action pending in the superior court of Guilford county of the said insurance company against the Greensboro Water Supply Company."

On March 15, 1907, the receiver in the said suit of the Guardian Trust & Deposit Company against the Greensboro Water Supply Company, pending in the United States Circuit Court, made a report to the court which was as follows:

"That he has paid out under the orders of this court all claims against the Greensboro Water Supply Company, of which he has any knowledge, including the cost of litigation, except a small balance due the clerk of this court amounting to \$3.95.

"That in addition to this he has paid out to bondholders under order of this court a dividend of 38 per cent., and that he has on hand now a balance of \$2,391.33, which so far as he knows should be applied on the bonds mentioned in the pleadings in this case, less the \$3.93 cost above stated.

"Wherefore the receiver respectfully prays that an order be passed by this honorable court directing the application of this money, and that he be discharged from all further liabilities."

On March 15, 1907, a decree of the United States Circuit Court was passed in said suit as follows:

"This cause coming for final order upon the report of the receiver, which shows that after paying out money in accordance with all the orders previously made by this court in this case and the costs, there is a balance of \$2,387.31 for distribution to and among the stockholders to whom a previous dividend has been made under the orders of this court: Now on motion it is ordered, adjudged, and decreed by the court that the receiver, R. R. King, be, and he is hereby, directed to distribute among and pay over to the said bondholders the sum of \$2,387.31 now in his hands as provided heretofore. It is further ordered by the court that, unless exceptions are filed to the action of the receiver within 30 days next hereafter, he be discharged."

On the 16th day of February, 1909, John N. Staples filed in the said suit of the Guardian Trust & Deposit Company against the Greensboro Water Supply Company a petition in which he alleged that the above suit still remained on the docket of the Circuit Court of the United States for the Western District of North Carolina, at Greensboro, and that he, together with A. L. Brooks, were solicitors of record for B. J. Fisher, whose judgment against the Greensboro Water Supply Company was \$25,000 and interest. It is also alleged in that petition that John N. Staples, the petitioner, brought the action of B. J. Fisher against the Greensboro Water Supply Company for damages in the superior court of Guilford county, and that an appeal was taken to the Supreme Court of North Carolina.

The history of the civil action of B. J. Fisher against the Greensboro Water Supply Company and of the suit in equity of the Guardian Trust & Deposit Company against the Greensboro Water Supply Company is set out in that petition.

It is also stated in that petition that "in all of the said proceedings your petitioner was one of the solicitors of the said B. J. Fisher and rendered him faithful and efficient service as such, and that in conjunction with Brooks the full amount of said judgment was collected on the 14th day of April, 1906, amounting as your petitioner is informed and believes, in all, to about \$33,053.15. That on the day, namely, the 14th day of April, 1906, by consent of the administratrix of the said Fisher and of Mr. Brooks and your petitioner (the said Fisher himself having heretofore died, and his wife, Isabella Fisher, having qualified as administratrix), the amount of the said recovery above named was paid to Mr. A. L. Brooks as a solicitor of this court, and was received by him as such, he being one of the solicitors in the case together with your petitioner, and by him deposited in the City National Bank to his account, upon the agreement aforesaid, and upon further agreement that he should retain a sufficient sum thereof to satisfy whatever amount should thereafter be determined to be due your petitioner as the other solicitor in the case."

It was recited that an effort was made by arbitration and award to determine the amount John N. Staples was entitled to receive as the attorney for B. J. Fisher for his services in collecting said judgment, but that the award had been set aside. It was further recited by John N. Staples in said petition that A. L. Brooks then held as solicitor \$3,500 of the sum which was paid on

account of the judgment of B. J. Fisher against the Greensboro Water Supply Company, in the said action as one of the solicitors for B. J. Fisher; the said Brooks having theretofore paid to the said John N. Staples \$3,500, and the said Fisher during his lifetime having paid to the said John N. Staples the sum of \$900.

The petition of John N. Staples also recites that said A. L. Brooks is ready and willing to pay the said sum claimed by John N. Staples, but that the representatives of the estate of B. J. Fisher object, and asks that notice issue to the representatives of the estate of B. J. Fisher to show cause why an order should not be passed by the United States Circuit Court for the Western District of North Carolina, at Greensboro, directing the payment to the said John N. Staples of the sum claimed by him.

On February 16th an order was passed by the United States Circuit Court, at Greensboro, directing A. L. Brooks to retain in his hands the money then remaining in his hands, which was received by him in satisfaction of the judgment of B. J. Fisher on April 14, 1906, to await the determination of the amount that John N. Staples, attorney for said Fisher, should receive for his services; the same to be determined by the United States court. It was further provided in said order that notice issue to the representatives of the estate of B. J. Fisher and to A. L. Brooks, to the end that they might appear and show cause why an order should not be passed fixing the compensation of John N. Staples, and directing its payment out of the funds held by said Brooks.

A. L. Brooks filed his answer to this notice to appear on April 14, 1909, in which he admitted that all of the money received by him on account of the judgment of B. J. Fisher against the Greensboro Water Supply Company had been deposited by him in the bank, and had been checked out, but, that he held to his credit as receiver and commissioner of the Fisher estate, by virtue of his appointment as such by the state court, in a different proceeding, the sum of \$3,500 "which he retained in the bank out of the account of receiver and commissioner \$3,500 in lieu of the other to await the outcome and settlement of the matter of the fee of Col. John N. Staples and the estate."

On March 6, 1909, Isabella Fisher, administratrix of B. J. Fisher, in response to the notice issued to her to show cause why an order should not be passed by the Circuit Court of the United States allowing a fee to John N. Staples out of the moneys held by A. L. Brooks, entered a special appearance and moved that the petition of John N. Staples be dismissed upon the following grounds:

First. Because the suit of the Guardian Trust & Deposit Company against the Greensboro Water Supply Company was at an end, and the court had no further jurisdiction or power to make the order asked for by John N. Staples.

Second. Because the funds received by A. L. Brooks were turned over to him as the agent of the estate of B. J. Fisher, and not as an officer of the court.

Third. Because A. L. Brooks had disbursed and paid out all of the funds so received by him, amounting to \$33,000.

Fourth. Because John N. Staples had already sought to enforce his claim for a fee outside of the United States court, thereby recognizing that if he had any claim it was a personal one, with respect to which the United States Circuit Court had no power or jurisdiction.

Fifth. Because the United States Circuit Court had no jurisdiction or authority, in any event, to grant the relief or make the order prayed by John N. Staples, in his petition.

A like answer was made by C. A. Bray, trustee of the estate of B. J. Fisher, who was also brought into court.

The demurrers, being heard on special appearance, were overruled, as will appear by finding of fact of the United States Circuit Court.

Thereafter on April 14, 1909, an answer was filed by the representatives of the estate of B. J. Fisher in which they protested against the court's making any order with respect to the matters set out in the petition of John N. Staples. It was also alleged in that answer that an inspection of the account of A. L. Brooks as solicitor with the City National Bank of Greensboro would disclose that the amount of the judgment of B. J. Fisher against the

Greensboro Water Supply Company was collected by him for the estate and deposited in his name as solicitor, and that all of said amount had been paid out. It was further set out in said answer that there was no agreement by the administratrix of the estate of B. J. Fisher, deceased, by which A. L. Brooks was authorized to hold any money for John N. Staples, and that if any such agreement had been made it in no way gave to the United States Circuit Court jurisdiction to enforce it. The prayer of the answer was that the petition of John N. Staples be dismissed.

The facts pertinent to this case were set out in a paper writing headed "Findings of Fact by the United States Judge," appearing in the record.

On the 27th day of May, 1909, a decree was passed in the suit of the Guardian Trust & Deposit Company against the Greensboro Water Supply Company as follows:

"Upon considering the facts found in the above-entitled case, the court being of the opinion that it has jurisdiction to determine the matter of the fee of the said John N. Staples, and to order its payment out of the fund now in the hands of the said A. L. Brooks, and that the said fund is within the control of the court, and that the said Staples is entitled to be paid therefrom a just and reasonable sum as compensation for his services to the said Fisher in this case, and that the said sum of \$33,053.15 was recovered by means of the services of the said John N. Staples, and that he has the right to have his compensation paid therefrom, and to that end the same has been held by the said A. L. Brooks, and that the services rendered by John N. Staples in recovering this fund are reasonably worth \$7,500: It is therefore ordered, adjudged, and decreed that the said John N. Staples be allowed the further sum of \$3,100 in full payment for his services rendered the said Fisher in this case; and the payment of \$3,500 heretofore made by A. L. Brooks be, and the same is hereby, approved; and that the said A. L. Brooks pay into the registry of this court said sum of \$3,100 for the use and benefit of said John N. Staples."

Charles M. Stedman and E. J. Justice (Stedman & Cooke and Justice & Broadhurst, on the brief), for appellants.

William P. Bynum, for appellee.

Before PRITCHARD, Circuit Judge, and WADDILL and DAYTON, District Judges.

PRITCHARD, Circuit Judge (after stating the facts as above). As appears from the statement of facts, on the 30th day of September, 1901, B. J. Fisher filed his pleadings in the United States Circuit Court in the action in which a receiver had been appointed, setting up a judgment of \$25,000 which he had obtained in the state court, claiming enough of the fund in the custody of the court to satisfy such judgment before the trustees of the deeds of trust and the bondholders were entitled to receive anything; and this, by virtue of section 1255 of the Code of North Carolina, as will appear by the pleadings in that proceeding. His right to the fund claimed, or any part of it, was denied by the Guardian Trust & Deposit Company, the trustee in the first deed of trust. This suit was in effect a test case to determine this matter, both as to Fisher and the other judgment creditors, and the decision of that case governed the cases of the other judgment creditors; and the conduct of that case devolved entirely upon his attorneys of record, Messrs. Staples and Brooks.

An examination of the record will show that appellee and Mr. Brooks appeared as counsel for Mr. Fisher before Judges Simonton and Boyd, who heard the case. From the judgment rendered therein,

an appeal was taken to this court, and, when the question was argued here, appellee and Mr. Brooks appeared as counsel for Mr. Fisher and argued the different questions involved in the controversy. After argument was had before this court, the case was certified to the Supreme Court of the United States. There the appellee and Mr. Brooks again appeared as counsel for Mr. Fisher and succeeded in establishing the priority of the judgment which had been obtained in the state court.

From the time the Circuit Court of the United States assumed jurisdiction, the proceeding was purely of an equitable nature and was contested as such by appellee and Mr. Brooks as attorneys for Mr. Fisher; and, as a result of their services, it was finally decreed that Mr. Fisher was entitled to priority in that suit, and a decree was entered in his favor, by virtue of which the sum of \$33,000 was adjudged to be due Mr. Fisher, and this amount was paid over to Mr. Brooks, who was, as we have said, associated as counsel with Mr. Staples.

The learned judge who heard this case below found as a fact that it was agreed between Messrs. Fisher and Staples that Mr. Staples was only to be paid a fee for his services in the event he should recover, and that his fee was to be paid out of any amount that might be recovered. It also appears, as is shown by the findings of fact, that the sum of \$3,100 was to be held by Mr. Brooks to await the determination of the controversy between Mr. Staples and Mrs. Fisher (executrix of Fisher, who had died in the meantime), as to the amount of appellee's fee, and that out of said sum appellee was to be paid such amount as might be found to be due him for services rendered in that suit. Counsel for appellants insist that there was a final decree entered prior to the institution of this suit by which that case was taken from the docket. That decree, however, provided that a final report should be made, and in the event no exceptions thereto were filed, that the receiver should be discharged; but an examination of the record shows that no report has ever been filed by the receiver, and, therefore, the judgment has not become effective owing to the conditions contained therein. The court below found as a fact that the case is still pending on the docket at Greensboro, and this finding of fact, in our opinion, disposes of the question as to whether this court has jurisdiction.

It is also insisted that, inasmuch as the original amount of the judgment was paid over to Mrs. Fisher, the court thereby lost control over the fund and has, therefore, no power to make any order respecting the same. The court below found as a fact, based upon the petition and the answer filed by Mr. Brooks, together with his testimony, that, during his absence, his law partner, while acting under a misapprehension of the facts, did pay to Mrs. Fisher \$20,000 of the fund which had been directed to be held by him subject to the determination of the controversy between the appellee and Mrs. Fisher. It is also shown and found as a fact that, as soon as Mr. Brooks returned, he repudiated the entire transaction, and, out of other funds in his possession as agent for the Fisher estate, placed the sum of \$3,100 in the bank to his credit as solicitor to await the determination of the controversy between appellee and Mrs. Fisher; and this is the fund which is now being held

by Mr. Brooks subject to the orders of the court to await the determination of the question as to the amount that Mrs. Fisher, as executrix, is due to appellee, as attorney.

That the court had the custody and control of the fund acquired in this suit is admitted. Having thus acquired the custody of the same, it necessarily follows that it had jurisdiction to determine when it should be disbursed and to whom it properly belonged.

Under the terms of the contract between petitioner and his client, the petitioner was only entitled to compensation out of any amount that he might recover in that suit, and it was by his skill and ability that the judgment in question was recovered. We think that the court below very properly held that the appellee was entitled to be paid for his services out of the funds thus recovered.

Under the circumstances of this case, and in view of the findings of fact by the court below, we are of opinion that there is no error, and that the judgment complained of should be affirmed.

DAYTON, District Judge (dissenting). I very reluctantly dissent. I cannot reconcile myself to the conclusion that the court below had jurisdiction in the premises.

As I view this record, it is beyond all question that, by decree of July 18, 1901, the receiver's sale of the waterworks company's plant was confirmed, and all persons claiming "any right, title, or interest in or lien upon the property sold" were required to present their claims or demands within 60 days or be barred thereof; that by decree of September 3, 1901, this sale was again confirmed, and the \$75,000 purchase money was directed to be substituted for the property, and all rights in, and claims upon, the property were to be transferred and held against such proceeds of sale; that on September 30, 1901, B. J. Fisher, by petitioner Staples and A. L. Brooks, his attorneys, filed his answer claiming his judgment to be a lien upon such fund prior to that of the bondholders by reason of its origin in tort and not in contract; that on March 24, 1902, decree was entered declaring the Fisher judgment and three others for this reason, in accord with a North Carolina statute, to be prior to the mortgage liens, and directing "that the receiver in this suit pay to B. J. Fisher or his attorneys of record" his judgment with its accrued interest; that by this decree and a subsequent one of January 9, 1907, the whole fund was directed to be disbursed by the receiver; that on March 15, 1907, the receiver filed his report showing all debts to have been paid and that a balance of \$2,391.33 in his hands was due bondholders; that by decree of that day, declaring itself upon its face to be a final one, the receiver was directed to distribute this balance to the bondholders, and providing "that, unless exceptions are filed to the action of the receiver within 30 days next hereafter, he be discharged"; that no exceptions were filed within 30 days, and no reason whatever existed for retaining this cause, after the lapse of such 30 days, as all matters had been absolutely and finally disposed of, and the cause could have been so retained only by reason of the clerk's inadvertence and failure to strike it from the docket; that on February 16, 1909, nearly two years after the entry of this decree finally ending

the cause, Staples filed his petition seeking to assert an attorney's lien against the Fisher judgment that had been paid in full and without objection on his part to Brooks, his associate counsel, under decree entered nearly seven years before, and which, so far as Fisher was concerned, settled all his rights in the cause and in legal effect dismissed him therefrom. This petition sets up a private contract (wholly independent and impertinent to any issue involved in the original controversy) between Staples, Fisher's administratrix, and Brooks, whereby, it is alleged, it was agreed that Brooks, who received the Fisher money from the court's receiver under the decree of March 24, 1902, should hold a sufficient sum thereout as stakeholder until the amount due Staples for his services to Fisher might be ascertained and determined, and it is alleged that, to accomplish this, an arbitration was provided for between Staples and Fisher's administratrix and actually had, the award having been made and, for defects, set aside by the state courts and further action under the agreement declined by Fisher's administratrix.

The basis of the majority opinion seems to be that the learned judge below filed a statement of "finding of fact" from which it appears that he ascertained as facts, among other things, that an agreement existed between Fisher in his lifetime and Staples that the latter should be paid for his services only out of the amount of recovery, that the cause was still pending and the fund still under the jurisdiction of the court, which "findings of fact" are deemed conclusive of Staples' right to recover.

With the utmost deference for the opinion of my Associates, it seems to me that this position is unsound for two reasons: First, because this "finding of fact," setting forth as it does many things aliunde the record, is not warranted in practice in an equity case as determined by this court in *Hyams v. Federal Coal & Coke Co.*, 82 C. C. A. 324, 152 Fed. 970, where it is held that evidence cannot be adduced orally in open court upon hearing unless the parties consent to do so, but must be taken and filed in form of depositions, and this, too, notwithstanding Equity Rule 67, May 15, 1893 (149 U. S. 793). In this case it is clearly shown that the defendant administratrix of Fisher was objecting to any such finding of facts by the court; she having filed plea denying in toto the court's jurisdiction, and also having excepted on record to such finding. If, therefore, this rule of practice is to stand as fixed by this *Hyams Case* (the soundness of which I frankly say I have always doubted), the finding of facts from other sources than from the depositions filed is no longer warranted in equity as administered in this circuit.

But, second, aside from all this, it cannot be questioned that the orders and decrees in an equity cause must speak for themselves, and the interpretation of their scope and effect involves, not a question of fact, but is matter purely legal. The mere findings of the court below to the effect that the fund was still under its jurisdiction and the original cause was still pending can be held as nothing less and nothing more than its judicial construction of the decrees and orders entered in the cause, and we cannot avoid a review of this judicial act by call-

ing it a "finding of fact" on its part. The true question is: What was the legal effect of the decrees of March 24, 1902, declaring the Fisher judgment to be prior to the mortgage liens and directing its payment in full by the receiver to Fisher or his attorneys of record, and of March 15, 1907, ascertaining that the receiver had paid all the debts decreed, including, of course, this Fisher one, disbursing the balance in his hands to the stockholders, and directing his discharge unless exceptions be filed in thirty days? If these decrees or either of them were final ones, they could only be set aside, modified, or corrected, after the lapse of the terms when rendered, by bill of review or by appeal. *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797; *Klever v. Seawall*, 12 C. C. A. 653, 65 Fed. 373.

What constitutes a final decree? In the determination of this question it is to be remembered that the test of the finality of a decree is not whether the cause remains in fieri, in some respects, in the court of chancery, awaiting further proceedings necessary to entitle the parties to the full measure of the rights it has been declared they have, but whether the decree which has been rendered ascertains and declares these rights. If these are ascertained and adjudged, the decree is final. *Ex parte Norton*, 108 U. S. 237, 2 Sup. Ct. 490, 27 L. Ed. 709; *St. Louis, etc., R. R. Co. v. Southern Express Co.*, 108 U. S. 24, 2 Sup. Ct. 6, 27 L. Ed. 638; *Grant v. Life Ins. Co.*, 106 U. S. 429, 1 Sup. Ct. 414, 27 L. Ed. 237; *Forgay v. Conrad*, 6 How. 201, 12 L. Ed. 404; *Winthrop Iron Co. v. Meeker*, 109 U. S. 180, 3 Sup. Ct. 111, 27 L. Ed. 898; *Dainese v. Kendall*, 119 U. S. 53, 7 Sup. Ct. 65, 30 L. Ed. 305; *Lodge v. Twell*, 135 U. S. 232, 10 Sup. Ct. 745, 34 L. Ed. 153.

And where a decree is made as to one of several defendants whose interests are not at all connected with that of the other defendants, such decree is final as to him, although the cause may be still pending in the court as to the rest. *Royall's Adm'x v. Johnson*, 1 Rand. (Va.) 421, 427; *Bunnell v. Berlin Bridge Co.*, 66 Conn. 24, 33 Atl. 533, 536; *Klever v. Seawall*, 12 C. C. A. 653, 65 Fed. 373; *Hill v. Chicago & E. R. Co.*, 140 U. S. 52, 11 Sup. Ct. 690, 35 L. Ed. 331; *Forgay v. Conrad*, 6 How. 201, 12 L. Ed. 404.

Under these authorities, and many others that could be cited, how is it possible upon mere inspection of the decree of March 24, 1902, for us to hold otherwise than that it was final as to Fisher and his interests in the cause? It distinctly determines the question in controversy, to wit, his alleged right of priority over the bondholders, in his favor, and decrees that the receiver "pay to B. J. Fisher, or his attorneys of record, the sum of \$25,000 with interest thereon from the 14th day of January, 1901," thereby fixing the amount of his debt and directing immediate payment thereof without qualification or limitation. Nothing remained for the court to do thereafter. The execution of the decree only required the ministerial act of the receiver of paying over the money. Will it be contended for a moment that the bondholders could have waited seven years and then appealed from this adjudication in Fisher's favor because the cause was still on the docket and the receiver had not reported his payment over of the money or a portion of it finally to them?

But we must not forget that still another decree was entered based upon the receiver's payment of this debt and others as directed which ascertained the balance in his hands, directed its distribution to stockholders and his final discharge if exceptions were not filed. And this decree was entered one year and eleven months before Staples filed his petition. How can this decree, unappealed from, be held under the law as other than final as to all parties and all matters involved in the cause? Are we to hold that the mere default of the receiver to report his ministerial acts of disbursement of the small balance due to stockholders is sufficient for us to assert control over the Fisher fund, decreed near seven years before to be paid, and which Staples charges in his petition was actually paid on April 14, 1906, near three years before we are asked by this petition to do so? I cannot think so. If Staples had desired, it seems to me, to assert his attorney's lien against the fund, he would have realized the necessity of doing so before the decree of March 24, 1902, at which time the court below could have ascertained its amount and directed its payment. He did not do this; but, on the contrary, his petition expressly shows that he entered into and relied upon a new contract constituting a new and different tribunal than this court—that is to say, an arbitration board—to ascertain and determine his rights.

Strictly speaking, no attorney's lien attaches to any fund which is within the custody or control of the court; but it is the court's right to award attorney's fees out of the fund. But this power to award fees is impersonal, acting on the res alone, so, where the res is beyond the control of the court, the attorney must seek some other remedy. *Fowler v. Lewis*, 36 W. Va. 112; 14 S. E. 447; *Dubois' Appeal*, 38 Pa. 231, 80 Am. Dec. 478; *Mordecai v. Devereux*, 74 N. C. 673; *U. S. v. Boyd* (C. C.) 79 Fed. 858; *Penn'a Finance Co. v. Charleston, etc., R. Co.* (C. C.) 46 Fed. 426; *Weigand v. Alliance Supply Co.*, 44 W. Va. 133, 28 S. E. 803; *Tuttle v. Claflin* (C. C.) 86 Fed. 964; *Rumsey v. People's R. Co.*, 84 Mo. App. 508; *Rawlings v. New Memphis Gaslight Co.*, 105 Tenn. 268, 60 S. W. 206, 80 Am. St. Rep. 880; 4 Cyc. 1013, and notes.

Here it seems to me that both the res is beyond the control of the court, with the full knowledge and assent of Staples (he having filed as attorney his client's petition and having secured thereon the decree disbursing it), and that he has already sought another remedy, to wit, an independent contract between himself, his associate attorney Brooks, and his client's personal representative. That the latter refuses to comply with this contract may be his misfortune and may disclose moral turpitude on her part, yet his right to enforce its performance would seem to be clear, provided he attempts to do so in a court of competent jurisdiction. That the court below was not such court is clear because the parties to such contract are all citizens of the same state. My conclusions therefore are:

First. That the court below had no jurisdiction to entertain this petition of Staples, as being filed in and as a part of the record in the original cause, because by the decree of March 24, 1902, all the rights of his client Fisher were finally determined and decreed, and by the

decree of March 15, 1907, the cause was finally ended, and the fact that it was allowed to remain on the docket was due solely to the ministerial omission of the clerk in not striking it therefrom.

Second. That if this were not so the power of the court below to ascertain, fix, and decree any attorney's fee claimed by Staples against the Fisher fund was limited and existed only so long as the fund remained under its control. Therefore when Staples suffered the decree of March 24, 1902, to be entered, directing payment in full to Fisher or to his attorneys without setting up his demand, subsequently entered into the independent agreement with Fisher's administratrix and Brooks his associate counsel as to the manner in which his fee should be ascertained and paid, and, in accord with this agreement, allowed Brooks to collect the fund, he waived all right to assert his claim in the original cause, and must be held to have elected to look to the enforcement of his rights to compensation to this new and independent contract. For the law touching such waiver, see 4 Cyc. 1011 and 1012, and notes 75, 76, and 77, and authorities therein cited.

Third. That the court below had no jurisdiction to entertain Staples's petition as an independent and original proceeding to enforce the contract between himself, Brooks, and Fisher's administratrix, based upon the allegation that Fisher's administratrix had violated it because the sole parties in such a controversy would be the three named, all of whom are citizens of North Carolina.

Fourth. That the right of Staples to appeal to a local court of competent jurisdiction to enforce this agreement, if he can, is clear and undeniable.

The decree of the court below, therefore, in my judgment, ought to be reversed, and the petition dismissed solely for want of jurisdiction and without prejudice to any action Staples may see fit to institute in any court of competent jurisdiction to enforce such contract.

ATLANTIC TERRA COTTA CO. v MASON'S SUPPLY CO.

(Circuit Court of Appeals. Sixth Circuit. July 13, 1910.)

No. 2,026.

1. TRIAL (§ 141*)—QUESTION OF LAW OR FACT—DIRECTED VERDICT.

Where defendant admitted that plaintiff was entitled to a certain amount with interest and alleged a tender thereof, the court erred in directing a verdict for defendant; plaintiff at least being entitled to recover the amount admitted to be due.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. § 141.*]

2. CONTRACTS (§ 176*)—ELEMENTS—MEETING OF MINDS.

Where plaintiff made a proposal to furnish the terra cotta for a building and entered into a contract, and it was a matter of dispute whether the drawings furnished disclosed side lintels and sills subsequently required by specifications, it was a question for the jury whether, on the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

papers furnished plaintiff, it was required to furnish such lintels and sills.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 767-770, 1097; Dec. Dig. § 176.*]

Mutuality in, see note to American Cotton Oil Co. v. Kirk, 15 C. C. A. 543.]

3. EVIDENCE (§ 441*)—WRITTEN CONTRACT—SECONDARY EVIDENCE.

A proposal and its acceptance will ordinarily be treated as merged in the written contract, the terms of which may not be altered or varied by secondary evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2030-2047; Dec. Dig. § 441.*]

4. EVIDENCE (§ 417*)—PAROL EVIDENCE—CONTRACT TERMS—SPECIFICATIONS.

Where a contract to furnish the terra cotta for a building required plaintiff to furnish terra cotta "shown on drawings and described in specifications," and it was claimed that certain terra cotta required by the specifications and not shown on the drawings was not within the contract, evidence that the ordinary function of specifications is to show how materials called for by plans are to be treated, and not to show materials not shown on the plans, was admissible.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 417.*]

5. CONTRACTS (§ 28*)—SPECIFICATIONS—EVIDENCE.

Where a contract to furnish the terra cotta for a building required plaintiff to furnish terra cotta "shown on drawings and described in specifications," and plaintiff claimed that the plans and drawings on which its bid was made did not disclose side lintels and sills, for which it sought to recover as extra, evidence that the papers submitted to plaintiff and on which its proposal was based did not include the specifications and did not call for the terra cotta lintels and sills in dispute was admissible.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 28.*]

6. CONTRACTS (§§ 159, 176*)—CONSTRUCTION—"AND."

A contract required plaintiff to furnish terra cotta for a building "shown on drawings and described in specifications." Plaintiff claimed that the specifications were not furnished at the time it submitted its bid, and that the plans submitted did not include the certain terra cotta lintels and sills subsequently required, and for which plaintiff sought to charge as extra. *Held*, that the word "and," in the clause "shown on the drawings and described in the specifications," was not necessarily to be construed in its disjunctive sense as "or," so as to require plaintiff to furnish terra cotta shown on either the drawings or described in the specifications, and that plaintiff was not required as a matter of law to furnish terra cotta for such lintels and sills under its contract for the contract price.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. §§ 159, 176.*]

For other definitions, see Words and Phrases, vol. 1, pp. 385-394; vol. 8, p. 7575.]

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Action by the Atlantic Terra Cotta Company against the Masons' Supply Company. Judgment for defendant, and plaintiff brings error. Reversed.

This action was brought in the court below by plaintiff in error against defendant in error (and the parties will be referred to here as "plaintiff" and "defendant"); the former being a New York corporation and the latter an Ohio corporation. The action was one at law and was brought to issue upon

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

amended petition, an answer, and a reply. The recovery sought was for a balance of \$5,513.45 for supply of terra cotta used in the construction of the Hippodrome building, fronting on Euclid and Prospect avenues, Cleveland, Ohio. It appears that the principal contractor was the Reaugh Construction Company; that Mr. Reaugh of that company was a stockholder of the Hippodrome Company and also president of the defendant; and that at his request the written contract now in dispute to furnish terra cotta was made between plaintiff and defendant.

The amended petition comprises two causes of action. The first one is based on the contract before mentioned, which was entered into on July 26, 1906. It is in substance alleged that plaintiff agreed to provide the material and perform the work for delivery of the "terra cotta f. o. b. on cars at destination, shown on drawings and described in specifications prepared by Knox & Elliot, architects for the Hippodrome building" for \$12,600; that the value of extra terra cotta work was to be fixed by the architects, and in case of dissent by either party the valuation should be referred to arbitrators; that the defendant subsequently gave written orders to plaintiff to furnish certain extra side lintels and sills of terra cotta, and also to make certain terra cotta replacements; that it furnished the same; but that defendant refused to submit to the decision either of architects or arbitrators any question concerning such side lintels and sills and also refused to pay therefor, claiming they were included in the original contract; that the value of the extra material under the first order is \$4,200, and under the second order \$60, making plaintiff's entire claim \$16,860; but that defendant has paid only \$11,346.55, leaving the balance due as before stated. The second cause of action differs only in form from the first one; it is to recover upon quantum valebat. By its answer defendant stated an account showing a balance due to plaintiff on the original contract of \$304.03, with interest from October 9, 1907, and a further sum of \$60 for replacements of terra cotta with interest from the same date, which sums with interest "defendant hereby tenders plaintiff and brings into court with its answer herein." In the reply admission is made of some of the items of the account in the answer, and denial is made of others.

At the close of all the evidence, the court, on motion of defendant, directed a verdict in its favor, and the case is pending here on error.

M. B. & H. H. Johnson, for plaintiff in error.
Smith, Taft & Arter, for defendant in error.

Before WARRINGTON and KNAPPEN, Circuit Judges, and SANFORD, District Judge.

WARRINGTON, Circuit Judge (after stating the facts as above). The main question is whether plaintiff obligated itself to deliver for the sum of \$12,600 all or only a part of the terra cotta which was used in the construction of the Hippodrome building. The solution of the question must depend upon whether the contract of July 26, 1906, was intended to include certain lintels and sills of terra cotta on the sides of the building. It is claimed on behalf of the plaintiff that this is a question of fact, and on behalf of defendant that it is a question of law. Although no opinion was rendered either upon the motion to direct or upon the motion for a new trial, we gather from an interlocutory statement made during the progress of the trial that the learned judge was "inclined to the opinion that the contract covers all of the terra cotta work to be furnished as gathered from the plans and specifications"; or, as otherwise stated, plaintiff was "bound to furnish terra cotta work described in the specifications but which was not shown on the plans."

The issue thus presented arose upon a dispute relative to certain papers upon which plaintiff claims to have submitted its bid and en-

tered into the contract. Plaintiff claims that only two drawings were received by it, to wit, the Euclid and Prospect avenue elevations, and that no side elevations, floor plans, or specifications were received; but defendant claims the contrary. There is conflict upon the issue so made, both in the testimony and correspondence offered. It is insisted by defendant, however, that this conflict is not material, because the contract in terms requires plaintiff "to provide all the material and perform all the work for the delivery of terra cotta f. o. b. cars at destination, shown on drawings and described in specifications prepared" by the architects.

Shortly after the contract was signed (August 3, 1906), the defendant notified plaintiff by letter that it was sending to it by express "plans and specifications, together with three-quarter scale drawings for the Cleveland Hippodrome building," and requesting plaintiff to get "full sized working drawings out and return to us for architects O. K. at once." Plaintiff replied to this by letter of August 9th, stating:

"In looking over the drawings recently sent for this order, we find among them additional drawings showing side lintels of terra cotta. These drawings were never sent to us before, consequently were not figured by us in our estimate to you. * * * We received the specifications after we had signed the contract. We trust that there will be no misunderstanding as to our part in this matter, as everything seems to us clear. Undoubtedly the original intention was to have these lintels and sills in some other material except terra cotta."

Plaintiff stated further that it was inclosing its estimate for side lintels and sills in terra cotta.

This resulted in much correspondence; defendant claiming and plaintiff denying that it (plaintiff) had received a copy of the specifications. Plaintiff expressed its willingness to perform the contract, but declared it would "not include material that is not included in same"; and again that it would "not make sills and lintels without extra order." In this correspondence it appears that terra cotta companies other than plaintiff had declined to bid on certain papers submitted by defendant, and defendant claimed that it had in consequence sent additional papers not only to other terra cotta companies, but to plaintiff. While neither company seems to have receded from its original claim, their correspondence by mail and telegrams culminated in a settlement of the dispute by a proposition of plaintiff in a letter of September 11th, and accepted by defendant, as follows:

"Will proceed to fulfill our contract leaving all disputes to arbitration in accordance with article three of our agreement. * * *"

The arbitration clause so referred to is stated in a letter of plaintiff thus:

"All disputes or disagreements of any nature whatsoever arising under this agreement shall also be referred to and settled by the arbitrators. * * *"

Defendant's letter of September 13th, accepting plaintiff's proposition of September 11th, contains also this statement:

"The settlement of any question in difference, to be arbitrated as per article 3 of your contract. In reference to the color of terra cotta, you will

please disregard the sample of granite recently sent you, as the Hippodrome board have made a change to a pinkish granite. * * * As there has been considerable delay in the progress of this work, it will be necessary to revise the time limit for the delivery of same. * * * The sills and lintels for the theater portion of the building, you will please bear in mind, will be wanted first. * * *

Plaintiff thereupon supplied the terra cotta in dispute and also made the replacements mentioned in the pleadings; and, while defendant admitted the reasonableness of the charge for the replacements, the parties failed to agree upon a submission either to the architects or to arbitrators of the question relating to the terra cotta used for lintels and sills upon the sides of the building. The provision for arbitration contained in the contract provided that "the decision of any two of whom (arbitrators) shall be final and binding." Efforts were made to formulate new articles of arbitration, but failed because of defendant's refusal "to sign papers in said matter which provide that a decision of a majority of the arbitrators is final," stating further that "we will treat this as a closed instance."

It will be recalled that the first cause of action of the petition is formulated upon the theory that plaintiff had not by its contract agreed to deliver, for \$12,600, terra cotta for the side lintels and sills or to make the replacements mentioned; that it was sought to recover the reasonable value of those items as extras; and that in the second cause of action recovery is sought as upon a quantum valebat. It is further to be borne in mind that in the answer the defendant admitted that there was due to the plaintiff under the contract as defendant interpreted it a balance of \$304.03, and as an extra the sum of \$60 for replacements, with interest on both sums from October 9, 1907. It is averred also in the answer that defendant "tenders" these sums and brings them "into court with its answer herein"; but we do not discover any evidence offered in support of this averment; nor do we understand that the matter was disposed of when the condition of the pleadings in respect to the sums mentioned in the answer was under consideration by the court and counsel during the progress of the trial.

Now, was defendant entitled to a directed verdict upon this record? Can it be rightfully maintained that plaintiff was not entitled to a recovery of any sum whatever? It might be sufficient to say that it was entitled to recover at least the sums admitted to be due. But, aside from this, we shall consider the more important question whether as matter of law plaintiff was bound to supply terra cotta for the side lintels and sills. Plainly there were two sets of different instruments submitted to some manufacturers of terra cotta, who were prepared to make proposals. Some of them would not bid on one set of these papers. The defendant would seem *prima facie* to be responsible for the mistake if there were any in the submission of papers to bidders. If it be true that plaintiff made its proposal and entered into the contract upon drawings which did not disclose side lintels and sills, it is clear that there was no actual meeting of minds upon that subject. *Turner v. Webster*, 24 Kan. 38, 40, 36 Am. Rep. 251, per Justice Brewer. To be sure a proposal and its acceptance would ordi-

narily be treated as merged in the contract, and the terms of the writing could not be altered or varied by secondary evidence.

But in the present instance the dispute arose before performance of the work was begun. Progress could not be made until it was further agreed in writing that the differences respecting side lintels and sills should be settled by arbitration. Moreover, the contract in terms required plaintiff to furnish terra cotta "shown on drawings and described in specifications." Testimony was received to the effect that the ordinary function of specifications is to show how materials called for by plans are to be treated, and not to describe materials which are not shown on the plans. It is evident that the court below was thus seeking to place itself in the situation of the parties to the contract both at the time of its execution and at the date of the settlement of the dispute, with a view of ascertaining what terra cotta was under the circumstances really intended to be furnished for \$12,600. This is permissible.

As observed in *Nash v. Towne*, 5 Wall. 689, 699 (18 L. Ed. 527):

"Courts, in the construction of contracts, look to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described."

See, also, *Merriam v. United States*, 107 U. S. 437, 441, 2 Sup. Ct. 536, 27 L. Ed. 531; *Hull Coal & Coke Co. v. Empire Coal & Coke Co.* (Fourth Circuit) 113 Fed. 256, 260, 51 C. C. A. 213.

Why then, in view of the peculiar circumstances of this case, and also of the written instruments (one dated July 26th, and the other concluded by correspondence later), is not plaintiff entitled to show, if it can show, that the papers actually submitted to it and upon which its proposal was based did not include the specifications and did not call for the terra cotta lintels and sills in dispute? When all the instruments constituting the ultimate contract are construed, the intention of the parties becomes reasonably clear that this question was not to be concluded by the instrument alone of July 26, 1906.

In *Sexton v. City of Chicago*, 107 Ill. 323, it appears that the city of Chicago had caused a general plan of a city hall to be prepared, consisting of numerous drawings and specifications, and to be placed on file in its department of public works. Sexton, desiring to bid on the iron work, applied at the proper office and was furnished with a duplicate plan of the iron work for the purpose of enabling him to make his estimate and a formal proposal. He offered to "furnish the materials and do the iron work according to plans and specifications" for a sum named. This was accepted, and afterward a formal contract to that effect was executed, and Sexton commenced performance of the work; but later he refused to furnish certain "T" iron rafters for the roof, and also materials and work for a skylight, on the ground that his contract did not require him to do so, and for this refusal his contract was in terms forfeited in accordance with a provision in that behalf. Among the papers upon which he made his estimate was a

tracing which at the time was an exact copy of the original plan. Subsequently the city changed the weight of the "T" iron for the rafters, but through inadvertence this change was not noted on the tracing submitted to bidders. Say the court (at page 332, of 107 Ill.):

"Thus it will be perceived the city is wholly responsible for the mistake out of which this entire controversy has arisen—a mistake which makes a difference in the cost of the building of some \$8,000 or \$10,000—and yet the city seeks to fasten this whole loss upon the appellant, who was in no sense to blame for it, but on the contrary, it is the direct result of the city's own negligence.

"We do not understand the expression 'plans and specifications,' and other terms of like import, as used in the contract, have exclusive reference to the general plan from which the duplicate plans or 'tracings' are made out. The latter, although for convenience are generally called 'tracings,' are nevertheless as clearly plans, within the meaning of the contract, to the extent of the work represented by them, as the originals from which they are taken, and we think justice, honesty and fair dealing demand they should be so treated in giving a construction to the contract. As already seen, they were given by the city to appellant to make his estimates and do the work by, and he had a right to assume these were the plans referred to in the contract. And if, through the city's negligence, a mistake occurred in making them out, the city must suffer the consequences. * * *

And again (at page 333 of 107 Ill.):

"Whether the city, under the circumstances, was estopped from denying the correctness of the plans thus furnished appellant, and for that reason had no right to declare a forfeiture of the contract, or whether, by reason of a mutual mistake, caused by the negligence of the city, as to the subject-matter of the contract, no contract was created between them, it is not important to inquire, as in either case the law is with the appellant, and he therefore had the right to acquiesce in the forfeiture of the contract, and proceed, as he did, upon a quantum meruit for the materials and his services. *Bishop on Contracts*, §§ 186, 228, et seq.; *Continental Bank v. Bank of Commonwealth*, 50 N. Y. 575."

See, also, *Turner v. Webster*, supra.

It is further contended, and with considerable show of reason, that the true meaning of the words of the contract of July 26, 1906, which required plaintiff to furnish the terra cotta "shown on the drawings and described in specifications," is that it should furnish such terra cotta and such only as was both shown on the drawings and described in the specifications. This of course is construing the phrase as it is written, and the word "and" conjunctively. It is true that "and" is frequently read as "or"; but this does not seem necessary in order to effectuate the apparent intent of the parties in the present instance. *Rice v. United States* (Eighth Circuit) 53 Fed. 910, 911, 912, 4 C. C. A. 104; *Fredenburg v. Turner*, 37 Mich. 402, 405; *Mayer v. Cook*, 26 Misc. Rep. 774, 57 N. Y. Supp. 94, 95.

Admittedly the terra cotta lintels and sills in dispute were not shown on the drawings, and if in truth the drawings alone were submitted to plaintiff, it is hard to see how either of the parties can be said to have contemplated a supply of terra cotta for the side lintels and sills.

It follows that it was error to hold as matter of law that plaintiff was required for the sum specified in the contract of July 26, 1906, to include terra cotta for these lintels and sills. It is scarcely neces-

sary to say that it was not open to the learned trial judge, and we do not understand that he attempted to weigh the evidence offered in support and in denial of the issue touching submission of the specifications prior to the execution of the contract. That was a matter to be presented to the jury under appropriate instructions. Since a new trial must be granted, we do not consider it either necessary or proper to pass upon the other questions discussed in the briefs.

The decision below will be reversed, with costs.

GARST v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. July 12, 1910.)

No. 961.

1. CRIMINAL LAW (§ 778*)—TRIAL—INSTRUCTIONS.

Where the court charged the jury in a criminal case that "every person is presumed by the law to be innocent, and the burden is on the government to prove beyond a reasonable doubt that the defendants are guilty as charged in the indictment," it was not error to refuse to charge further that "such presumption of innocence is not a mere form which the jury may disregard at its pleasure, but a substantial part of the law of the land and binding upon the jury in this case."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1847; Dec. Dig. § 778.*]

2. CRIMINAL LAW (§ 552*)—INSTRUCTIONS—SUFFICIENCY OF CIRCUMSTANTIAL EVIDENCE.

In order to convict on circumstantial evidence, not only must all the circumstances concur to show that the defendant committed the crime, but they must be inconsistent with any other rational or reasonable conclusion, and an instruction that the jury should acquit if the facts are "equally consistent" with innocence or guilt is erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1257-1262; Dec. Dig. § 552.*]

3. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—BURDEN AND MEASURE OF PROOF.

The refusal of a requested instruction in a criminal case that "no amount of suspicion, however grave or serious, will justify you in finding the defendant guilty," was not error where the jury had been correctly instructed that the burden rested on the government to prove every fact necessary to establish the guilt of the accused beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

4. CRIMINAL LAW (§§ 829, 1172*)—INSTRUCTIONS—PREVIOUS GOOD CHARACTER.

Where the court in a criminal case instructed the jury that "the previous good character of defendants ought to be considered together with all the other facts in evidence," it was not error to refuse to charge further that "the law presumes that a man whose character is good is less likely to commit a crime than one whose character is not good," and, while the instruction was erroneous in assuming that previous good character was proven, the error was not prejudicial to defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3160; Dec. Dig. §§ 829, 1172.*]

5. CRIMINAL LAW (§ 858*)—TRIAL—TAKING COPY OF INSTRUCTIONS TO JURY ROOM.

Where the court in a criminal case charged orally and also gave certain written instructions requested by defendant, it was not error to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

overrule a motion to permit the jury to take such written instructions to their room.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2056-2059, 2062; Dec. Dig. § 858.*]

6. CRIMINAL LAW (§ 1093*)—APPEAL AND ERROR—SUFFICIENCY OF BILL OF EXCEPTIONS.

A bill of exceptions setting out that the judge at a time when the jury had been recalled into court "told the jury that in his opinion the evidence showed the defendants to be guilty and stated the reasons therefor," but which does not set forth what the judge said in stating his reasons, is insufficient to sustain an assignment of error, except to the fact of giving such an opinion at the time it was given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2828-2833, 2919, 2920; Dec. Dig. § 1093.*]

7. CRIMINAL LAW (§ 762*)—INSTRUCTIONS—EXPRESSION OF OPINION AS TO GUILT OR INNOCENCE OF DEFENDANT.

While it is not error in the federal courts for the trial judge to state his opinion as to the guilt or innocence of the defendant in a criminal case if given to the jury with the proper explanation that it has no binding force, yet, when such opinion is given, it should be in connection with the instructions; and withholding it until it appears likely that the jury will not agree is a practice not to be commended.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759, 1769; Dec. Dig. § 762.*]

Waddill, District Judge, dissenting.

In Error to the District Court of the United States for the Western District of Virginia, at Roanoke.

G. W. Garst was convicted of a criminal offense, and brings error. Reversed.

R. H. Willis, for plaintiff in error.

Barnes Gillespie, U. S. Atty (Samuel H. Hoge, Asst. U. S. Atty., on the brief).

Before PRITCHARD, Circuit Judge, and WADDILL, and KELLER, District Judges.

KELLER, District Judge. This is a writ of error to a judgment pronounced against the plaintiff in error by the District Court of the United States for the Western District of Virginia on the 29th day of June, 1909, upon an indictment for removing and concealing spirits in violation of the revenue laws of the United States.

The indictment under which this conviction was had consisted of four counts, and the verdict of the jury found the defendant not guilty of the charges contained in the second, third, and fourth counts of the indictment, but guilty of the charge contained in the first count of the indictment to the effect that the said defendant, G. W. Garst, "did unlawfully remove and aid and abet persons, to the grand jury unknown, in the removal of certain distilled spirits, to wit: seventy-six gallons of corn whisky upon which the tax imposed by law had not been paid, from a distillery, to wit: G. W. Garst's distillery, to a place other than the distillery warehouse provided by law, to wit: Patrick county, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States." A number

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of bills of exception were taken in the progress of the trial, and after its close an assignment of errors, consisting of nine paragraphs, was prepared by counsel for the plaintiff in error.

Before discussing the assignments of error which seem to be properly taken and are therefore necessary to be considered in the determination of this case, it seems proper to once more call attention to the requirements of the rules of this court in relation to assignments of error. Rule 11¹ provides that, when the error assigned is to the admission or rejection of evidence, "the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. * * * When this is not done counsel will not be heard except at the request of the court, and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned."

Many of the assignments of error presented in this record were not prepared in conformity with the rule from which the above quotation was taken, and one of them (the fifth assignment) is remarkable in that there is no bill of exceptions to support it. This assignment reads:

"Fifth: The court erred, as set forth in the defendant's bill of exceptions No. 8, in instructing the jury that the records of the G. W. Garst distillery were not offered in evidence to show how much whisky had been made and how much tax paid, but for the purpose of showing the cost of manufacture of said spirits."

As stated above, no bill of exceptions No. 8 appears in the record, and we cannot too earnestly remind counsel that this court cannot supply omissions nor rectify errors in the preparation of these matters, and ought not to be asked to puzzle over such conditions as are disclosed by this assignment.

Some assignments of error, not the subject of objections hereinabove mentioned, were not urged in argument, and may be considered as abandoned; others, relating to the admission of evidence, challenged as irrelevant, are clearly without merit, and we do not find it necessary to consider any except the third, fourth, and sixth assignments of error.

The third assignment of error relates to alleged errors concerning several written instructions and changes made therein by the court, as to which exceptions were saved by appropriate bills of exception, and is in the following language:

"Third. The court erred in refusing to give instruction offered by the defendant, Nos. 1, 2, 3, and 7, and in altering the said instruction in the following particulars; that is to say in the defendant's instruction No. 1, as set forth in the defendant's bill of exceptions No. 2, the court struck out the following words, 'that such presumption of innocence is not a mere form which the jury may disregard at its pleasure but a substantial part of the law of the land and binding upon the jury in this case.' And as appearing from the said bill of exceptions the court likewise struck out from the said instructions the following words: 'If such facts might also be true and the defendant be innocent, then it makes no difference how much stronger the probability of his guilt than his innocence, you must acquit'—and, as shown by the said bill of exceptions, the court added to the said instructions the following words: 'Yet if the facts are equally consistent with innocence you

¹ 79 C. C. A. xxvii, 150 Fed. xxvii.

should acquit.' And in the defendant's instruction No. 2, as set forth in the defendant's bill of exceptions No. 3, the court struck out the following words: 'No amount of suspicion, however grave or serious,' and inserted the words 'suspicion of guilt.' And the court likewise added to the said instruction the words, 'you must be satisfied of guilt beyond all reasonable doubt.' And in the defendant's instruction No. 3 the court struck out the words 'for the law presumes that a man whose character is good is less likely to commit a crime than one whose character is not good.' And in the defendant's instruction No. 7, as set forth in the defendant's bill of exceptions No. 4, the court struck out the words, 'as appears by the official record.'"

We are satisfied that the action of the trial court, as disclosed by bills of exception Nos. 3 and 5, touching instructions Nos. 2 and 7, was without error and fully justified by the weight of authority.

Bill of exceptions No. 2 is in the following words:

"Be it remembered that upon the trial of this cause, after the evidence had been concluded, the defendants, by counsel, moved the court to instruct the jury as follows:

"(1) The court instructs the jury that the mere fact that the defendants are accused of a crime or that the grand jury has indicted them does not raise any presumption against them whatever, but that every person is presumed by the law to be innocent, and the burden is on the government to prove beyond a reasonable doubt that the defendants are guilty as charged in the indictment; that such presumption of innocence is not a mere form which the jury may disregard at its pleasure, but a substantial part of the law of the land and binding upon the jury in this case. If, therefore, the government fails to prove to you every fact necessary to establish the guilt of the accused beyond a reasonable doubt, you must acquit them. And in this connection you are instructed that circumstantial evidence should be weighed with extreme caution and a doubt as to any one fact or circumstance necessary to establish the guilt of the accused is conclusive and you must acquit, and that, even though every fact be proven and such a state of affairs be shown to you as if true would be entirely consistent with the guilt of the accused if such facts might also be true and the defendants be innocent, then it makes no difference how much stronger the probability of his guilt than his innocence, you must acquit."

"Which instruction the court then and there refused, but, instead, gave the following instruction:

"(1) The court instructs the jury that the mere fact that the defendants are accused of a crime or that the grand jury has indicted them does not raise any presumption against them whatever, but that every person is presumed by the law to be innocent, and the burden is on the government to prove beyond a reasonable doubt that the defendants are guilty as charged in the indictment. If, therefore, the government fails to prove to you every fact necessary to establish the guilt of the accused beyond a reasonable doubt, you must acquit them. And in this connection you are instructed that circumstantial evidence should be weighed with great caution, and a reasonable doubt as to any one fact or circumstance necessary to establish the guilt of the accused is conclusive, and you must acquit, and that, even though every fact be proven and such a state of facts be shown to you as if true would be entirely consistent with the guilt of the accused, yet, if the facts are equally consistent with innocence, you should acquit."

The first change which the court made in this requested instruction was in striking out the words, "That such presumption of innocence is not a mere form which the jury may disregard at its pleasure, but a substantial part of the law of the land and binding upon the jury in this case." As to this portion of the instruction, while in some cases its equivalent has been given and approved, we are of opinion that the defendant was not prejudiced by the failure of the court to give those

words, inasmuch as the court had already stated to the jury that "every person is presumed by the law to be innocent, and the burden is on the government to prove beyond a reasonable doubt that the defendants are guilty as charged in the indictment." There is no warrant for the idea that the jury might infer that those words were a mere form, and therefore no necessity to particularly emphasize this phase of the law. *Cochran & Sayre v. United States*, 157 U. S. 286, 15 Sup. Ct. 628, 39 L. Ed. 704. Further along in the instruction the court modified the word "doubt" by inserting before it the word "reasonable," a change which was not only free from error, but was necessary to correct the instruction which, without it, would have been clearly erroneous. Still further along in the first instruction, the court was asked to charge upon the effect of circumstantial evidence as follows:

"That even though every fact be proven, and such a state of facts be shown to you as, if true, would be entirely consistent with the guilt of the accused if such facts might also be true and the defendants be innocent, then it makes no difference how much stronger the probability of his guilt than his innocence, you must acquit."

The court declined to give the words above italicized, but gave in lieu thereof the following words:

"Yet, if the facts are equally consistent with innocence, you should acquit."

This substitution is assigned as error, and it is urged that it was misleading to the jury as only directing an acquittal in the event the circumstantial evidence was equally as consistent with innocence as with guilt.

While we are convinced that the court used the word "equally" in the sense of "also," we think nevertheless that there is substantial merit in this assignment of error. The rule in regard to circumstantial evidence is that all the essential facts and circumstances shown in evidence must be consistent with the defendant's guilt and inconsistent with every other reasonable hypothesis. Unquestionably the instruction as presented to the court was faulty, in that the language used did not limit the direction to acquit to a reasonable or rational hypothesis of innocence; but instructed the jury that, if the facts proven "might also be true and the defendants be innocent, the jury must acquit"; but, when the court undertook to reframe the instruction, we think the instruction as given should have gone as far as the weight of authority authorized, and should not have made it possible for the jury to infer that they were only authorized to acquit in the event that the proved essential facts and circumstances were "equally as consistent" with the innocence as with the guilt of the defendants, for the practically unbroken line of decisions is to the effect that, in order to convict on circumstantial evidence, not only must all the circumstances concur to show that the defendant committed the crime, but they must be inconsistent with any other rational or reasonable conclusion, and that the refusal to give such an instruction is error. See *Hughes' Instructions to Juries*, §§ 311-314, and the cases there cited. In the same

assignment of error the plaintiff in error complains that the court erred in refusing instruction No. 2, offered in the following words:

"The court instructs the jury that no amount of suspicion, however grave or serious, will justify you in finding the defendant guilty."

And in giving in place thereof the following:

"The court instructs the jury that suspicion of guilt will not justify you in finding the defendant guilty. You must be satisfied of guilt beyond all reasonable doubt."

Clearly there was no error in refusing the instruction asked for, especially in view of the fact that the court had already instructed the jury in instruction No. 1 that "the burden is on the government to prove beyond a reasonable doubt that the defendants are guilty as charged in the indictment. If, therefore, the government fails to prove to you every fact necessary to establish the guilt of the accused beyond a reasonable doubt, you must acquit them." We think the court would have been justified under the circumstances in refusing this instruction without giving anything in lieu thereof, and are quite clear that this specification of error is without merit. Hughes on Instructions to Juries, §§ 20-22, and cases cited.

The same may be said of the specification in relation to instruction No. 7, which appears in bill of exceptions No. 5, instead of No. 4, as stated in the assignment of errors. This specification was not mentioned in the argument and was apparently waived, but it is certainly without merit, as it made the court say to the jury that a certain fact "appears by the official record," whereas it was for the jury to determine what facts were shown by such record.

This assignment of error further complains of the action of the court in relation to the third instruction offered by the defendant below, which was offered as follows:

"The court instructs the jury that the previous good character of the defendants ought to be considered together with all the other facts in evidence, in passing upon the question of their guilt or innocence of the charge, *for the law presumes that a man whose character is good, is less likely to commit a crime than one whose character is not good.*"

The court struck out the words above italicized in the instruction, and gave the remainder of it and this is assigned as error. We think there is no merit in this assignment of error for several reasons: The clause stricken out institutes a comparison between a man whose character has been proved good and one whose character is not good. There is no warrant for an instruction based upon such comparison, because the law presumes that every defendant's character is good, and the sole effect of evidence introduced by him tending to affirmatively show such good character is to strengthen the presumption of innocence which already exists in his favor by virtue of this presumption of law. The government is not allowed to show as a part of its case that any defendant's character is not good; and therefore in our judgment there is no warrant whatever for instituting in an instruction a comparison between the character of a man who has presented evidence tending to show that his character is good and a man whose character is not good.

It would undoubtedly have been correct to ask the court to instruct the jury that evidence of good character is proper to be considered by the jury as strengthening the presumption of innocence which exists in his favor, but we are clear that the court can never be required to institute a comparison. We further think that the court erred in giving the instruction as amended in that the instruction assumes that the evidence given in relation to the previous good character of the defendant amounted to proof of that fact. In other words, the instruction should have read: "The court instructs the jury that evidence of the previous good character of the defendants ought to be considered," etc.—instead of saying to the jury that "the previous good character of the defendants ought to be considered," because the latter phrase practically told the jury that such previous good character had been proven, whereas the question of the weight to be given to the evidence tending to prove such character was exclusively a matter for the jury. However, such error was certainly not prejudicial to the defendant below, and, therefore he could not complain of it.

The fourth assignment of error was to the action of the court in overruling the motion of the defendant below to permit the jury to take the written instructions given by the court to their room with them. This matter was in our judgment a question within the discretion of the court, and therefore not reviewable upon writ of error except for such obvious abuse of discretion as might exist in permitting a jury to take instructions framed upon one assumption of facts proved, and refusing to permit them to take those framed on the converse assumption. No such case existed here, but the court had instructed the jury orally and could well assume that if the jury was given permission to take the written instructions framed by defendant's counsel to their room, being unable to have before them the oral charge of the court, they might give undue prominence in their deliberations to those instructions, framed by counsel for the defendant, and of course favorable to him, and the action of the court in this matter was not error.

In view of what we have already stated in relation to bill of exceptions No. 2, it is perhaps unnecessary to refer to any of the other assignments of error, and yet we cannot forbear to call attention to one of them, as well to convey our view of the insufficiency of the bill of exceptions taken thereon as to deprecate, except in special cases, any departure from the usual and established order of proceedings in criminal cases.

The eleventh bill of exceptions, referred to in the sixth assignment of errors, sets forth:

"That after the court had instructed the jury on Saturday, the 26th day of June, 1909, and the case had been fully argued by counsel, the same was submitted to the jury, who thereupon retired to their room for deliberation, and at the hour for adjournment the court ordered the marshal to call the jury into the courtroom, and asked them if they had agreed upon a verdict, whereupon the jury stated that they had not agreed upon a verdict, and they were adjourned over until Monday, June 28th, at 10:00 a. m., and, the jury having at that time assembled in the courtroom, the court then stated to them that he had not intended to express to them his opinion on the facts, but after having reflected upon the case since the adjournment Saturday afternoon, he would express to them his opinion on the facts. The court then told the jury that they were not bound by his opinion, and that it was offered

for what they might think it worth. He then told the jury that in his opinion the evidence showed the defendants to be guilty, and stated the reasons therefor, and concluded by again instructing the jury that they were not bound by his opinion on the facts, to which action," etc.

This bill of exception in our opinion is insufficient upon which to predicate error because it does not set forth what the court said to the jury in the way of his reasons for his opinion, and hence is only good as a charge of error in giving such an opinion at the time it was given.

That in the federal courts the judge may express his opinion as to the guilt or innocence of the accused, if such expression of opinion is given to the jury with the proper explanation, that it has no binding force whatever, is well established, and we should be very reluctant to say that an expression of opinion so guarded was error. Yet at the same time we are of opinion that ordinarily, if it is thought proper in a given case, to give to the jury the benefit of the court's opinion for what it may be worth, there would seem to be no good reason why such opinion should not be given in connection with the charge of the court and the instructions submitted, so that there should be no possible danger of its making more of an impression upon the mind of the jury than the court desired, or than it properly should make. If given in such a way and at such a time we are persuaded that it could have no more weight with the jury than that properly accorded to the views of an intelligent, unprejudiced man, learned in the law and attentive to the evidence, and so given, would never be accorded undue weight; but it is entirely possible that if that same jury has been considering the case patiently and has been unable to agree and has reached that stage at which they are about convinced that they will be unable to agree, and they are then called in by the judge of the court and told that he has reflected upon the case, and that in his opinion the defendant is guilty and he marshals the reasons for his opinion, there is some danger that his opinion will exercise an influence which would not have been accorded to it had it been expressed along with the submission of the legal instructions and immediately in connection with the arguments of counsel; and this may, and, indeed, under such circumstances, is quite likely to be true, even though the court carefully endeavors to keep its influence within the bounds assigned to it by the approved practice of the federal courts. For these reasons we would deprecate a practice of withholding such opinion until a time when it appears likely that the jury may not agree without its expression.

For the reasons given in our discussion of the assignment of error based upon the first instruction contained in bill of exceptions No. 2, we are of opinion that the judgment in this case must be reversed and the case remanded to the District Court of the United States for the Western District of Virginia, and a new trial awarded.

It is accordingly so ordered.

Reversed.

WADDILL, District Judge (dissenting). I am unable to concur either in the conclusions reached, or the views expressed by the majority in this case. The evidence in my opinion abundantly supports the verdict of the jury, and the judgment of approval thereof rendered

by the court, and the record fails to show any error committed prejudicial to the accused, for which there should be a reversal. I especially desire to express my nonconcurrence in what is said in commenting on the action of the trial judge in expressing an opinion upon the facts of the case. While it may be conceded that generally in the courts of the states of the Union the exercise of this authority on the part of the trial judge is not permitted, still nothing is better settled than the right to do so in the federal courts, where the English rule on the subject prevails, and that their action in so doing is not the subject of review, provided no rule of law is incorrectly stated, and the matters of fact are ultimately submitted to the determination of the jury. *Lovejoy v. United States*, 128 U. S. 171, 173, 9 Sup. Ct. 57, 32 L. Ed. 389; *Star v. United States*, 153 U. S. 614, 14 Sup. Ct. 919, 38 L. Ed. 841; *Breeze v. United States*, 106 Fed. 680, 45 C. C. A. 853, Id., 108 Fed. 804, 48 C. C. A. 36. Indeed, this right is apparently conceded by the majority; but the court undertakes to limit the time when the trial court may express its opinion upon the facts and determine what weight should be given to what the judge says. I am unable to concur with the views expressed on either of these positions. If the right of the trial court can be prescribed in the manner indicated as to the time when it may express an opinion on the facts of the case, it will largely destroy the benefits intended to be given by the exercise of the authority, and, if what the trial judge says carries with it no greater weight than that indicated in the opinion of the majority, it is unfortunate that such power exists at all, and the same should never be exercised. *Allis v. United States*, 155 U. S. 117, 121, 122, 15 Sup. Ct. 36, 39 L. Ed. 91; *Allen v. United States*, 164 U. S. 492-501, 17 Sup. Ct. 154, 41 L. Ed. 528; *Burton v. United States*, 196 U. S. 283, 304, 306, 25 Sup. Ct. 243, 49 L. Ed. 482. The object of permitting the trial court to express an opinion upon the facts of a case, leaving their determination for the ultimate judgment of the jury, was designed for some good purpose; that is, to facilitate the administration of justice, and to materially aid the jury in arriving, without undue delay, at a just and correct conclusion, and hence to trial judges must necessarily be given the right, if they are to act at all, to say in what cases, when, and under what circumstances they shall express their views on the character, credibility, weight, and sufficiency of the evidence, leaving always to the jury the right to finally determine the facts; and to the views of courts, when so expressed, weight and consideration should be given by the jury, having regard to the character, the learning, ability, discriminating judgment and experience of the judge so announcing the same.

SHAW v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. July 13, 1910.)

No. 2,020.

1. GRAND JURY (§ 15*)—COMPETENCY OF JURORS—"CIVIL OFFICER."

A practicing attorney is not a "civil officer" within Ky. St. § 2248 (Russell's St. § 3061), rendering such officers incompetent to serve as grand jurors.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 35, 36; Dec. Dig. § 15.*]

For other definitions, see Words and Phrases, vol. 2, p. 1198.]

2. POST OFFICE (§ 48*)—INDICTMENT—"ARTICLE OF VALUE."

Money is comprehended by the term an "article of value" within an indictment of a railway postal clerk for secreting and embezzling a letter containing "articles of value."

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 66-80; Dec. Dig. § 48.*]

3. POST OFFICE (§ 48*)—LETTERS CONTAINING ARTICLE—INDICTMENT—SUFFICIENCY.

An indictment of a railway postal clerk for embezzling a letter containing "articles of value," to wit, "\$12 in money of the United States," which letter was addressed to a specified person at a specified address, it being alleged that a further description of the letter and its contents is unknown to the grand jurors, sufficiently describes the money.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 66-80; Dec. Dig. § 48.*]

4. POST OFFICE (§ 48*)—LETTERS CONTAINING ARTICLE—INDICTMENT—REQUISITES.

An indictment of a railway postal clerk for secreting and embezzling a letter containing an article of value need not describe the article with the same precision as in a prosecution for forgery or larceny, but the article must be stated.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 66-80; Dec. Dig. § 48.*]

5. POST OFFICE (§ 48*)—LETTERS CONTAINING ARTICLES—INDICTMENT—SUFFICIENCY.

An indictment of a railway postal clerk for secreting and embezzling a letter containing an article of value sufficiently describes the article if it apprises defendant of the charge against him and protects him against a second prosecution for the same offense.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 66-80; Dec. Dig. § 48.*]

6. CRIMINAL LAW (§ 1036*)—CONFESSION—FAILURE TO OBJECT—EFFECT.

That accused's confession was not objected to by him when offered as not being voluntary warrants disregard of an objection on appeal on that ground.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2639; Dec. Dig. § 1036.*]

7. CRIMINAL LAW (§ 519*)—CONFESSIONS—ADMISSIBILITY—VOLUNTARY CHARACTER.

Confessions not voluntarily made are inadmissible against accused; he being protected against confessions obtained by duress or through hope or fear.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1163; Dec. Dig. § 519.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

8. CRIMINAL LAW (§ 519*)—CONFESSIONS—VOLUNTARY NATURE.

A confession is not shown to be involuntary merely because made while under arrest or on questions by an officer.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1167; Dec. Dig. § 519.*]

9. CRIMINAL LAW (§ 531*)—CONFESSIONS—VOLUNTARY NATURE—EVIDENCE—SUFFICIENCY.

Evidence held sufficient to show prima facie that a confession made by a railway postal clerk to secreting a letter containing money was voluntary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1215; Dec. Dig. § 531.*]

10. CRIMINAL LAW (§ 781*)—CONFESSIONS—INSTRUCTIONS.

On request by accused it is proper to specially instruct that a confession must be found to have been voluntarily made before it could be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1864; Dec. Dig. § 781.*]

11. CRIMINAL LAW (§ 692*)—CONFESSIONS—VOLUNTARY NATURE—WAIVER OF OBJECTIONS.

Accused did not waive the right to question the voluntary nature of his confession by motion to strike it out by failing to cross-examine as to its voluntary nature.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1629; Dec. Dig. § 692.*]

12. POST OFFICE (§ 49*)—LETTERS CONTAINING MONEY—EVIDENCE.

In a trial of a railway postal clerk for embezzling a letter containing money, the fact that the letter which was introduced in evidence was found in his pocket was some evidence tending to show intent to embezzle.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84-86; Dec. Dig. § 49.*]

In Error to the District Court of the United States for the Western District of Kentucky.

George B. Shaw was convicted of secreting and embezzling a letter as a railway postal clerk, and he brings error. Affirmed.

W. M. Smith, for plaintiff in error.

George Du Relle, for the United States.

Before WARRINGTON and KNAPPEN, Circuit Judges, and McCALL, District Judge.

KNAPPEN, Circuit Judge. The defendant was indicted under the first clause of section 5467 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3691), charged with having, while he was employed by the United States as a railway postal clerk, feloniously secreted and embezzled a certain letter which had come into his possession by reason and because of his employment in the postal service of the United States; said letter being alleged to contain certain articles of value. A prior indictment against this defendant was considered by this court in *Shaw v. United States*, 165 Fed. 174, 91 C. C. A. 208. Upon the trial under this latter indictment conviction was had and sentence thereon imposed. Before the trial the defendant moved to quash the indictment upon the ground that the foreman of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the grand jury which found the indictment was incompetent to serve as a grand juror from the fact that he was a practicing attorney and a member of the bar of the court into which the indictment was returned. After the hearing upon the facts, both by affidavits and oral examination of the foreman, the court overruled the motion to quash on the grounds: First, that the foreman was not a practicing attorney; and, second, that even if he were, he was not thereby disqualified. The overruling of the motion to quash is assigned as error.

Section 800 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 623) provides that:

"Jurors to serve in the courts of the United States, in each state respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned."

Section 2248 of the Kentucky Statutes (Russell's St. § 3061) provides that:

"A grand jury shall consist of twelve persons, and no person shall be qualified to serve as a grand juror unless he be a citizen and a housekeeper of the county in which he may be called to serve, and over the age of twenty-one years. No civil officer (except trustees of schools) no surveyor of a highway, tavern keeper (or persons of several other enumerated classes) shall be competent to serve as a grand juror; but the fact that a person not qualified or competent served on a grand jury shall not be cause for setting aside indictments found by such a grand jury."

The defendant contends that a practicing attorney, although not mentioned by name in the statute, is a civil officer within the meaning of the Kentucky statute. The Court of Appeals of Kentucky has held that impaneling as a grand juror one who is not a housekeeper is a substantial error in the formation of a grand jury, and can be taken advantage of on motion to set aside the indictment (*Commonwealth v. Smith*, 10 Bush, 476); but that the fact that a member of a grand jury was a school trustee (such trustee being held under the statute as then existing to be a civil officer) is not ground for setting the indictment aside (*Commonwealth v. Pritchett*, 11 Bush, 277); the rules applicable to each class being held to be different from the fact that the "disqualifications" created by the first clause were adopted for the protection of citizens, and the provisions as to "incompetency" contained in the second clause were created in part for the benefit of the class of persons therein named, "and also to leave grand juries unembarrassed by the presence of those whose pursuits in life were most likely to direct the attention of grand juries to them." These decisions were made before the adoption of the provision in the statute that:

"The fact that a person not qualified or competent served on a grand jury, shall not be cause for setting aside indictments found by such a grand jury."

It is urged by defendant that the statutory provision last quoted, as well as the Kentucky decisions just referred to, are not effective in the federal courts; in other words, that if a grand juror was incompetent under the Kentucky statute, he would be disqualified under the federal statute, notwithstanding the Kentucky statute forbade the setting aside of an indictment found by reason of such disqualification or

incompetency; it having been held in *Crowley v. United States*, 194 U. S. 461, 24 Sup. Ct. 731, 48 L. Ed. 1075, that the disqualification of a grand juror, prescribed by statute, is a matter of substance, which cannot be regarded as a mere defect or imperfection within the meaning of section 1025 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 720).

We do not find it necessary to determine this question, in view of the conclusion we have reached as to the status of a practicing attorney as a civil officer. In support of his contention that a practicing attorney is a civil officer, the defendant cites *In re Wall* (C. C.) 13 Fed. 814, and *In the Matter of Mosness*, 39 Wis. 509, 20 Am. Rep. 55. In the *Wall* Case, which was a proceeding to disbar an attorney, it was said that "an attorney is an officer of the court." In the *Mosness* Case, which was an application for the admission of a nonresident of Wisconsin to practice in the courts of that state, the court, in denying the application on the ground of nonresidence, said:

"Attorneys and counselors of a court, though not properly public officers, are quasi officers of the state whose justice is administered by the court."

It is further urged that attorneys are within the class whose actions are liable to investigation by a grand jury by reason of certain statutes penalizing the engaging in practice by certain public officers, the defending by the law partners of certain prosecuting officers of those whom it is made the official duty of such officers to prosecute, the forming of a law partnership between clerks of certain courts and attorneys at law, and practicing law without a license. In our opinion there is no merit in the contention that a practicing attorney is a civil officer within the meaning of the Kentucky statute. While attorneys may be in a sense quasi public officers, they plainly are not, to the common understanding of mankind, civil officers. They are not, in our judgment, within either the letter or the spirit of the Kentucky statute. The correctness of this conclusion is confirmed by the language of the Kentucky statute prescribing the exemptions of petit jurors, in which "practicing attorneys" are specially enumerated in connection with a large number of other classes of persons, notwithstanding a previous designation of civil officers, thus evidencing the legislative understanding that practicing attorneys are not included in that term. In our judgment the motion to quash was properly denied. This conclusion makes it unnecessary to determine whether the juror was in fact a practicing attorney, or whether the motion to quash was seasonably made.

Upon the denial of the motion to quash the indictment, the defendant filed a general demurrer thereto, upon the ground that:

"Said indictment does not state facts sufficient to constitute any offense against the laws of the United States."

No specific defect in the indictment is pointed out in the record. On the contrary, the court in its opinion on the motion for new trial states that:

"When the demurrer was filed and came on to be argued, counsel for defendant distinctly avowed their inability then to see or state any defect in

the indictment, stating that the demurrer was formal and interposed so as to get any advantage that might thereafter develop."

Under the circumstances, it would seem hardly necessary to consider this demurrer. We shall, however, do so. The specific defect now urged is that money is not included in the general term "articles of value," and that, if so included, the description of the money contained in the indictment is insufficient in that the character and description of the currency is not given. There is plainly no merit in this criticism. Money is clearly included in the term "an article of value." *Bromberger v. United States* (Second Circuit) 128 Fed. 346, 63 C. C. A. 76. As to the description: The letter is described as containing "articles of value, to wit, \$12 in money of the United States, and which said letter was then and there inclosed in a sealed and postpaid envelope, then and there addressed to 'Mrs. M. J. Blaufield, Tulane Hotel, Nashville, Tenn.,' and a further description of which said letter and its contents is to the grand jurors aforesaid unknown." It is urged that this description of the money is insufficient in an indictment for larceny, and that the same rule should prevail under this indictment. There are authorities which hold such description insufficient in a prosecution for larceny. There is, on the other hand, excellent authority that the description used in the indictment here would be good in a prosecution for forgery. *Bishop's New Criminal Procedure*, vol. 2, § 705. We see no reason why the same rule should not prevail in prosecution for embezzlement or larceny of money.

The gravamen of the charge in the indictment before us is, however, the secreting and embezzling of the letter, and thus while it is necessary that the letter contain an article of value, and that this article be stated, yet it is not necessary to describe it with the same precision as in a prosecution for forgery or larceny. See *Rosencrans v. United States*, 165 U. S. 257, 263, 17 Sup. Ct. 302, 41 L. Ed. 708. There was no request for a bill of particulars, nor anything to suggest that the description contained in the indictment was not sufficient to apprise the defendant of the charge made against him, as well as to protect him against a second prosecution for the same offense. This degree of certainty is all that is required. *Jones v. United States* (C. C.) 27 Fed. 447; *Bromberger v. United States*, *supra*, at page 351 of 128 Fed., at page 76 of 63 C. C. A. In our opinion the demurrer was rightly overruled.

The contention that verdict should have been directed for defendant because of the alleged falsity of the statement in the indictment that a further description of the letter and its contents was unknown to the grand jurors is without merit. The reference is not only to the letter, but to its contents, and thus extends to the subject of any further description of the money than that it is "\$12 in money of the United States." This objection seems to rest upon the assertion of variance between the indictment and the proofs. *United States v. Riley* (C. C.) 74 Fed. 210. The latter are not, in our judgment, clearly at variance with the indictment. Moreover, the letter, envelope,

and money were received in evidence under an apparent disclaimer by defendant's counsel of any objection thereto.

Complaint is earnestly made of the action of the court in admitting evidence of an alleged confession by the defendant. The ground of the objection to the admissibility of the evidence is that the alleged confession was not shown to have been voluntary.

The testimony showed that defendant was a railway postal clerk, assigned to duty as transfer clerk; his duties including the transferring of mail from a mail box in the railway depot to the railway post office to which it belonged. The government's testimony tended to show that two post office inspectors, suspecting that defendant was embezzling valuable letters, deposited in the depot mail box a test letter containing \$12 in currency, and so prepared as to suggest that the letter contained money; that defendant took the letter from the mail box and failed to deposit it in the proper railway post office. The testimony of one of the inspectors was, in substance, that, after examining the mail box and finding the test letter gone, he went to the post office; that the defendant was then there, having completed his duties; that the witness requested the defendant to go upstairs to the inspector's office, on the fifth floor of the building, and he did so; that the other inspector then stated to defendant his reason for asking him to come, viz., that numerous losses had been occurring in mail matter; that the two inspectors had been making an investigation of these losses, and asked defendant in effect whether he knew about them; that defendant stated he did know of some but not of all of them; that he was told that a test letter had been placed in the mail that was to go through his hands and did not come out; that defendant thereupon produced four \$1 bills which he said he had got from the mail in the pouch en route through his hands to the train he met that afternoon; that he had destroyed the letter he got the money from and could not tell anything more about it. (The testimony as to the four \$1 bills was afterwards withdrawn from the jury.) The witness further stated that defendant (who had not up to that time mentioned the test letter) was told that the letter containing the \$4 was not the letter they were looking for; that at this time the witness, who was sitting by defendant at the table, reached over and drew from defendant's left side sack coat pocket the test letter in question (the upper edge of what proved to be the test letter having been seen extending from the edge of the pocket), together with another letter; that defendant, after first claiming that he did not know the letter was in his pocket, said in answer to questions that he had taken the test letter (together with the other letter) from the mail box with the intention of later taking the money out, as there appeared to be money in both of them, and then, likewise in answer to questions, "explained that he had been for several months taking letters of that class from the mails at that point and would take the money from them"; that defendant said he estimated the money he had so taken would aggregate about \$200; that since his injury several years before in a railroad wreck he at times "felt an irresistible impulse or tendency to steal." The witness stated upon cross-examination that the door of his office had a spring lock,

"and if the door was pushed shut it locked, and if it was not, it did not"; that "there was no locking of the door so far as any act of locking it is concerned"; that defendant was not told that "it would be better for him to confess up the matter," nor that the inspectors had "positive evidence against him," nor, in terms, that the inspectors had "positive evidence that he was guilty." The witness further testified that the test letter, when taken from defendant's pocket, was still sealed and unopened, and apparently just as the inspectors had prepared it.

The statement of the other inspector differed from that of the one before mentioned, so far as appears to us material, in these respects only, viz.: That this other inspector testified that defendant said that he had taken the test letter out of the box, intending to keep it, but had changed his mind on the way up and intended to remail it; that defendant ascribed his appropriation of valuable letters to an injury to his head suffered in the train wreck mentioned; that the witness talked with the defendant about an hour and a half, during the latter (and a considerable) part of which time the other inspector was absent getting out a warrant, the record not, however, showing that the reason for such absence was known to defendant; that the witness, when alone with the defendant, prepared a statement for the latter to sign, confessing to the taking of the test letter and other valuable letters; that defendant objected to signing the statement on account of matters contained therein other than those relating to the test letter in question (making no objection because of the letter in question), and because he wished to consult his attorney; that defendant later offered to sign it; but that the other inspector, who had come back, told him not to do so if there was anything in it that he objected to; and that the statement was not signed. The witness further testified that defendant was not in the room for an hour and a half "in order to try to get a confession and a signed statement from him." The testimony as to the attempt to get the signed statement was introduced through cross-examination by defendant's counsel, and the draft thereof was introduced in evidence by said counsel. No objection was made to the testimony upon the ground that the confession was involuntary. Before any testimony as to the statements made by defendant was given, the court, on its own motion, gave defendant's counsel permission to question the witness as to whether the statement made was "the result of any inducement offered to the accused to make that statement, any promise of reward." Counsel replied, "We do not care to ask him now," nor was that subject again referred to by counsel.

The defendant was sworn as a witness and denied that he had confessed to any theft, embezzlement, or secreting of money or valuable letters, or that he had in fact made such thefts, embezzlements, or secretings. He admitted that the test letter was found in his pocket in the inspector's office, explaining its presence there by the statement that in delivering letters from the box to the train he always carried them in his pocket, because he had the registered pouches to look after, and that the letter in question stuck to an insurance book which he

had in his pocket, and that he was not aware of the fact until the letter was found in his pocket during his interview with the inspectors. He testified that after he had entered the inspector's room the door was locked; that he was asked for all the money he had upon him and was accused of stealing from the mails; that he was told it would be better for him to make confession—easier on him. There was testimony that the defendant had been injured in a railway wreck, and that as a result of such injuries he was physically and mentally impaired; such impairment including a partial paralysis of his leg and arm and other parts of his body, lessened power of vision and hearing, impaired memory and absentmindedness, and a lessened sensibility of touch. There was evidence, however, that he had for several years satisfactorily performed the duties of transfer clerk. The defendant offered no requests for instructions, and took no exceptions to the charge of the court.

In our opinion the court was not in error in admitting the testimony of the inspectors as to the alleged confession. The fact that the defendant's confession was not objected to as not being voluntary is of itself sufficient to justify a disregard of the alleged error in admitting the testimony. But in our opinion the testimony would have been competent against objection. It is well settled that confessions not voluntarily made are inadmissible against an accused person, and the courts are astute, and properly so, in protecting the rights of accused persons against confessions obtained by duress or through hope or fear. The merest reference to authority is sufficient for the purposes of this opinion. *Bram v. United States*, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568; *United States v. James* (D. C.) 60 Fed. 257, 26 L. R. A. 418. On the other hand, the fact that a confession is made by an accused person, even while under arrest or when drawn out by the questions of an officer, does not necessarily render the confession involuntary. *Sparf v. United States*, 156 U. S. 51, 55, 15 Sup. Ct. 273, 39 L. Ed. 343; *Perovich v. United States*, 205 U. S. 86, 91, 27 Sup. Ct. 456, 51 L. Ed. 722. The testimony of the inspectors, if believed, showed *prima facie* a voluntary confession within the authorities. It would have been proper for the court, if requested by defendant, to have specially instructed the jury upon the subject of the necessity that the confession be found to have been voluntarily made before it could be considered by the jury; but such request was not made. The defendant was represented upon the trial by able counsel. The defendant did not, in our judgment, by failing to cross-examine as to the voluntary nature of the alleged confession, waive the right to further question the character of the confession by motion to strike it out; but such motion was not made. The court, in a fair charge, submitted to the jury the question of the weight and credibility of the testimony of the inspectors and of the defendant respectively, as to what occurred in the inspector's office. In our opinion there was no error in admitting the evidence of the alleged confession.

At the close of the government's case, and again at the close of all the evidence, the instruction of a verdict in defendant's favor was asked; counsel saying that he wished to state the reasons for such re-

quested direction. The court replied that he could not grant the motion, and that the reasons should not be stated in the presence of the jury, but that they might be put as fully as desired upon the record. This permission was not complied with.

Assuming that, if the testimony without such confession was insufficient for conviction, defendant might have raised the question of such admissibility by motion for a directed verdict, in our opinion, as already stated, the government's testimony presented a prima facie case of voluntary confession; and, even had the confession been excluded, the fact that the letter was admittedly found in defendant's pocket (the letter itself having been introduced in evidence without objection) was some evidence to go to the jury as to his intent to embezzle it.

We have examined all the errors assigned, whether discussed or not in defendant's brief. In our opinion defendant has had a fair trial.

We find no error committed to his prejudice, and the judgment must, accordingly, be affirmed.

PRESS PUB. CO. v. MONTEITH.

(Circuit Court of Appeals, Second Circuit. July 16, 1910.)

No. 249.

1. APPEAL AND ERROR (§ 1058*)—CURE OF ERROR—EXCLUSION OF TESTIMONY.

Any error in excluding a question whether witness knew plaintiff and her general reputation was cured by permitting him to state on the next question that he did not know her general reputation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4200-4206; Dec. Dig. § 1058.*]

2. APPEAL AND ERROR (§ 1058*)—CURE OF ERROR—EXCLUSION OF TESTIMONY.

Any error in excluding a question whether witness knew plaintiff's reputation in the community was cured by permitting him to state on the next question that he never heard her word disputed as to truth.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4200-4206; Dec. Dig. § 1058.*]

3. LIBEL AND SLANDER (§ 110*)—PLAINTIFF'S CHARACTER—EVIDENCE.

A question asked a witness as to the general character of plaintiff in libel not limited to a time at and prior to the publication was properly excluded.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 110.*]

4. APPEAL AND ERROR (§ 260*)—OFFER TO PROVE—EXCEPTIONS.

The aggrieved party should except to a rejection of an offer to prove in order to preserve the ruling for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1503-1515; Dec. Dig. § 260.*]

5. LIBEL AND SLANDER (§ 103*)—IRRELEVANT TESTIMONY.

In a libel suit for insinuating that a child cared for by plaintiff was born to her out of wedlock, testimony that plaintiff "waywardly held out the impression in the community that there was a mystery about this

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

child" was properly rejected as being incompetent, where communication of the declaration to defendant was not shown.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 281; Dec. Dig. § 103.*]

6. LIBEL AND SLANDER (§ 103*)—EVIDENCE—ADMISSIBILITY.

In a libel suit for charging abuse of her child, one who saw her before and after the publication could testify that she was healthy, robust, rosy cheeked, and full of spirits, though the testimony covered a period extending more than two weeks beyond the publication.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 281; Dec. Dig. § 103.*]

7. LIBEL AND SLANDER (§ 124*)—INSTRUCTIONS.

In a libel suit for charging abuse of a child, it was not error to instruct that it was for the jury to say what weight should be given to the facts that the child appeared to be healthy and her relations with plaintiff affectionate, where the jury had observed the child in court, though the trial occurred several years after the publication.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 365-373; Dec. Dig. § 124.*]

8. APPEAL AND ERROR (§ 1032*)—ERROR—PREJUDICE NOT PRESUMED.

Prejudice from error should be shown and not presumed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047-4051; Dec. Dig. § 1032.*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by Laura W. Monteith against the Press Publishing Company. Judgment for plaintiff for \$15,000, and defendant brings error. Affirmed.

Howard Taylor (John M. Bowers and W. H. Van Benschoten, of counsel), for plaintiff in error.

Olney & Comstock (J. Noble Hayes, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The plaintiff, Laura W. Monteith, is a lady of refinement, culture and gentle lineage whose ancestors have occupied "Heathcote Farm" at Kingston, New Jersey, since 1737. Prior to leasing the farm she had been engaged in teaching young ladies and preparing them for college. She had traveled extensively and spoke five languages. She was acquainted with the best people in the locality and entered into the society of the university town of Princeton, numbering among her friends such people as Ex-President Cleveland and Dr. Van Dyke. In April, 1900, she married Col. Walter S. Monteith, a member of the bar of Columbia, South Carolina, and lived with him at the Heathcote farm, until December 8, 1903, when he left her and returned to South Carolina. In February, 1900, she took a lease of the Heathcote farm from the executors of her father's estate and was endeavoring to make it a success as a dairy farm but with indifferent results.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

About two years after the marriage Mrs. Monteith went to New York and brought back with her the little girl, Pearl, whose treatment while at Heathcote farm caused the publication which is the subject of the present controversy. The foregoing brief introduction is necessary to a full understanding of the article which is too long to quote in full. The article seems to have been written by the reporter without any personal animosity towards the plaintiff but rather in response to the morbid demand of a degenerate public for sensational and scandalous literature. It was probably the product of that false and abhorrent code of newspaper ethics which sanctions the rule—"Publish first and investigate afterwards." However this may be, it requires only a casual perusal of the article to convince the reader that its author, not only by direct and brutal statements, but more particularly by insinuations and innuendoes, which he has taken little pains to veil, has held the plaintiff up to the public as a monster of cruelty and immorality. Those who did not know her would, after reading the article, set her down as a pariah to be avoided by all decent folk; in short, the effect of the article was to destroy her reputation. Take, for instance, the following:

"Went to Europe.

"Shortly afterward, she was absent for a year or more and Kingston heard that she was on a visit to Europe. When she returned she brought with her a baby not many months old, and that baby grew up to be the eerie, doll-like Pearl. To the neighbors, Mrs. Monteith said that the child had been given to her by a New York woman. To other neighbors she said that she had adopted the child from a New York institution. But who the woman was, or what institution it was, she has never told anybody, not even her own mother. The man who was to become her husband entered the scene about a year later."

The innuendo here is so brutally plain that it is admitted by the author of the article and no justification is attempted. It insinuates that the plaintiff before her marriage, became the mother of a child. Not only was the inference false but the details were untrue also. Pearl, when she came to Kingston, was a little girl walking by the plaintiff's side, not "a baby not many months old." She came there not when the plaintiff was a single woman but two years after she had married Monteith. The plaintiff had not been to Europe and did not inform any one that she had been. When she brought Pearl back her journeying consisted of a trip to New York and return. In short, the author of the article in order to make the inference of unchastity too plain to be mistaken did not hesitate to resort to anachronisms and the substitution of fiction for fact. Here, then, we have the most infamous charge which can be made against a virtuous woman, without a word of proof to justify its publication.

The article stated further that upon the division of the family, after the death of the father, the plaintiff "with a romantic turn and a love for admiration went on the road with a theatrical troupe." It charges her with extravagance "which fairly took the husband's breath away." It asserts she never paid her servants in full, was sued by them for their wages and that her interest in the estate "was plastered over with judgments."

It brands her as a monster of cruelty having no counterpart in history and few in fiction. It says that she knocked the little girl down, blackened her eye, locked her in a cold room at night with the thermometer 15 degrees below zero and frequently "beat her unmercifully with a six-foot horsewhip and the child's body was marked with black and blue spots." It states that on one occasion the plaintiff was seen to "Beat little Pearl like a carpet." It also charged that the little girl was brutally starved by the plaintiff and was even denied bread, that the child was always hungry and begging for food. The following will serve as an illustration. The article says that a servant in the Monteith household swore as follows:

"About 11 o'clock the child came down to the kitchen and asked for a piece of bread. 'You shan't have one piece of bread,' Mrs. Monteith cried. 'Get upstairs now in a hurry!' 'Mamma, please give me a piece of bread, I am so hungry!' pleaded the little girl. Without answering, Mrs. Monteith kicked her and knocked her down. The child screamed, and Mrs. Monteith grabbed a napkin and held it over her mouth and beat her with her fists and kicked her again. I jumped between them and told Mrs. Monteith to stop. Pearl was hurt so she had to pull herself up by a chair from the floor and then Mrs. Monteith sent her upstairs. Mrs. Monteith followed her with a horsewhip. I heard Pearl screaming and called my husband and sent him upstairs."

The article says that these charges were made in affidavits but, with one unimportant exception, the record shows that they were neither signed nor sworn to.

These, briefly stated, are the charges against the character and reputation of the plaintiff made by the defendant. Accusations more serious could hardly be made against a woman. If true, she was a moral leper whose inhuman treatment of defenseless youth recalls the savagery of Dotheboys Hall. But the charges were not true. Many of them were concededly false and as to those regarding which there was a conflict upon the evidence, the jury found for the plaintiff.

The first proposition argued by the defendant deals with assignments of error from 8 to 11 inclusive.

A witness called by the defendant was asked, "Do you know Mrs. Monteith and her general reputation?" The question was duly objected to. The objection was sustained and an exception noted.

The next question and answer were as follows: "Do you know her general reputation? I do not." Clearly the answer applied to the first as well as to the second question and destroyed any force the exception might have had. In legal effect the previous ruling was reversed and the witness was permitted to answer the question. Another witness for the defense was asked, regarding the plaintiff, "You know her reputation, do you not, in the community?" This was duly objected to, the objection was sustained and the defendant excepted. This exception was also rendered innocuous by the answer to the next question, "I never heard her word disputed, as far as truth is concerned. I never heard that she was anything but a truthful woman, and the only trouble that I ever"—here he was reminded by the court that he should not digress from the question which was "Do you know her reputation for truth and veracity?" The witness continued

"I should say she was all right as far as truth was concerned." After a brief cross-examination the court adjourned and upon reassembling the next morning the defendant's counsel presented an authority which he insisted sustained his contention regarding the admissibility of testimony as to the general character of the plaintiff. The court however adhered to his former ruling. Counsel for defendant then said:

"It may be considered then that upon the trial the defendant offered to prove the general character and reputation of the plaintiff in the community in which she lived, which evidence was ruled out and an exception taken, on the ground it was incompetent, irrelevant and immaterial.

"The Court: Yes."

It will be noticed that the witness was not recalled and no new offer was made to prove the general reputation of the plaintiff. Counsel was merely calling the attention of the court to what had taken place on the preceding afternoon, in order that there should be no misunderstanding as to the actual occurrence. The sum and substance of it all is that the court adhered to his ruling of the day before. An examination of the question which occasioned the discussion makes it plain that the ruling was correct; principally because the question did not ask for the knowledge of the witness as to plaintiff's general character and was not limited to a time at and prior to the publication. Counsel for the defendant argue that the statement above quoted should be "treated as an offer to prove by witnesses, who had knowledge of the general character of the plaintiff in the community, what that general character was at the time of and before the libel." A very serious objection to this contention, assuming it to be otherwise tenable, is that no exception was taken to the ruling. But we are convinced that it was not the intention of the judge to exclude legitimate testimony as to the plaintiff's general character; on the contrary the widest latitude was allowed, the inquiry even extending to her financial standing and the petty complaints of discharged employes.

The eighteenth assignment of error deals with the exclusion of testimony so manifestly incompetent and irrelevant that a mere statement of the facts is sufficient to demonstrate the correctness of the ruling. The defendant proposed to show by Mrs. May W. Hicks that after the publication of the libel she had a conversation with the plaintiff in which the latter "waywardly held out the impression in the community that there was a mystery about this child." Counsel disclaimed any purpose to show that the conversation was ever communicated to the writer of the libelous article. There is not a shadow of doubt in our minds that the court properly excluded the testimony. *Sun Ass'n v. Schenck*, 98 Fed. 925, 40 C. C. A. 163.

For similar reasons the objection to the question put to the plaintiff upon cross-examination, relating to the same conversation with Mrs. Hicks, was also properly sustained.

The testimony of Mrs. McPherson who saw Pearl in the summer of 1905, before and after the publication of the libel, which was on the 13th of August, was perfectly competent, even though her description of Pearl's condition extended into September. It was for the jury to say whether the "healthy, robust child—rosy cheeks—full of

spirits" which the witness saw in September could, in August, have been the starved and cowering creature which the article described. It was not conclusive, of course, but it was evidence.

These are all the exceptions to the admission or rejection of testimony which have been argued. It must be admitted that they are few in number when it is considered that the trial lasted more than a week and was fiercely contested at every turn.

The court charged the jury as follows:

"You are entitled on this whole matter to take into consideration what you have observed in the courtroom; what Mr. Hayes has called Exhibit 1, that is, the little girl herself. It is for you to say. She looks like a healthy child. Her relations with Mrs. Monteith seem affectionate. It is for you to say what weight should be given to that."

This was excepted to by the defendant. We find no error in the charge. The language used was, perhaps, unnecessary, for it stated a self-evident proposition, known to every member of the jury. For eight days the plaintiff and Pearl had been in court together and we can see no impropriety in telling the jury that they might do what they could not avoid doing, viz.: observe the child and her actions in court. She was sworn as a witness, her testimony covering five printed pages.

If it were error to tell the jury that they might look at Pearl it follows that it was error to permit her presence in the courtroom, and no one contends for so absurd a proposition. Suppose she had been left at home. It is easy to picture the defendant's counsel, after describing the plaintiff's alleged cruelties, facing the plaintiff's counsel and triumphantly demanding—"Where is little Pearl? Why has she not been produced? If she regards the plaintiff with the filial affection depicted by counsel, why is she not here that you may judge for yourself? Her absence points to but one conclusion."

The appeal would have been legitimate and the question difficult to answer. The plaintiff's counsel was not justified in taking the risk of trying the case in the absence of Pearl. As she was properly in court counsel on both sides might legitimately comment on her presence and draw such inferences from her appearance and conduct as the occasion justified. The judge too was well within his rights when he used the language which is the subject of criticism.

As before intimated, his instruction was unnecessary and yet it is customary in sharply contested trials to hear the statement from the bench "You have seen the witnesses, gentlemen, you have observed their demeanor in court and you have a right to take these matters into consideration in determining what credence you will give to their testimony."

We are not familiar with a case where an appellate court has reversed a judgment because such language was used by the trial judge. Of course the trial took place several years after the publication in the *World*, of course the child was older than when the cruelties were alleged to have taken place, but these facts were as patent to the jury as to the judge and he was not called upon to enter into details so collateral and minute that a mere statement of them would imply a re-

flection upon the intelligence of the jury. We think he was justified in assuming that the jury was composed of men of ordinary capacity who might fairly be trusted to draw an inference from the facts as they appeared in court, especially as one of the most intelligent witnesses had testified regarding Pearl—"She looked the same in August, 1905, as she looks now." In other words, if they found Pearl to be a bright, healthy, happy girl, on affectionate terms with plaintiff, they might take these facts into consideration in determining whether the same Pearl was starved and beaten by the plaintiff three years before.

Other exceptions to the charge were taken but we do not consider it necessary to discuss them in detail. We are convinced that the charge fairly and impartially states the facts and the law applicable thereto and that every member of the jury must have understood his duty when he entered the jury room.

The defendant realizing, apparently, that even upon its own presentation no very serious error has been committed invokes the archaic rule that if error be discovered, no matter how trivial, prejudice must be presumed. The more rational and enlightened view is that in order to justify a reversal the court must be able to conclude that the error is so substantial as to affect injuriously the appellant's rights.

Prejudice must be perceived, not presumed or imagined.

The writer, speaking only for himself, is in hearty accord with the modern tendency.

The object of all litigation should be to arrive at a just result by the most direct, speedy and inexpensive proceedings. If such a result can be reached by absolutely inerrant methods so much the better, but while the administration of justice is in the hands of merely finite beings, such perfection can hardly be expected. I venture to think that no long continued, hotly contested trial can be conducted to a conclusion without mistakes being committed. Few minds are so constituted that they can grasp at the outset all the ramifications of a complicated controversy and, before the judge can get the perspective of the trial, some mistakes may occur, but these should be disregarded if it can be seen that the case was correctly decided and that, even if they had not been made, the same result would have been reached. Justice can be attained without infallibility.

One of the English rules provides:

"A new trial shall not be granted on the ground of the misdirection of the jury or of the improper admission or rejection of evidence, unless in the opinion of the court to which the application is made, some substantial wrong or miscarriage of justice has been thereby occasioned on the trial."

Were such a rule in force here, even assuming that defendant's contentions are correct, the court would be unable to say that substantial wrong has been done the defendant. In several instances the alleged error was subsequently corrected and the excluded evidence supplied.

The granting of a new trial is often a denial of justice, witnesses die or remove beyond the jurisdiction of the court and the resources of the litigants become exhausted.

Believing as we do that the libel here was without justification or excuse and that the verdict was not excessive, we should hesitate long before requiring the plaintiff to begin anew the weary pilgrimage through the courts.

The judgment is affirmed with costs.

TAYLOR v. EASTON.

(Circuit Court of Appeals, Eighth Circuit. June 23, 1910.)

No. 3,113.

1. APPEAL AND ERROR (§ 1076*)—ASSIGNMENTS OF ERROR—WAIVER.

Where, after appeal, appellant filed in the appellate court a paper, entitled in the cause, reciting that at the suggestion of the court he would rely on the jurisdictional questions relating to the power of the Circuit Court to appoint respondent as receiver, and to enter a final order vacating a decree discharging appellant from all liability as receiver, he thereby waived an assignment of error that the court did not acquire jurisdiction over appellant's person by the issuance and service of an order to show cause.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1076.*]

2. APPEAL AND ERROR (§ 499*)—SCOPE OF REVIEW—QUESTIONS NOT RAISED AT TRIAL.

An assignment of error, in that the trial court acquired no jurisdiction over appellant's person by the issuance and service of an order to show cause, could not be reviewed, where there was nothing in the record to show that the jurisdiction of the Circuit Court over appellant's person was challenged on that account at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2295; Dec. Dig. § 499.*]

3. APPEAL AND ERROR (§ 674*)—RECORD—CONTENTS.

An assignment of error, in that the court never acquired jurisdiction over appellant's person by reason of the issuance and service of an order to show cause on appellant in another state, to which he had removed, would not be reviewed, where the record did not show that appellant had not voluntarily appeared, or that the service, if made, was not made within the court's territorial jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2874; Dec. Dig. § 674.*]

4. COURTS (§ 405*)—FEDERAL COURTS—JURISDICTIONAL QUESTIONS.

Assignments of error challenging the jurisdiction of the Circuit Court sitting as a court of equity to review its decree after the term at which it was rendered, and not involving any question as to the court's jurisdiction over defendant's person, were properly reviewable on appeal to the Circuit Court of Appeals.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1099; Dec. Dig. § 405.*]

Jurisdiction of Circuit Courts of Appeals in general, see notes to *Lau Ow Bew v. United States*, 1 C. C. A. 6; *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 475.]

5. RECEIVERS (§§ 35, 59*)—APPOINTMENT—COLLATERAL ATTACK.

A Circuit Court of the United States, in the absence of statute requiring notice of application for the appointment of a receiver, in the exer-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cise of judicial discretion, may appoint a receiver without notice; such appointment being subject only to direct attack for abuse of discretion.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 54-60, 103, 104; Dec. Dig. §§ 35, 59.*]

Notice of application for appointment of receiver, see note to *Mann v. Gaddie*, 88 C. C. A. 7.]

6. RECEIVERS (§ 64*)—APPOINTMENT OF SUCCESSOR.

Where an order discharging a receiver and releasing him from further liability showed that there was money on hand which he was directed to pay over, subject to the order of the court, such money not having been finally disbursed, and it appearing that there was still property within the court's jurisdiction belonging to the corporation not administered and which the receiver had concealed, the court had not lost jurisdiction, but could appoint a new receiver, in the exercise of discretion, on an ex parte application, without notice.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 113; Dec. Dig. § 64.*]

7. EQUITY (§ 442*)—DECREE—MODIFICATION AFTER TERM.

While a court of law has no power to change or modify its judgments in substantial respects after the rising of the court for the term at which the judgment was rendered, a court of equity may vacate or modify its decrees by a bill of review filed after the term.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1065; Dec. Dig. § 442.*]

8. EQUITY (§ 452*)—BILL OF REVIEW—TIME.

Where a bill of review is based on errors appearing on the record, it must be filed within the time in which an appeal could have been taken; but, if based on fraud in obtaining the decree, or for newly discovered evidence, the time within which it may be filed is governed by the equitable rule of laches.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1104; Dec. Dig. § 452.*]

9. EQUITY (§ 447*)—BILL OF REVIEW—NATURE OF REMEDY—NEWLY DISCOVERED EVIDENCE—FRAUD.

A bill of review is the proper remedy to obtain a vacation of a decree in equity for newly discovered evidence or fraud.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1090-1092; Dec. Dig. § 447.*]

10. EQUITY (§ 460*)—BILL OF REVIEW—REQUISITES.

A bill of review for fraud or newly discovered evidence should state when the fraud or new evidence was discovered and should contain a prayer for subpoena or process.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1117-1123; Dec. Dig. § 460.*]

Appeal from the Circuit Court of the United States for the District of South Dakota.

Action by C. F. Easton, as receiver of the Building & Loan Association of Dakota, against Maris Taylor. From an order appointing plaintiff receiver and vacating so much of certain former judgments as released defendant Taylor from all liability as receiver and vacating the order confirming his accounts, he appeals. Motion to dismiss appeal denied, and order appointing Easton receiver affirmed, and the order of vacation reversed and remanded.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep. & Indexes

T. H. Null and Harris Richardson, for appellant.

Edward C. Eliot (E. T. Taubman and G. N. Williamson, on the brief), for appellee.

Before SANBORN, Circuit Judge, and RINER and W. H. MUNGER, District Judges.

W. H. MUNGER, District Judge. In 1900, in a suit in equity brought in the Circuit Court for the District of South Dakota, by one Smiley against the Building & Loan Association of Dakota, such proceedings were had that Maris Taylor was appointed receiver for said corporation. The usual proceedings in said action were had towards closing up the estate of said Building & Loan Association, and in August, 1902, the receiver filed his final report and petition for discharge. An order was entered for hearing on the report and petition, due notice of which was given by publication, the report of the receiver was referred to a master, and in March, 1903, the court approved the master's report, directed that certain moneys on hand be paid in subject to the further order of the court, and entered an order discharging said Taylor as receiver, and releasing him from all further liability. In 1908 one C. F. Easton, a stockholder and creditor of said Building & Loan Association, filed a petition of intervention in said action, which petition of intervention, upon hearing, was allowed by the court to be filed; said petition of intervention alleging that there were still assets unadministered belonging to said Building & Loan Association, and asking for the appointment of a receiver to administer the same. Upon hearing the court appointed C. F. Easton receiver. Said Easton thereupon, as receiver, filed in said court what was denominated a "petition," setting forth facts showing that said Taylor had misappropriated funds which came into his hands as receiver, for which he did not account, etc.; that his report to the court was false and untrue; and praying, among other things, that an order issue directed to said Maris Taylor, directing him to show cause before the court, at a time and place specified, why the provision of the order made in 1903, releasing Taylor from further liability, should not be vacated and set aside, and why a certain order, confirming the sale of residuary assets made in 1902, should not be set aside and vacated. There was not the usual prayer for subpcena. The court issued an order, requiring said Taylor to appear upon a given date and show cause why the former orders and decrees should not be modified in these respects. Pursuant to such order said Taylor appeared and objected to the right or authority of the court to make the order prayed for or any order whatsoever, in the proceeding, on the ground that the final orders and decrees of the court could not be attacked or vacated or set aside after the close of the term at which said orders had been entered. He also filed an answer to the petition of the receiver, denying the principal allegations thereof, and also filed a demurrer. The demurrer was based upon the ground: First, that there was a defect of parties plaintiff; second, that the court had no jurisdiction to hear and determine the matters in controversy, in that it appeared that the orders attempted to be set aside were entered by the court at a term of

court long since closed; and, third, that the bill did not state a case, or contain any matter of equity entitling plaintiff to the relief asked. The objections to the jurisdiction and the demurrer were each overruled, to which proper exceptions were taken. The case was then referred to a master, who found in substance that Maris Taylor had not truly and faithfully administered all of the assets of said Building & Loan Association; that he had misappropriated large amounts of the assets to his own use; that he had made false and misleading reports to the court, and had thus, by his fraud, induced the court to grant the discharge and grant the release from liability, etc.

From the order of the court, appointing Easton receiver and vacating so much of the former judgment as released Taylor from all liability and vacating the order of confirmation, this appeal has been taken.

Various assignments of error were filed, among them being that Taylor, having removed from the state of South Dakota into the state of Washington, and without the jurisdiction of the court, the court had lost jurisdiction and control over said Taylor and could not reacquire jurisdiction by citation or order to show cause.

Appellee moved to dismiss the appeal on the ground that, as the questions presented by the appeal relate only to the jurisdiction of the Circuit Court, appeal should have been taken directly to the Supreme Court and not to this.

Thereafter appellant Taylor filed in this court a paper which, after entitling the case, was as follows:

"Appellant, at the suggestion of the court, hereby declares that, upon his appeal from the order of the lower court herein, he will rely only on the foregoing jurisdictional questions, relating to the power of the Circuit Court to appoint Easton as receiver, and to enter the final order of March 24, 1903, vacating the final decree of April 1, 1903, discharging appellant from all liability as receiver."

The original assignment of error that the court did not acquire jurisdiction over the person of Taylor by the issue and service of an order to show cause, Taylor being a resident of Washington, and out of the jurisdiction of the court, was waived by the paper filed in this court. Even though it was not waived, there is nothing in the record showing that the jurisdiction of the Circuit Court over the person of Taylor was challenged in that court. There is nothing in the record to indicate that Taylor had removed to the state of Washington, or was out of the jurisdiction of the court, excepting the fact that Taylor, in his answer, says:

"Statement of Maris Taylor, resident of the state of Washington, answering the petition of C. F. Easton, as receiver, upon which was based the order to show cause issued out of the United States Circuit Court for the District of South Dakota," etc.—

and the further fact that his answer was verified in the county of Whatcom and state of Washington. There is nothing to indicate that the service of the order to show cause, if made, was not made upon Taylor within the jurisdiction of the court. Indeed, there is nothing in the record, aside from what is found in the assignments of error,

to show that the order was ever served, nothing to indicate but that Taylor voluntarily appeared. Taylor's objection to the jurisdiction of the court was based entirely and solely upon the ground that the term of court had passed in which the decree sought to be modified was rendered. The assignment that the court did not have jurisdiction of the person of Taylor is not, therefore, supported by the record. Besides, the waiver of assignments, before mentioned, was a waiver of everything excepting jurisdiction to appoint Easton as receiver and the power of the court to vacate or modify the decree discharging Taylor from further liability.

These challenges to the jurisdiction are not such as are required to be certified by the Circuit Court to the Supreme Court. They are not questions which challenge the jurisdiction of the court over the person of the defendant, as in *Shepard v. Adams*, 168 U. S. 618, 18 Sup. Ct. 214, 42 L. Ed. 602, and in *St. Louis Cotton Compress Co. v. American Cotton Co.*, 125 Fed. 196, 60 C. C. A. 80. In each of those cases the jurisdiction of the Circuit Court over the person of the defendant was presented, and in those cases it was held that such question was appealable only to the Supreme Court.

The questions now presented to this court are questions which relate only to the general powers of the court as a court of equity, and are not questions which relate to the jurisdiction of the court as a federal court, and we think this court has jurisdiction on appeal to consider and determine the power and jurisdiction of the Circuit Court, sitting as a court of equity, to review its decree after the term at which the decree was rendered has passed. That, in this respect, the case falls directly within the rule announced by the Supreme Court in *Louisville v. Knott*, 191 U. S. 225, 24 Sup. Ct. 119, 48 L. Ed. 159, and *Courtney v. Pradt*, 196 U. S. 89, 25 Sup. Ct. 208, 49 L. Ed. 398, and previous decisions of the court therein cited.

Considering the merits of the appeal, the first objection is that the court had no power or jurisdiction to appoint Easton receiver upon an ex parte application, for the reason that the court had lost jurisdiction of the case. In the absence of a statute, requiring notice of the application for the appointment of a receiver, we think the law correctly stated in *Alderson on Receivers*, p. 168, § 131, as follows:

"The appointment of a receiver without notice is entirely a matter of judicial discretion. The power to make the appointment without notice is inherent in a court of equity. It follows logically that want of notice does not affect the validity of the appointment, in reference to whether it be void, but merely concerns it as being the proper or improper exercise of sound and judicial discretion. An abuse of such discretion would merely render the appointment erroneous, subject to only direct and not collateral attack."

The order made, discharging Taylor as receiver, and releasing him from further liability, showed that there was money upon hand which Taylor was directed to pay over, subject to the order of the court. It does not, anywhere, appear that this money had been fully and finally disbursed by the court, and jurisdiction terminated. Again, it appears by the allegations of the petition and the finding of the master that there was property within the jurisdiction of the court belonging to the assets of the Building & Loan Association, which had

not been administered by Taylor during his receivership, but the existence of which he had concealed from the court. Such being the case, the court had not lost jurisdiction, and there was no abuse of discretion in the appointment of Easton as receiver upon an *ex parte* application without notice.

The only remaining question relates to the power and jurisdiction of the court to vacate or modify its decree after the term. It must be conceded that a court of law is powerless to change or modify, in substantial respects, its judgments after the rising of the court for the term in which the judgment was rendered. *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797; *Phillips v. Negley*, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013. But a court of equity may, by bill of review, filed after the term, modify or vacate its decrees. If the bill of review is based upon errors appearing upon the record, it must be filed within the time in which an appeal could have been taken. If, however, the bill of review is based upon fraud in obtaining the decree, or for newly discovered evidence, the time within which it should be filed is governed by the general equitable rules of laches. Bill of review has always been recognized as the proper remedy in case of newly discovered evidence. That it is also the proper remedy in case of fraud was said by Justice Miller, in *Terry v. Commercial Bank of Alabama*, 92 U. S. 454-456, 23 L. Ed. 620.

In the case before us the application made to the Circuit Court by petition is lacking in some of the essential elements of a bill of review. A bill of review should state when the fraud or new evidence was discovered, so that the court may see that the party has not been guilty of laches, and, like other bills in equity, should contain a prayer for subpœna or process. No claim is made in the briefs, nor was any suggestion made in the oral argument, that the petition could be sustained as a bill of review, and we do not think it can be so treated.

For the foregoing reasons, the motion to dismiss is overruled, the order of the court appointing Easton receiver is affirmed, but the order of March 24, 1909, which vacated the former order and decree, is reversed, and the cause remanded to the Circuit Court, with leave to that court to take such further steps as it may desire, not inconsistent with this opinion.

KNIGHT v. ILLINOIS CENT. R. CO.

(Circuit Court of Appeals, Sixth Circuit. July 13, 1910.)

No. 2,032.

1. EXCEPTIONS, BILL OF (§ 56*)—REQUISITES—SIGNATURE BY JUDGE.

A bill of exceptions not actually signed by the trial judge must be disregarded.

[Ed. Note.—For other cases, see *Exceptions, Bill of*, Cent. Dig. §§ 94-96; Dec. Dig. § 56.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. APPEAL AND ERROR (§ 547*)—REVIEW—INSUFFICIENT BILLS OF EXCEPTIONS.

Assignments of error to peremptory instructions, and alleged misinstructions, and that the verdict and judgment are against the law and the evidence, are not reviewable, where there is no sufficient bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2427-2432; Dec. Dig. § 547.*]

3. COURTS (§ 352*)—FEDERAL PRACTICE—CONFORMITY TO STATE PRACTICE—TRIAL.

Rev. St. § 914 (U. S. Comp. St. 1901, p. 684), requiring civil procedure in the federal Circuit and District Courts, except in equity and admiralty, to conform to the state practice, does not apply to the personal conduct and administration of the judge in discharging his separate functions; and hence state statutes and constitutions forbidding judges in instructing to express an opinion on the facts do not bind federal courts, nor does the statute apply to provisions requiring written instructions to be taken by the jury on retiring or permitting papers read in evidence to be taken by them or requiring written instructions, or forbidding separation of the jury, or requiring exceptions to the charge to be made before the jury retires.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 926-932; Dec. Dig. § 352.*]

Conformity of practice in common-law actions to that of state court, see notes to *O'Connell v. Reed*, 5 C. C. A. 594; *Nederland Life Ins. Co. v. Hale*, 27 C. C. A. 392.]

4. COURTS (§ 353*)—FEDERAL PRACTICE—CONFORMITY TO STATE—PRACTICE.

Rev. St. § 914 (U. S. Comp. St. 1901, p. 684), requiring civil procedure in the federal Circuit and District Courts, except in equity and admiralty to conform to the state practice, does not apply to motions for new trial.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 933; Dec. Dig. § 353.*]

5. COURTS (§ 356*)—FEDERAL PRACTICE—CONFORMITY TO STATE PRACTICE—REVIEW.

Rev. St. § 914 (U. S. Comp. St. 1901, p. 684), requiring civil procedure in the federal Circuit and District Courts, except in equity and admiralty, to conform to the state practice, does not apply to bills of exceptions and proceedings on review.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. § 356; * Appeal and Error, Cent. Dig. § 3397.]

6. COURTS (§ 347*)—FEDERAL PRACTICE—CONFORMITY TO STATE PRACTICE—PLEADINGS.

Rev. St. § 914 (U. S. Comp. St. 1901, p. 684), requiring civil procedure in the federal Circuit and District Courts, except in equity and admiralty, to conform to the state practice, applies to pleadings.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. § 347.*]

7. COURTS (§ 352*)—FEDERAL PRACTICE—CONFORMITY TO STATE PRACTICE—VERDICT.

Rev. St. § 914 (U. S. Comp. St. 1901, p. 684), requiring civil procedure in the federal Circuit and District Courts, except in equity and admiralty, to conform to the state practice, applies to the form and effect of verdicts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 926-932; Dec. Dig. § 352.*]

8. COURTS (§ 354*)—FEDERAL PRACTICE—CONFORMITY TO STATE PRACTICE—JUDGMENT.

Rev. St. § 914 (U. S. Comp. St. 1901, p. 684), requiring civil procedure in the federal Circuit and District Courts, except in equity and admiralty, to conform to the state practice, applies to the mode of entering and re-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 180 F.—24

ording judgments, including provisions for entering judgments against one or more defendants.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 934; Dec. Dig. § 354.*]

9. Courts (§ 352*)—FEDERAL PRACTICE—CONFORMITY TO STATE PRACTICE—TRIAL.

Rev. St. § 914 (U. S. Comp. St. 1901, p. 684), requiring civil procedure in the federal Circuit and District Courts, except in equity and admiralty, to conform to the state practice, applies to Civ. Code Prac. Ky. § 371, permitting a plaintiff to dismiss without prejudice before final submission of the case to the jury.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 926-932; Dec. Dig. § 352.*]

10. DISMISSAL AND NONSUIT (§ 7*)—RIGHT TO VOLUNTARY NONSUIT.

Under Rev. St. § 914 (U. S. Comp. St. 1901, p. 684), requiring civil procedure in the federal Circuit and District Courts, except in equity and admiralty, to conform to the state practice, and under Civ. Code Prac. Ky. § 371, permitting a plaintiff to dismiss without prejudice before final submission of the case to the jury, it was error to refuse to allow plaintiff to dismiss without prejudice before peremptory instruction for defendant, though motion was made after the judge stated he would sustain defendant's motion for verdict.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 15-19, 22; Dec. Dig. § 7.*]

11. APPEAL AND ERROR (§ 1177*)—DISPOSITION—NEW TRIAL.

Reversal of judgment for defendant on a directed verdict for error in refusing to allow plaintiff to dismiss without prejudice does not require a new trial, but merely a direction to sustain the motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597-4620; Dec. Dig. § 1177.*]

In Error to the Circuit Court of the United States for the Western District of Kentucky.

Action by Henry Knight, Wright Knight's administrator, against the Illinois Central Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed, with directions.

J. B. Wickliffe, for plaintiff in error.

Attila Cox, for defendant in error.

Before WARRINGTON and KNAPPEN, Circuit Judges, and McCALL, District Judge.

KNAPPEN, Circuit Judge. The plaintiff brought suit in the circuit court for Ballard county, Ky., against the defendant above named and the Chicago, St. Louis & New Orleans Railroad Company for the recovery of damages by reason of the alleged negligent killing of the decedent by the defendant companies. The Illinois Central Railroad Company removed the case to the United States court on the ground of diversity of citizenship of the parties. At the close of the evidence the trial judge directed a verdict for defendant and judgment was entered thereon.

We are asked to consider assignments of error which complain of the propriety of giving peremptory instructions and alleged misinstructions as to the law of the case; also upon the proposition that the verdict and judgment are contrary to the law and evidence.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The transcript contains no bill of exceptions. There is sent up a document certified by the official stenographer to be a correct copy "of all the evidence introduced and heard, and offered to be introduced and rejected, and all the exceptions, objections, and avowals, concerning the same, as well as all papers and exhibits offered to be or used as evidence in the trial." This paper is not signed by the judge, nor is it in any way authenticated by him. A bill of exceptions not actually signed by the judge must be disregarded. U. S. Rev. St. § 953 (U. S. Comp. St. 1901, p. 696); *Origet v. United States*, 125 U. S. 240, 243, 244, 8 Sup. Ct. 846, 31 L. Ed. 743; *Malony v. Adsit*, 175 U. S. 281, 284, 20 Sup. Ct. 115, 44 L. Ed. 163; *Oxford & Coast Line R. Co. v. Union Bank* (4th Circuit) 153 Fed. 723, 82 C. C. A. 609. We must therefore disregard the assignments of error referred to.

The judgment entered, however, shows that at the conclusion of the evidence the defendant moved that the jury be instructed to find for the defendant; that the court thereupon excused the jury until the following morning, meanwhile hearing argument upon the motion, and at its conclusion announced to the attorneys "upon the reasons then stated that he would sustain the motion, and that the jury would be directed to find for the defendant upon the convening of court to-morrow"; that on the opening of court the next day, before the jury had been instructed, the plaintiff moved to dismiss the case without prejudice; that the defendant's objection to such action was sustained and the jury instructed to find for the defendant, a verdict accordingly being rendered and judgment entered thereon. The propriety of the court's refusal to permit the plaintiff to submit to nonsuit is, in view of the state of the record, the only question presented for our decision.

The judgment entered shows that the court refused the motion to dismiss because "of the opinion that it would be unjust at this stage to do otherwise." The Kentucky Civil Code of Practice (section 371) provides that the plaintiff may dismiss an action without prejudice to a future action "before final submission of the case to the jury." The Court of Appeals of Kentucky, construing this statute, has held that after the court has sustained a motion by defendant for a peremptory instruction to the jury, but before such an instruction has been given, the plaintiff has a right to dismiss his action without prejudice, upon the ground that there has been at that time no "final submission" of the case to the jury, within the meaning of the Code provision referred to. *Vertrees' Adm'r v. Newport News, etc., R. R. Co.*, 95 Ky. 314, 25 S. W. 1. If this statute is binding upon the federal court, it is clear that error was committed in refusing to allow the plaintiff to dismiss.

Section 914 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 684) requires that:

"The practice, pleadings, and forms and mode of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

The personal conduct and administration of the judge in the discharge of his separate functions is not within the meaning of this statute; hence state statutes and state constitutions forbidding judges in charging juries to express an opinion upon the facts are not binding on the federal courts (*Railroad Co. v. Putnam*, 118 U. S. 545, 553, 7 Sup. Ct. 1, 30 L. Ed. 257; *Railway Co. v. Vickers*, 122 U. S. 360, 7 Sup. Ct. 1216, 30 L. Ed. 1161); nor are state statutes providing that written instructions shall be taken by the jury in their retirement, and that papers read in evidence may be taken by them (*Nudd v. Burrows*, 91 U. S. 426, 23 L. Ed. 286); nor provisions that the judge require the jury to find specially upon particular questions of facts (*Railroad Co. v. Horst*, 93 U. S. 291, 299, 23 L. Ed. 898; *McElwee v. Metropolitan Lumber Co.* [6th Circuit] 69 Fed. 302, 319, 16 C. C. A. 232); nor statutes requiring that all instructions of the court to the jury shall be in writing (*Lincoln v. Power*, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224); nor does the statute require the federal court to follow a state practice forbidding the separation of a jury after charge given and before verdict rendered (*Liverpool & L. & G. Ins. Co. v. Friedman* [6th Circuit] 133 Fed. 713, 716, 66 C. C. A. 543); nor is a state statute dispensing with the requirement that exceptions to the charge be made while the jury is at the bar, and before it retires, binding upon the federal courts (*Consumers' Cotton Oil Co. v. Ashburn* [5th Circuit] 81 Fed. 331, 333, 26 C. C. A. 436). In regard to motions for a new trial, bills of exceptions, and proceedings on review, the courts of the United States are independent of any statute or practice prevailing in the courts of the state in which the trial is had. *Missouri Pacific Ry. Co. v. Chicago & Alton R. R. Co.*, 132 U. S. 191, 10 Sup. Ct. 65, 33 L. Ed. 309; *Francisco v. Chicago & Alton R. R. Co.* (8th Circuit) 149 Fed. 354, 79 C. C. A. 292; *Chateaugay Ore & Iron Co.*, Petitioner, 128 U. S. 544, 553, 9 Sup. Ct. 150, 32 L. Ed. 508.

On the other hand, as to the sufficiency and scope of pleadings and the form and effect of verdicts in actions at law, the federal courts are bound by the state practice (*Bond v. Dustin*, 112 U. S. 604, 5 Sup. Ct. 296, 28 L. Ed. 835; *Glenn v. Sumner*, 132 U. S. 152, 156, 10 Sup. Ct. 41, 33 L. Ed. 301); so also as to the mode of entering and recording of judgments, including provisions for entering judgments against one or more defendants (*Sawin v. Kenny*, 93 U. S. 289, 23 L. Ed. 926). In *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 29, 39, 11 Sup. Ct. 478, 481 (35 L. Ed. 55) it was held that "whether a defendant in an action at law may present in the one form or in the other, or by demurrer to the evidence, his defense that the plaintiff, upon his own case, shows no cause of action, is a question of 'practice, pleadings, and forms and modes of proceeding' as to which the courts of the United States" are required to conform as near as may be to those existing in the courts of the state within which the trial is had, and that a judgment of compulsory nonsuit entered by a federal court in Pennsylvania in conformity to state practice is reviewable on writ of error, notwithstanding the rule that a federal court has no power to order a nonsuit without the plaintiff's acquiescence. See, also, *Coughran v. Bigelow*, 164 U. S. 301, 308, 17 Sup. Ct. 117, 41 L. Ed. 442;

Fadley v. B. & O. R. R. Co. (3d Circuit) 153 Fed. 514, 517, 82 C. C. A. 464. In Fries-Breslin Co. v. Bergen (C. C.) 168 Fed. 360, it was held that the Pennsylvania practice act, which provides that, upon the granting of a new trial in a case where peremptory instructions have been reserved or declined, the court shall enter such judgment non obstante veredicto as should have been entered upon the evidence, is binding upon the federal courts sitting within that state.

Decisions upon the precise question presented here are not numerous, nor are they harmonious. The United States Circuit Court of Appeals of the Fourth Circuit has in two cases held that the state practice prevailing in North Carolina, permitting a plaintiff to submit to nonsuit after the conclusion of the evidence and after a motion by defendant for direction of verdict had been submitted and sustained, is not binding upon the federal courts. *Huntt v. McNamee*, 141 Fed. 293, 72 C. C. A. 441; *Parks v. Southern Ry. Co.*, 143 Fed. 276, 74 C. C. A. 414. The Courts of Appeals of the Seventh and Eighth Circuits have held the contrary. Thus, a statute of Illinois that "every person desirous of suffering a nonsuit on trial shall be barred therefrom unless he do so before the jury retire from the bar" has been held binding upon the federal courts sitting within that state, and to require the permitting of nonsuit even after the announcement of the judge's decision sustaining the motion for a directed verdict for the defendant. *Wolcott v. Studebaker* (C. C.) 34 Fed. 8, 13; *Drummond v. L. & N. R. Co.* (C. C.) 109 Fed. 531; *Meyer v. National Biscuit Co.* (7th Circuit) 168 Fed. 906, 94 C. C. A. 335. In *Gassman v. Jarvis* (C. C.) 94 Fed. 603, a similar holding was made under a statute of Indiana permitting the plaintiff to dismiss "before the jury retires." In *Chicago, M. & St. P. R. Co. v. Metalstaff* (8th Circuit) 101 Fed. 769, 41 C. C. A. 669, it was held in an opinion by Judge Thayer that the federal courts sitting in Missouri were bound by the statute of that state which, as construed by the state courts, permitted the plaintiff to dismiss his suit or take a nonsuit at any time before the same is finally submitted to the jury. The same rule was applied by Judge McPherson with respect to a statute of Iowa permitting a dismissal by the plaintiff "before the final submission of the case to the jury." *Duffy v. Glucose Sugar Refining Co.* (C. C.) 141 Fed. 206. The decisions in the Fourth Circuit, with respect to the North Carolina practice, are possibly distinguishable from those in the Seventh and Eighth Circuits, under the statutes of Illinois, Indiana, Iowa, and Missouri, in that the North Carolina practice is not based upon statute, but apparently upon construction of common-law rules. *Pescud v. Hawkins*, 71 N. C. 299. There is authority for the proposition that a federal court is not required by section 914 of the Revised Statutes of the United States to follow a state practice which is not statutory, but was established by a decision of the state Supreme Court as the proper mode of procedure under the common law. *Wall v. Chesapeake & Ohio R. Co.* (7th Circuit) 95 Fed. 398, 402, 37 C. C. A. 129; *Sanford v. Town of Portsmouth*, Fed. Cas. No. 12,315, decided in the Eastern District of Michigan by Judge (later Mr. Justice) Brown.

The question is not free from difficulty. We are impressed, how-

ever, with the view that the Kentucky statute does not relate merely to the personal conduct and administration of the judge in the discharge of his separate functions, but confers a substantial right and prescribes a practice and mode of proceeding which under the federal statute is binding upon the courts of the United States sitting within that state. This view seems especially appropriate as applied to a case where, as here, the plaintiff brought his suit in the state court. The conclusions we have reached require a reversal of the judgment. The practice, however, does not require a new trial, but only a direction that upon the setting aside of the judgment the plaintiff's motion to dismiss without prejudice be sustained. *Vertrees v. Newport News, etc., R. R. Co.*, 95 Ky. 318, 25 S. W. 1; *Francisco v. Chicago & Alton Ry. Co.* (8th Circuit) 149 Fed. 354, 360, 79 C. C. A. 292. The plaintiff will recover the costs of this court, the defendant those of the court below.

HUFF et al. v. BIDWELL et al.

(Circuit Court of Appeals, Fifth Circuit, at Chambers. June 1, 1910.)

No. 2,048.

1. COURTS (§ 382*)—APPELLATE JURISDICTION—UNITED STATES SUPREME COURT.

Under Act Creating the Circuit Court of Appeals (Act March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549]) § 6, making the judgment of that court final where jurisdiction of the trial court depends on diversity of citizenship, appeal lies to the Supreme Court where the trial court's jurisdiction attaches on other grounds.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1020; Dec. Dig. § 382.*]

2. CONSTITUTIONAL LAW (§ 42*)—WHO ENTITLED TO OBJECT.

A statute will be held to be unconstitutional only at the suit of a party directly and certainly affected thereby.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40; Dec. Dig. § 42.*]

3. COURTS (§ 382*)—JURISDICTION—DETERMINATION.

Act Creating the Circuit Court of Appeals (Act March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549]) § 6, makes the judgment of that court final, where jurisdiction of the trial court depends upon diversity of citizenship. In a suit to enforce judgment liens against land, claimants made a city a party, claiming that the land was being taken under paving taxes without due process of law, in violation of the Constitution. Defendants denied that the taxes affected complainants' rights. On a showing of the amount of taxes due, complainants' tender of that amount was received, but afterwards returned. On decree for complainants, defendants appealed to the Circuit Court of Appeals, where the decree was affirmed on being amended to allow the paving taxes by allowing the city the taxes tendered. Defendants having failed to prosecute their appeal from this judgment, it was dismissed by the Supreme Court. *Held*, that the constitutional question was abandoned, making final the Circuit Court of Appeal's judgment on a second appeal.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 382.*]

Bill by William L. Bidwell and another against W. A. Huff and others. On affirmance by the Circuit Court of Appeals of a judgment

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for complainants, defendant Huff applies individually and as trustee for an appeal to the Supreme Court. Appeal denied.

See, also, 176 Fed. 1022.

Dupont Guerry, J. H. Hall, and T. S. Felder, for appellants.

John I. Hall, W. G. Smith, T. E. Ryals, W. J. Grace, James L. Anderson, George S. Jones, N. E. Harris, Charles H. Hall, Jr., R. L. Anderson, Walter A. Harris, and J. E. Hall, for appellees.

Before PARDEE and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is a petition by W. A. Huff, individually, and as trustee for Mattie J. C. Jennings and Edison Huff, for an appeal to the Supreme Court from the United States Circuit Court of Appeals. To show the petitioners' case, it is necessary to state the proceedings which led to the decree from which the appeal is sought.

The litigation was begun by Bidwell and Woodford filing a bill in the United States Circuit Court for the Western Division of the Southern District of Georgia in August, 1899, against W. A. Huff and others. Bidwell and Woodford were judgment creditors of W. A. Huff, and the purpose of the bill was to enforce their lien against his real estate. The property, or at least a portion of it, was situated in the city of Macon. The city of Macon was made a party defendant because it was claiming taxes against the property of Huff, which the complainants alleged were not legal. It was also alleged that it was claimed by the city of Macon that Huff was indebted to it for assessments imposed for paving around what is known as the Kimball House lot in the city of Macon. The main purpose of the bill was to collect the judgments which Bidwell and Woodford had against Huff. As an incident to this main purpose, the complainants sought to clear the property of the lien and charges for taxes. In the first paragraph of the bill the diverse citizenship of the complainants and the defendants was alleged. In the eleventh paragraph of the bill it was alleged substantially, in reference to the city's claim for taxes, that the property of Huff upon which the complainants claim their judgment liens was being taken without due process of law and contrary to the Constitution of the United States and the provisions of article 14 of the amendments to the Constitution, and that if the relief prayed was not given they would be deprived of their property rights in said property without due process of law, in violation of the provisions of the Constitution of the United States and of the fourteenth amendment; and that complainants' right is one arising under the Constitution and laws of the United States.

The defendants, W. A. Huff and others, who now apply for this appeal, in their answer to paragraph 11 of the bill, admitted the allegation thereof as to the invalidity of the paving assessments referred to, but denied that "said assessments are in any wise inimical to complainants' rights, or that the rights of the complainants are in any wise threatened or likely to suffer by reason of said assessments." The controversy in reference to the taxes, as made by the pleadings, was wholly between the complainants, Bidwell and Woodford, and the

city of Macon. The proceedings in the Circuit Court showed that the amount of taxes claimed was \$3,546.89. The complainants became satisfied that this was a proper claim and tendered to the city the full amount of the taxes, including the costs in the Circuit Court. The amount of the tender was received at first by the city, but was afterwards returned to the complainants. After a final decree was rendered in the Circuit Court, an appeal was taken by Huff and others to the United States Circuit Court of Appeals. In reference to the matter of taxes, among other things, that court said:

"We think the tender should have been accepted by the city, and the litigation between it and the plaintiffs ended. The practical way to end the controversy now is to amend the decree by allowing the city the full amount of taxes claimed by it on the Kimball House property which the plaintiffs are willing to pay, and its costs in the Circuit Court. The amount, with interest to March 5, 1906, as appears from the record, is \$3,011.29. The decree will be so amended." *Huff v. Bidwell*, 151 Fed. 563, 81 C. C. A. 43.

After this decree of affirmance was rendered by the Circuit Court of Appeals, an appeal to the Supreme Court was taken by W. A. Huff and others, and was subsequently dismissed by the Supreme Court, pursuant to rule 10 (29 Sup. Ct. xv). *Huff v. Bidwell*, 214 U. S. 528, 29 Sup. Ct. 694, 53 L. Ed. 1069.

The decree from which this first appeal was taken was one directing the sale of Huff's property. The mandate went down from the Court of Appeals to the Circuit Court, and the Circuit Court proceeded to enforce its decree. Huff's real estate was sold under the decree, and a report of the sale was made to the Circuit Court. Objections were formally made to the confirmation of the sale, but the Circuit Court overruled the objections and confirmed the sale. A second appeal was taken to the United States Circuit Court of Appeals from the decree of the Circuit Court confirming the sale. The errors assigned related to the manner in which the sale had been conducted and the amount realized from the sale. The United States Circuit Court of Appeals affirmed the decree of the Circuit Court in a brief opinion, per curiam, as follows:

"The original decree, as affirmed in this court, required all the property of the defendant Huff to be sold to pay off, adjust, and satisfy the many liens thereon, and in the conduct and management of the sale complained of the trial judge had and exercised a sound discretion. As the case is presented by record, we conclude that the sale in question was properly confirmed. The decree appealed from is affirmed, and, in considering the large amount of funds tied up by the appeal, mandate will issue at once." *Huff v. Bidwell* (C. C. A.) 176 Fed. 1022.

It is this last judgment of affirmance that Huff and others now seek to review by an appeal to the Supreme Court.

The right of appeal is claimed under section 6 of the act creating the Circuit Courts of Appeals. Act March 3, 1891, c. 517, 26 Stat. 828 (U. S. Comp. St. 1901, p. 549). The act contemplates that certain judgments of the Circuit Courts of Appeals may be reviewed by appeal or writ of error, and certain other judgments cannot be so reviewed. The line of division between cases appealable from Circuit Courts of Appeals to the Supreme Court and those not so appealable is determined by the sources of jurisdiction of the trial court. Sec-

tion 6 provides that the judgment of the Circuit Court of Appeals shall be final in those cases in which the jurisdiction of the trial court is dependent entirely upon the diversity of citizenship. Where the jurisdiction of the trial court attaches upon other and different grounds, then the right of appeal to the Supreme Court from the Circuit Court of Appeals is given. *Macfadden v. United States*, 213 U. S. 288, 294, 29 Sup. Ct. 490, 53 L. Ed. 801. The question here, of course, is whether or not the jurisdiction of the trial court was dependent alone upon diverse citizenship; that is, whether or not the other averments of the bill relating to the illegality of the city taxes would of itself be sufficient to give the court jurisdiction if diverse citizenship had not existed.

The Supreme Court has repeatedly held that when a suit does not really and substantially involve a controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws; and that it must appear on the record by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a controversy as to a right which depends on the construction of some law or treaty of the United States before jurisdiction can be maintained on this ground. *Defiance Water Company v. Defiance*, 191 U. S. 184, 24 Sup. Ct. 63, 48 L. Ed. 140. In this case the complainants and defendants were citizens of different states, and the amount involved was sufficient to give the court jurisdiction. The bill was filed by Bidwell and Woodford, as judgment creditors, to enforce the liens of their judgments upon real estate. The constitutional question, if raised at all by the averments of the bill, relates to taxes claimed by the city of Macon against the defendant W. A. Huff. Bidwell and Woodford had no pecuniary interest in the controversy as to the constitutionality of the tax, if Huff's property was amply sufficient to pay both his debts and the taxes. The record in this case shows that the property was sufficient to pay both. We think it a question of grave doubt whether the complainants were so situated as to entitle them to raise the constitutional question. The duty of condemning state legislation as unconstitutional and void cannot be thrown upon the courts except at the suit of parties directly and certainly affected thereby. *Chadwick v. Kelley*, 187 U. S. 540, 23 Sup. Ct. 175, 47 L. Ed. 293.

We think the record does not show that the case really and substantially involved a dispute or controversy as to the effect or construction of the Constitution or laws of the United States. The reference to the Constitution and amendments is incidental. The result of the case, and the relief sought, to wit, the collection of debts by the enforcement of judgment liens, did not depend upon the construction of the Constitution or laws of the United States. Although we are required to look alone at the averments of the bill to settle the question of jurisdiction, we think that other parts of the record tend to throw light on the proper construction of the bill and therefore on the question as to whether the case really and substantially involved a federal

question as claimed. Looking at other parts of the record, we find that the complainants abandoned the claim that the taxes were illegal, and tendered payment of them in full. This occurred before the first appeal was taken to the United States Circuit Court of Appeals.

If any federal question that would give jurisdiction was ever raised, it was abandoned in the Circuit Court by the complainants, Bidwell and Woodford, and in the Supreme Court by Huff and others, who failed to prosecute their appeal from the first decree of affirmance.

Under the circumstances, we are of opinion that the decree of the Circuit Court of Appeals is final. *Arbuckle v. Blackburn*, 191 U. S. 405, 24 Sup. Ct. 148, 48 L. Ed. 239.

The application for an appeal must be
Denied.

PARDEE, Circuit Judge. I have read and considered the foregoing opinion of Judge SHELBY and I fully concur.

VAN DEVENTER v. LOTT et al.

(Circuit Court of Appeals, Second Circuit. June 14, 1910.)

No. 288.

1. NAVIGABLE WATERS (§ 37*)—HIGH-WATER MARK.

Where the ocean is called for in a deed as a boundary of land, the boundary is high-water mark.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. § 212; Dec. Dig. § 37.*]

2. NAVIGABLE WATERS (§ 42*)—LAND FORMED IN SEA—RIGHTS OF OWNERS OF SHORE LANDS.

Rockaway Beach, on the south shore of Long Island, is a strip of sand between Jamaica Bay and the ocean, terminating on the west at Rockaway Inlet, and for two centuries the western end or point has been gradually lengthened to the westward by accretions caused by the action of the sea. It was formerly to the eastward of Barren Island, but is now to the south of it; the point being about south from the west side. During the same time the south side of the island has been washed away by the shifting of the channel or inlet; but, as shown by a preponderance of the evidence, no part of the present Rockaway Beach is within the original boundaries of the shore owners on the island, which stopped at high-water mark, and the beach has always been, and is now, separated from the island by the navigable inlet half a mile in width. *Held*, that the extension so formed by accretion is not the property of the shore owners on the island, but of the owners of the beach to which it is attached.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 253-255; Dec. Dig. § 42.*]

3. QUIETING TITLE (§ 13*)—RIGHT OF ACTION—POSSESSION.

Where the only persons in actual occupancy of a tract of land, the legal title to which was in complainant, were tenants of small portions originally leasing from defendants, who were adverse claimants, but who afterward took leases from complainant, and the only remaining representative of defendants near the property occasionally lodged in a houseboat moored to the shore, his family residing elsewhere, there was no such possession adverse to complainant, as would support an action of ejectment

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by him, and he was entitled to maintain a suit to quiet title, under Code Civ. Proc. N. Y. §§ 1638-1650.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 8; Dec. Dig. § 13.*]

Necessity of possession in suits to quiet title, see note to *Jackson v. Simmons*, 39 C. C. A. 522.]

4. CHAMPERTY AND MAINTENANCE (§ 7*)—CHAMPERTOUS CONTRACTS—DEED.

A deed conveying the legal title to property is not champertous, when at the time it was executed there was no one in the actual possession of the property, claiming under a title adverse to the grantor.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. §§ 54-110; Dec. Dig. § 7.*]

5. COURTS (§ 335*)—SUIT IN FEDERAL COURT—FOLLOWING STATE PRACTICE—EQUITY—RIGHT TO JURY TRIAL.

There is no statute requiring the federal courts to conform to the state practice in equity causes; and the defendant in a suit to quiet title in a federal court is not entitled to demand a jury trial, although it may be provided for by a state statute.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 335.*]

Appeal from the Circuit Court of the United States for the Eastern District of New York.

Suit in equity by Andrew K. Van Deventer against Jurien S. Lott and others. Decree for complainant, and defendants appeal. Affirmed.

Said decree was in favor of the complainant in an action to quiet title to lands situated in the county of Queens, at the west end of Rockaway Beach. The opinion of the Circuit Court was filed July 24, 1909, and is reported in 172 Fed. 574.

Hubbard & Rushmore (George C. Case, of counsel), for appellants John R. and Sarah Lott.

H. M. Gescheidt, for other appellants.

Everett J. Esselstyne (Frederick R. Kellogg and Maxwell Evarts, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The salient facts are fully stated in the opinion below and need not be repeated here at length. The land in dispute is at the extreme westerly end of Rockaway Beach.

The complainant shows title to the property described in the various conveyances, the earliest dating from 1685. On February 11, 1901, he received the deed executed by Arabella D. Huntington, widow of Collis P. Huntington, and Henry E. Huntington, holding under the last will and testament of the said Collis P. Huntington. Complainant's record title to the lands described in the various conveyances cannot be questioned.

The defendants show title to property on Barren Island, which lies north of Rockaway Point and is separated therefrom by a navigable channel half a mile in width. The property in controversy is not covered specifically by the language of all the deeds of either party,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

as it was not in existence in its present location at the time many of them were executed.

The land, or rather the sand, in dispute has, during the last two centuries, been added to the western end of Rockaway Beach by accretion caused by the set of the tides and storms of great severity, until Rockaway Point, which formerly lay to the eastward of Barren Island, is now south thereof and extends, approximately, as far west as the most westerly portion of that island. In other words, Rockaway Beach extends across the southern front of Barren Island, separated by the half mile wide channel before alluded to.

The defendants' contention is that the land in controversy was formerly attached to the southern portion of Barren Island and has, in the process of time, been eroded therefrom by the action of the sea and attached to Rockaway Point which, it is argued, now occupies the same location as was formerly occupied by the southerly portion of Barren Island.

We are of the opinion that the proof does not sustain this contention. The preponderance of evidence, including the maps and government charts, indicates that 75 years ago Barren Island was separated from Rockaway Beach by Rockaway Inlet, a channel over half a mile in width. During these years the tendency has been, sometimes during violent storms, but generally by the slow action of the sea, to lengthen Rockaway Beach in a southwesterly direction until Rockaway Point is $2\frac{1}{2}$ miles further west than it was in the early part of the nineteenth century. During this period Barren Island has been eroded and its southern boundary has receded to the north, but it has not been established that any part of the island thus washed away has been added to Rockaway Beach, which has at all times been separated from the island by a navigable channel ranging in depth from 20 to 60 feet. We are also satisfied that no part of Rockaway Beach, or Rockaway Point, now in controversy, is in territory ever occupied by the upland of Barren Island. In other words, if a line were drawn east and west through the most southerly high-water mark to which the island ever extended, it would be considerably to the north of the most northerly portion of the land in controversy.

There is much confusion and contradiction upon minor points, but we are thoroughly convinced that the following facts are established;

First.—Complainant's predecessors owned in 1685 "the land and meadow commonly called Rockaway Neck situate, lying and being as aforesaid, bounded on the east with Hempstead West Patent line, on the south with the marine sea or ocean to low water mark and on the west with the gut or inlet which makes the bay or sound betwixt Jamaica and the said neck and on the north with the said bay or sound as it runs easterly until it comes to Hempstead line as aforesaid." In other words, we are convinced that complainant's predecessors owned Rockaway Point.

Second.—From 1685 to the date of the trial Rockaway Point has been gradually and imperceptibly working to the west and south.

This has been by accretion and not by avulsion, but the defendants' access to the sea by a navigable channel has never been cut off.

Third.—Rockaway Point and Barren Island, no matter how their conformation may have been changed by the action of the sea, have always been separated by Rockaway Inlet, a navigable channel connecting Jamaica Bay and the ocean.

Fourth.—Certain sand bars in Rockaway Inlet known as Duck Bar, Pelican Bar and by other names, were not a part of Barren Island, but were separated therefrom by waters navigable by small boats.

Fifth.—The land in controversy is physically annexed to and is a part of the complainant's land deeded to his predecessors in 1685. He can walk to every part thereof.

Sixth.—The land in controversy is physically separated from the Barren Island land of the defendants and they can reach no part thereof except by crossing a navigable channel a half mile in width.

Seventh.—The complainant's land is all located in the county of Queens, whereas Barren Island is in the county of Kings, Rockaway Inlet being the dividing line between the two counties. Taxes have been paid on the disputed lands by complainant and his predecessors and not by the defendants or their predecessors.

Eighth.—The titles of the defendants all relate back to the conveyances from Hendrick I. Lott and Nelson Shaw in 1835 who never owned any lands except on Barren Island. In the deed from Jeromus Lott to Hendrick I. Lott the land is described as—

"that undivided tract of land, woodlands, meadows, marshes and beaches commonly called and known by the name of Barren Island, situate, lying and being in the town of Flatlands, aforesaid, said tract of Island being bounded as follows, to wit: Northernly partly by the Indian creek and partly by the bay; easterly by the inlet that separates said island from Rockaway Beach; southerly by the Atlantic Ocean; westerly by the inlet that separates said tract of land from Gravesend."

It will be observed that the deed describes an island which was bounded on the south by the ocean and was separated from Rockaway Beach, as it is to-day, by Rockaway Inlet.

Ninth.—There can be no doubt that the defendants' land was originally bounded on the south by the high-water mark of the Atlantic Ocean. That high-water mark is the boundary, where lands are so described, is abundantly established. *Mulry v. Norton*, 100 N. Y. 424, 433, 3 N. E. 581, 53 Am. Rep. 206; *Ex parte Jennings*, 6 Cow. (N. Y.) 518, 528, 16 Am. Dec. 447; *Shively v. Bowlby*, 152 U. S. 1, 57, 14 Sup. Ct. 548, 38 L. Ed. 331. This being the rule, it is manifest that the defendants' title never extended to the sand bars which formed and shifted from time to time in Rockaway Inlet during the many years that this channel was subjected to the more or less violent action of the sea. Unfortunately for the defendants, this action has favored the complainant; under different conditions the inlet might have worked to the eastward, adding to defendants' land and eroding the land of the complainant. The court cannot, however, reverse the laws of nature and award to the defendants, property which the sea has added to the domain of the complainant.

Tenth.—The deeds under which the defendants claim title referred solely to land on Barren Island until 1887, when one Henry D. Lott executed a quitclaim deed to the defendant Byron Whitcomb of a portion of Rockaway Beach and since then a number of other deeds have been recorded in Queens county. So far as the record title in Queens county is concerned, it begins with the deed to Whitcomb.

These considerations make the decision in *Mulry v. Norton*, *supra*, inapplicable. The portion of Barren Island carried away by erosion was transported beyond the owners' boundary, at least it has never been returned by accretion or reliction. The place where it was located is at present under water. The land which the defendants seek to reach is not within their original metes and bounds and there is no possibility of identifying it as ever having been owned by them or as having reappeared within an area so owned by them. Quite likely, if the defendants could show that they once owned the territory where Rockaway Point now is, the doctrine of the *Mulry Case* would apply; the difficulty is that they have not shown it. The court held in that case that owners of adjacent uplands were entitled to land formed in front of, or contiguous to, their property, but it has never been held that the owner of property, a portion of which has been washed away by the sea, has title to land which has formed over a half a mile distant on the other side of a wide, navigable channel at a place to which his title never extended.

The defendants' contention that in 1855 a storm of unprecedented fury burst over this part of the coast, the sea breaking through Barren Island and forming an inlet, which is now known as Rockaway Inlet, is absolutely in conflict with the charts and is not sufficiently supported by the oral testimony to justify a finding that it has been established. Captain Smith, who is, perhaps, the leading witness on this subject and who was 72 years of age when he was sworn, testified as to events which occurred 50 years prior to the date of his testimony. He says that he lay at the head of Hook creek with a vessel loaded with coal bound for Elizabethport and when he went down in the morning it was blowing a gale. Notwithstanding the unprecedented conditions, he put out to sea and reached Elizabethport, where he remained two days. When he returned he found that "the tide had cut right through Barren Island." The examination continued as follows:

"The main inlet closed up within a week. Q. And attached to what? A. Barren Island went across—that went through Barren Island. Q. And attached to Barren Island? A. It cut right through Barren Island and Barren Island was left to the southward. Q. Did it attach to any part of Barren Island? A. No; it cut right through; it went right through Barren Island. Q. Where did it cut through? A. It cut through in the first place; what we call Pelican; that was the first beach that runs to Barren Island; it cut right through there, and then it widened to the Southwest Way; and then it went—the first cut was through Pelican Way, and the Southwest Way through Barren Island, and then there is another way that goes down to Duck Bar. Q. What part of the island was cut through? A. As near as I can tell it was cut right through the center * * * and left a part of Barren Island out on the ocean front."

The inference to be drawn from his testimony, although we cannot find that he so states directly, is that Barren Island was cut in two, a new navigable channel formed through the center and that the southern part of the island is now Rockaway Point—the land in controversy. That such a cataclysm occurred is inherently so improbable that we should hesitate to accept it, even if corroborated by other witnesses called by the defendants. But it is not corroborated except as to inconsequential details. We have no doubt that Captain Smith intended to tell the truth and it is probable that he was misled by assuming that the shifting bars south of Barren Island were actually a part of the island itself instead of being separated therefrom by four feet of water at high tide. It is unnecessary to review the testimony in detail upon these questions further than to say that we are of the opinion that the preponderance of evidence establishes the propositions heretofore stated.

This suit was brought January 3, 1905, under sections 1638-1650 of the New York Code, which provide for an action to compel the determination of a claim to real property at the instance of a person claiming it in fee who has been in possession for one year. As before stated, the complainant has established title to the land in controversy and is entitled to maintain the action to quiet title unless it appears that the defendants have been in such actual possession as to require an action of ejectment.

The facts regarding the claim of adverse possession are stated in the opinion of the judge of the Circuit Court and need not be repeated here. Suffice it to say that leases to certain tenants were made by defendants, of small lots along the beach. These tenants afterwards took leases from the complainant's predecessors, thereby recognizing his title. Notices forbidding trespassing have been posted from time to time by defendants and a monument was set up on the land in 1887. During the summer months one Smith Foster lived on the property with the consent of the defendants and acted as their agent in certain particulars. He built a lodge and some cabins for sportsmen, which were burned down in 1903 by an order of the court issued in an action commenced by agents of the complainant, which order was subsequently held to be illegal.

At the time this action was commenced, however, Foster had no possession which would justify an action of ejectment. Since his eviction the only structure which he had upon the premises in question was a houseboat which was drawn up on the beach. Here he slept a portion of the time; his family living at the life-saving station, not on the disputed premises. It is difficult to see, therefore, who could have been made defendants in an ejectment action and what result could have been obtained had such an action been commenced. The complainant could not have sued the so-called Lott lessees for the reason that they were his own tenants. He could not have sued Foster for the reason that he was only the occupant of a houseboat, which he occupied occasionally only. It was not his home and could have been floated away at any time.

Complainant could not have sued the defendants in ejectment be-

cause their attempts to establish dominion over the land did not amount to possession within any of the authorities with which we are familiar. When it is remembered that the property in dispute is three miles long and nearly a mile in width, that it is not cultivated, inclosed, improved, or used for the supply of food or capable of such use, it will be seen how inconsequential and trivial would be the occupation of a few small lots along the beach, even if all the defendants' claims were conceded, that they were so occupied.

But in fact the claim of adverse possession must rest upon the so-called possession of Smith Foster. We are asked to dismiss this action, which will settle the title to hundreds of acres, upon the theory that the question can be determined in an ejectment suit against the owner of a wandering scow which was drawn up on the beach and used occasionally by him as a lodging house.

The deed to complainant is not void for champerty. It is enough to say on this subject that at the time of the delivery of the deed there was no one in the actual possession of the property, claiming under a title adverse to that of the grantors.

The defendants argue that they were entitled to a jury trial and that the refusal to grant their request in this regard was error, requiring a reversal of the decree. The action is in equity to quiet title to land and there is no provision of law which gives the defendant the right to a trial by jury in such an action in the federal courts. The law assimilating the practice of the federal courts to that of the state courts expressly excepts equity causes. The provision of the Revised Statutes of the United States is as follows:

"The practice, pleadings and forms and modes of proceedings in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such Circuit or District Courts are held." Rev. St. § 914 (U. S. Comp. St. 1901, p. 684).

There is no provision for trial by jury of the issues in equity causes in the United States courts, and, therefore, the state statutes and decisions are inapplicable. The judge of the Circuit Court was correct in refusing to follow the practice of the state courts. Assuming that a federal judge might, upon proper application, in such an action, have framed feigned issues for trial by a jury, his granting the request is entirely discretionary and his failure to grant it furnishes no ground for reversal.

The decree is affirmed with costs.

LANGDON v. TAYLOR.

(Circuit Court of Appeals, Second Circuit. July 1, 1910.)

No. 236.

1. TRIAL (§§ 71, 390*)—DIRECTION OF VERDICT—SUBSEQUENT JURISDICTION.

After a verdict is directed and the jury discharged, the trial judge may set the verdict aside and grant a new trial; but he has no jurisdiction to admit new evidence, make new findings on the evidence already given, or add to or subtract from the record.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 167; Dec. Dig. §§ 71, 390.*]

2. BROKERS (§ 7*)—CONTRACT—PROVISIONS.

Where a contract employing a broker to sell coal lands provided for the payment of a commission on the broker effecting a sale within six months from August 19, 1904, and further provided that, if during the six months the broker named to the owner a probable purchaser and the property came under the control of the person so named, the broker should be entitled to the commission if the sale or lease was made within a year from February 19, 1905, the agreement was neither unilateral nor abnormal.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 5-8; Dec. Dig. § 7.*]

3. BROKERS (§ 56*)—SALE OF COAL PROPERTY—RIGHT TO COMMISSIONS.

Defendant employed plaintiff to sell certain coal land for \$250,000, agreeing to pay \$10,000 commissions in case a sale was effected within six months from August 19, 1904, and that if during such time the broker named to defendant a probable purchaser, and the property came under such purchaser's control within a year from February 19, 1905, the broker should be entitled to commissions. Plaintiff, on the day the agreement was made, named the Ontario & Western Railway as a probable purchaser, and within the time specified the land was sold to R., who was secretary and treasurer of the railroad company, and also of the S. Coal Company; the sale having been made through B., who was attorney for both companies. R. thereafter transferred the property to the S. Coal Company, all of the stock of which, except a few qualifying shares, was owned by the railroad company, and it was also shown that a majority of the coal company's directors were directors of the railway company. *Held*, that the property was sold to the railway company within the terms of the contract, entitling plaintiff to commissions.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 56.*]

In Error to the Circuit Court of the United States for the Western District of New York.

Action by William H. Taylor against Andrew Langdon. Judgment for plaintiff for \$12,209.34, and defendant brings error. Affirmed.

Kenefick, Cooke & Mitchell (James McCormick Mitchell, of counsel), for plaintiff in error.

George B. Curtiss and Albert L. Watson, for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The record presents no question of fact. At the close of the testimony both parties moved for the direction of a verdict. The question at issue is one of law and depends upon the construction of a written instrument. The facts are as follows:

Andrew Langdon, the defendant, was the owner of a tract of coal

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 180 F.—25

land at Carbondale, Pa. William H. Taylor, the plaintiff, residing at Scranton, Pa., was a man of experience in buying, selling, and leasing coal property. Langdon desiring to sell his coal land employed Taylor as his agent to effectuate the sale, the parties entering into a written agreement August 19, 1904. The paragraphs of this contract which it is necessary to consider are as follows:

"Second.—When sale has been made, the party of the first part agrees to accept in full payment for the above property the sum of two hundred and fifty thousand dollars (\$250,000.00) less the sum of ten thousand dollars (\$10,000.00) to be paid by the party of the first part to the party of the second part as his commission, it being agreed that the party of the second part has the privilege of obtaining, and shall be paid as a further profit to himself, whatever amount may be secured for the property over and above the price of two hundred and fifty thousand dollars (\$250,000.00) and further agrees to promptly deliver the said property with free and unencumbered title to the purchaser thereof.

"Third.—It is distinctly understood and agreed that the period given to the party of the second part in which to dispose of this property is six (6) months from the date hereof, and it is further understood and agreed, that if the property should be sold or leased, or come under the control of, in any manner, any of the parties who may be named during the said six (6) months to the party of the first part, or any of his agents or representatives, by the party of the second part as probable purchasers or lessees, then in that event the commission herein (\$10,000.00) is to be paid the party of the second part by the party of the first part upon the consummation of sale or lease to such parties whenever the same might occur.

* * * * *

"Sixth.—If at the end of six (6) months from the date hereof, no sale or lease has been effected, then this agreement shall be null and void, except as to the provision in Section 'Three' which will remain in full force and effect for one (1) year thereafter."

The plaintiff testified that on the day the agreement was made he named the Ontario & Western Railway, the Scranton Coal Company, and some others, as probable purchasers. In this he is corroborated by Morgan Davis, Jr., but the defendant denies that the Scranton Coal Company was so mentioned. It is suggested by counsel for defendant that the Scranton Coal Company, which became the ultimate purchaser, cannot be considered by the court for the reason that the assertion that it was named by the plaintiff is disputed by the defendant. We incline to the opinion that by moving for the direction of a verdict the defendant conceded all the facts as sworn to by the plaintiff, contending that, even in their most favorable aspect, they presented no ground for recovery. At the close of the evidence both sides moved for a direction and the defendant made no request that the question—whether or not the coal company was named—should be submitted to the jury.

After the direction of the verdict the jury were discharged and the court adjourned for two months with permission to present the question again upon a motion for a new trial. On the adjourned day counsel for the defendant presented 44 special findings of fact which he requested the court to find and asked to be heard upon the question of fact "as to whether the Scranton Coal Company was named by the plaintiff as a probable purchaser." The court very properly declined to make any special findings and the defendant reserved an exception.

He also filed 12 exceptions to the "remarks of the court" in deciding the motions for the direction of a verdict. In making these requests and noting these exceptions counsel for the defendant has, we think, been misled into thinking that because the jury was instructed as to its verdict, the trial is to be considered as if it were a trial by the court, a jury having been waived.

Of course, after the verdict was directed and the jury discharged the record in the Circuit Court was made up. The trial judge could set the verdict aside and grant a new trial, but he could not admit new evidence or make new findings upon the evidence already in, or add to or subtract from the record in any way—the trial was ended.

It seems probable that defendant's counsel are now in accord with these suggestions for they say in their brief, regarding their exceptions to the remarks of the court in directing the verdict:

"We have come to the conclusion that it was wholly unnecessary to file any such exceptions. The exception taken to the verdict directed was clearly sufficient to raise every question of law presented by the undisputed evidence."

Whether or not counsel dispute the proposition that the Scranton Coal Company is to be considered as one of the probable purchasers named by the plaintiff, is not entirely clear. We think we are justified in assuming that they do not, in view of the fact that, in response to an inquiry by the court, counsel expressly stated that they did not wish to go to the jury upon this question, and also in view of the following quotation from the defendant's brief:

"We do not, however, propose to discuss the evidence on this issue, because we must assume that the question was resolved against us by the direction of a verdict in the plaintiff's favor in the court below. We cannot argue the question of fact here. The only question presented in this regard is whether the Circuit Court should not have submitted this one issue of fact to the jury, or made a special finding thereon in accordance with our request."

However this may be, we do not deem it of vital importance because it is conceded on all hands that the Scranton Coal Company is a creature of the Ontario & Western Railway Company and that the latter company was named by the plaintiff. All of the capital stock of the coal company was owned by the railway company except the few shares necessary to qualify the directors. Counsel for defendant say in their brief:

"We do not deny that the Scranton Coal Company was, in a certain sense, controlled by the New York, Ontario & Western Railway Company by virtue of its stock ownership; nor do we deny that Rickard was, in a certain sense, controlled by the Scranton Coal Company in regard to the purchase in question, because it furnished him the money with which to effect such purchase."

If, then, it appears that the defendant's coal land was sold or leased to the Scranton Coal Company during the period stipulated in the contract, it follows that it came under the control of a purchaser named by the plaintiff; to wit, the Ontario & Western Company.

Turning now to the contract we find nothing ambiguous in its provisions. Langdon employed Taylor to sell his Pennsylvania coal land for \$250,000 and agreed to pay Taylor \$10,000, as his commission, in making the sale if made within six months from August 19,

1904. The agreement further provides that if during the said six months Taylor names to Langdon a probable purchaser and the property comes under the control of the person so named Taylor shall be entitled to the said sum of \$10,000 if the sale or lease is made within one year from February 19, 1905. We see nothing abnormal or unilateral in this agreement. The provision preventing a surreptitious sale to the broker's customer is not unusual and, in view of subsequent events, seems to have been wise and necessary. It was simply a stipulation on Langdon's part that if Taylor disclosed to him the name of the party to whom he proposed to sell the property and that party came into full control prior to February 19, 1906, he (Taylor) should not lose his commission. In legal effect it was as if Langdon had said to Taylor:

"If you sell my coal property or give me the name of a customer who buys, leases or gets full control of said property within eighteen months, so that I receive \$250,000, I will pay you \$10,000."

In the learned brief of the counsel for defendant, considerable space is devoted to the legal and technical meaning of the word "commission." We deem it unnecessary to follow this discussion for the reason that there can be no doubt as to the meaning of the parties in the agreement in question. The \$10,000 which Langdon agreed to pay is described as a "commission." It might as well have been called "fee" or "compensation," or it might have been left undesignated. Strike out the words "as his commission" and the meaning is precisely the same. In other words, there can be no question regarding the amount to be paid Taylor or the services he was to render to earn it. Probably no one will dispute the proposition that if the money had been paid by the Ontario & Western Company and if the deed had been taken by it within the time named, Taylor would be entitled to the \$10,000 even if he had done nothing more. He had named the purchaser who took the deed and, under the contract, was entitled to the compensation therein stipulated. How then is the liability altered if it appears that the actual purchaser, who furnished the money and obtained full control of the property, for reasons of its own placed the legal title in a corporation absolutely owned and controlled by it?

Without intending to intimate that the defendant has been guilty of disingenuous conduct, we think it cannot be denied that a ruling exculpating him because the deed was not actually taken by the Ontario & Western Company would open wide the door to chicanery and fraud.

It remains to consider whether, prior to February 19, 1906, the defendant's coal lands were sold, leased or came under the control of a purchaser named by the plaintiff. On December 28, 1905, the property was deeded by Rickard to the Scranton Coal Company. If this company was named by Taylor it follows that, under the strict, literal meaning of the contract, it was sold to one of his "probable purchasers."

But, in order to avoid the complications regarding the disputed question of fact before adverted to, we think there can be no answer to the proposition that by the deed to the coal company the property came

under the control of the Ontario & Western Company—concededly named by plaintiff. The money which was paid to the defendant on November 16th upon the contract and the \$225,000 paid him on December 11th was ostensibly furnished by the Scranton Coal Company.

All the capital stock of the Scranton Coal Company amounting to \$200,000 was owned and held by the Ontario & Western Company except a few qualifying shares, as before stated. A majority of the coal company's directors were directors of the railway company. James E. Burr, through whom the property was purchased was the attorney for both companies. James E. Rickard in whose name the first deed was taken was secretary and treasurer of both companies. It is unnecessary to pursue the subject as we have no doubt that the Ontario & Western Company furnished the money which purchased the land in question, acquired full control and is the de facto owner of the same.

It is contended by the plaintiff that the defendant knew, or should have known, that the parties who dealt with him and procured the transfers of the property were in fact the agents of the Ontario & Western Company. It is also argued by the plaintiff that the transfer of the title by the circuitous method shown was but a subterfuge to enable the defendant to avoid his contract obligations. We do not consider it necessary to decide these questions.

The judgment is affirmed with costs.

SLENTZ v. WESTERN BANK NOTE & ENGRAVING CO. OF CHICAGO, ILL.

(Circuit Court of Appeals, Third Circuit. August 1, 1910.)

No. 24.

1. TRIAL (§ 142*)—PROVINCE OF COURT AND JURY.

Where the facts are in dispute, so that different inferences might be drawn, a verdict could properly be for either party, and the court cannot become a finder of facts and a decider of alternative inferences.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337; Dec. Dig. § 142.*]

2. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—ACTION—QUESTION FOR JURY—NEGLIGENCE.

In an injury action by a servant, whether he was negligent *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Action by Andrew Slentz against the Western Bank Note & Engraving Company of Chicago, Ill. There was a verdict for plaintiff, and a judgment for defendant notwithstanding the verdict, and plaintiff brings error. Reversed, with directions.

Meredith R. Marshall and Thos. M. & Rody P. Marshall, for plaintiff in error.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Edwin W. Smith and Reed, Smith, Shaw & Beal, for defendant in error.

Before BUFFINGTON and LANNING, Circuit Judges, and ARCHBALD, District Judge.

BUFFINGTON, Circuit Judge. In the court below Andrew Slentz obtained a verdict for personal injuries against the Western Bank Note & Engraving Company. The defendant on the trial asked the court to charge that "under the pleadings and all the evidence the verdict must be for the defendant," and, the verdict being in favor of the plaintiff, it subsequently moved the court to enter judgment in its favor non obstante veredicto. Such motion was granted, and, judgment being entered, plaintiff sued out this writ and assigned for error such entry.

After a careful examination of the proofs, we are of opinion the court was right in submitting the case to the jury. The facts were in dispute, and, when established, different inferences might be drawn from them. As such facts or inferences were drawn, the verdict could properly be for either party. Under such circumstances a court cannot become a finder of facts and a decider of alternative inferences. *Dalmas v. Kemble*, 215 Pa. 410, 64 Atl. 559; *Ackley v. Bradford Township*, 32 Pa. Super. Ct. 487.

The proofs of the plaintiff show that the J. B. Orr Company, for which he was working, was moving printing machinery for the defendant company from its old location to a new building. The machinery was carried in transit on an elevator operated by the defendant, from the ground floor of such new building to the upper ones occupied by the defendant. The elevator was at the rear end of a dark, unlighted hall. After the defendant's elevator operator helped put the machinery on and remove it from the elevator, during the two days the moving was being done, he had always kept the elevator at the floor where the machinery was being loaded until the work was finished and the men were ready to go up or down on the elevator. Slentz had never ridden on the elevator, but had always walked up and down the stairs. The building was only partially completed, and there was no gate or guard in front of the elevator, but there was no proof that Slentz had seen the latter except in place. On the second day Slentz, after helping on one of the upper floors to unload and move certain articles from the elevator, walked down stairs carrying some tools. As he passed near the elevator on his way to the wagon to leave the tools, he was told to get some rollers that had just been brought down on it. He then called to Barnett, who was employed by the defendant to run the elevator, "Have you got them rollers on the elevator?" to which Barnett replied that he had. The plaintiff then said, "Wait a minute, and I will come and get them," to which Barnett replied, "All right." Slentz then went about twenty feet to the wagon, laid down his tools, and returned to the elevator. Instead of remaining, as plaintiff contended he promised to do, Barnett had meanwhile taken a workman to one of the upper floors, leaving the shaft unprotected. The plaintiff returned to get the rollers, and thought

he saw the elevator in place. He stooped and reached into the opening to get the rollers, but instead fell forward into the shaft and was injured. This testimony was denied; but, the jury having found for the plaintiff, we must regard it as established that Barnett said what Slentz testified to, and that it was meant and accepted as a promise to Slentz that he would wait there for him.

Under such circumstances the question of Slentz's conduct, as bearing on the question of negligence, was for the jury, and in determining that question the effect of Barnett's promise was to be given due weight. In *Northern Pacific Railroad Company v. Amato*, 144 U. S. 465, 12 Sup. Ct. 740, 36 L. Ed. 506, a railroad section hand walked across a bridge and gave no thought to the approach of a train, because the boss had told him no train would come over the bridge at that hour. The trial court in its charge told the jury that, on the question whether it was a prudent thing for the plaintiff to walk across the bridge in the manner he did and not see the engine approaching until it was directly upon him, they had a right to take into consideration the statement, which he said was made to him by the boss, that it was safe for him to cross at that time, and that no engine would go over the bridge until about half-past 7 o'clock. Of this the Supreme Court say:

"The testimony of the plaintiff that the boss or foreman of the defendant had told him that no train or engine would come over the bridge until about 7 or half-past 7 o'clock was properly to be taken into consideration by the jury in determining the question whether the plaintiff was negligent in not seeing the engine. We concur also with the view * * * that it was fairly a question for the jury to determine whether or not it was negligence on the part of the plaintiff not to keep a lookout for a coming engine, in view of the assurance of the boss that there was none to come, and that the case is quite within the decisions in *Bradley v. New York Central Railroad*, 62 N. Y. 99, and *Oldenburg v. New York Central Railroad*, 124 N. Y. 414 [26 N. E. 1021]."

In view of this and other decisions, viz., *Ernst v. Hudson Company*, 35 N. Y. 9, 90 Am. Dec. 761, *Cary v. Morrison*, 129 Fed. 177, 63 C. C. A. 267, 65 L. R. A. 659, *Metal Company v. Maroni*, 123 Fed. 410, 59 C. C. A. 518, *Allis Company v. Reilley*, 143 Fed. 298, 74 C. C. A. 436, *Swift v. Langbein*, 127 Fed. 111, 62 C. C. A. 111, and in light of the facts of Barnett's promise and his usual course of keeping the elevator on the level of the floor where this moving gang was working, we are clear that the question whether the defendant was guilty of contributory negligence was for the jury and not the court to decide. The case falls within the principle laid down in *Railroad v. Stout*, 17 Wall. 657, 21 L. Ed. 745:

"Certain facts we may suppose to be clearly established, from which one sensible, impartial man would infer that proper care had not been used and that negligence existed, and another man equally sensible and equally impartial would infer that proper care had been used and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of the jury."

Judgment will therefore be reversed, with directions to enter judgment for the plaintiff, in accordance with the verdict rendered by the jury.

WING SING LUNG & CO. et al. v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. June 27, 1910.)

No. 872.

1. CUSTOMS DUTIES (§ 38*)—CLASSIFICATION—CHINESE SAUSAGES—"BOLOGNA SAUSAGES."

The provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 655, 30 Stat. 201 (U. S. Comp. St. 1901, p. 1687), for "sausages, Bologna," does not include sausages of Chinese origin, under the circumstances of this case.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 38.*]

2. CUSTOMS DUTIES (§ 17*)—CONSTRUCTION OF STATUTES—FLUCTUATING DEPARTMENTAL PRACTICE.

Held, that sundry official rulings as to the scope of a tariff provision did not go so far as to establish a departmental usage of a determinate character, as they fluctuated with regard to several importations in accordance with the peculiar facts in reference thereto.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 17.*]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

For decision below, see 171 Fed. 906, affirming a decision by the Board of United States General Appraisers (G. A. 6,250, T. D. 29,923), which had affirmed the assessment of duty by the collector of customs at the port of Boston. The case was submitted on briefs, without oral argument.

Searle & Pillsbury, Guy A. Ham, and William E. Waterhouse, for importers.

D. Frank Lloyd, Asst. Atty. Gen., and Thomas M. Lane, Sp. Atty., for the United States.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This is a customs case, depending on the application of paragraph 655 of the tariff act of 1897 (Act July 24, 1897, c. 11, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1687]), part of the free list thereof, containing only the following words: "Sausages, Bologna." The decisions of the collector, the Board of General Appraisers, and the Circuit Court were in favor of the United States; and, as the questions involved are not questions of law, but purely questions of fact, and as in no event can it be said that the importers make a clear case, the usual rule firmly established by the Supreme Court applies, that the concurrence of two tribunals with reference to a mere question of fact is not to be set aside, except for very grave reasons. Nevertheless, the ingenious argument submitted for the importers justifies us in giving the matter some further attention.

The importers admit that this is "common Chinese sausage," and they state what are the component parts. They maintain that the expert called in behalf of the importers testified that in the trade the term "Bologna sausages" means sausages similar in structure to those in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

question here. Nevertheless, the expert referred to, who is an Italian, and a large dealer in sausages imported from Italy and nearby countries, and perhaps in sausages made in the United States, closes his testimony as follows:

"Q. When you were testifying in answer to Mr. Garland's cross, you said 'they,' meaning the importation in question, 'were not known in the trade as Bologna sausage.' A. Not in the United States."

There is, indeed, no evidence in the record that any such trade nomenclature ever included the "common Chinese sausage."

However, what the importers rely on are sundry rulings of the officials which undoubtedly broaden out the application of the words "sausages, Bologna," as normally understood. Nevertheless they do not go so far as to establish a departmental usage of a determinate character, because they fluctuate with regard to several importations in accordance with the peculiar facts in reference thereto; and each of them disposes of a special question of fact only, and none deals in any way with any such rule of law, or any such general rule of construction, as would give the statute any specific effect. The ruling of Assistant Secretary Tichenor of April 17, 1899 (T. D. 9,340), goes the farthest of any, in that it permits the classification of "Frankfurter sausages" under the paragraph in question, stating "that the materials from which they are made are similar to those used in the manufacture of German sausages, which are admitted free as Bologna sausages." Therefore the "Frankfurters" were held substantially the same in quality as Bolognas strictly and geographically so designated, so that the only difference was with reference to the particular locality where they were made. They were apparently the same things, although with a difference in name. They might also come, in a broad way, through kindredship, within the rule declared in *S. S. Pierce Co. v. United States*, decided in the Circuit Court for the District of Massachusetts on February 12, 1910. 176 Fed. 440. As the United States justly say, the material of this importation consists of "chunks of fat and lean beef in rather coarse condition," "the meat is not chopped fine," "and it is a crude, unsavory looking product, having neither the qualities of Bologna sausage nor its reputation." It is a fair adaptation of the language of the importers to observe that it "seems like straining the doctrine of commercial designation beyond its limits to hold that an article of Chinese origin, imported and dealt in exclusively by Chinese, and sold exclusively to Chinese," and of the character shown here, and without the aid of any trade nomenclature, can be held to be covered in by the statutory expression "sausages, Bologna."

The judgment of the Circuit Court is affirmed.

NEALL v. P. DOUGHERTY CO.

THE SOMERS N. SMITH.

(Circuit Court of Appeals, Second Circuit. July 5, 1910.)

Nos. 244-245.

TOWAGE (§§ 3, 7*)—BREACH OF TOWAGE CONTRACT—SERVICE IN NATURE OF SALVAGE.

Libellant's tug was employed by respondent to tow three barges to Norfolk from Assateague, Va., where they had been anchored in a storm, respondent's towing tug having been disabled. They were represented as being in a safe anchorage, but were found to be in the breakers in a dangerous position, and where the tug could not reach them because of her draft, and smaller vessels refused to attempt to take a line to them owing to the danger. After making every effort, the tug gave up for the day, and during the night one of the barges having begun to leak, and being in danger of sinking, her master slipped her anchor, and allowed her to drift ashore. In the morning the storm having abated, the tug, with the assistance of a life saving crew, got a line to the other two, and by direction of respondent towed them to a place of safety, and left them. *Held*, that she was not liable for breach of her towing contract, nor for the going ashore of the one barge, but was entitled to recover for the towage service rendered to the others in the nature of salvage, and that an allowance of \$500, made by the trial court, would not be disturbed.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 3, 6, 7, 10; Dec. Dig. §§ 3, 7.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suits in admiralty by Frank L. Neall, as trustee, against the P. Dougherty Company and cross-libel by the P. Dougherty Company against the tug Somers N. Smith. Decree for libellant Neall on both original and cross-libel (168 Fed. 415), and the P. Dougherty Company appeals. Affirmed.

See, also, 159 Fed. 1016.

On appeal from decrees of the District Court for the Southern District of New York in favor of Frank L. Neall, as trustee, for \$875.29 damages and costs in the first of the above entitled actions, and for \$316.89 costs in the second of said actions. In the first action Neall, as trustee, recovered \$500 for towage service, in the nature of salvage, and costs. In the second action, which was a cross-libel filed by the Dougherty Company to recover damages against the tug Somers N. Smith for its alleged breach of a contract of towage, the libel was dismissed with costs. In both actions the Dougherty Company appeals.

De Lagnel Berier (James J. Macklin, of counsel), for appellant.

Robinson, Biddle & Benedict (Roderick Terry, Jr., and W. S. Montgomery, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. On the 23d of March, 1906, the tug Margaret owned by the P. Dougherty Company started from New York, with three barges in tow, bound for Norfolk, Va. The barge Dendron,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

loaded, was next the tug on a hawser and the barges Norfolk and Embrey, light, also on hawsers, were being towed, in the above order, behind the Dendron. On the next day the flotilla encountered a heavy northeast gale and snowstorm, and endeavored to find shelter in Tom's Cove, Virginia. On the way in the Dendron's hawser fouled the tug's propeller and the tug anchored and signaled the tow to anchor also. This was done, but the Margaret could not hold her ground and, being unable to operate her propeller, drifted upon Wallop's Beach. The three barges remained at anchor.

The situation was one of great danger, the barges being exposed to a northeast gale, a heavy sea and a lee shore, less than a mile distant.

On the 25th of March the master of the tug Somers N. Smith, having heard of the stranding of the Margaret, started from Delaware Breakwater to render such assistance as was needed, but before leaving the breakwater he was recalled by signal, to await the result of a conversation over the telephone between the owners of the Smith and the Margaret. This conversation resulted in an agreement that the Smith should proceed to Assateague and tow the three barges to Norfolk for \$500. If she succeeded in floating the Margaret without delay she was to get \$200 in addition, or \$700 in all. The Smith reached Assateague at 7:30 a. m. on the morning of the 26th, found the barges laboring in a heavy sea and endeavored in every way possible to get a line on them, but without success. The tug drew too much water to approach them successfully and as it was she struck bottom several times. No smaller boat would attempt so dangerous an undertaking. All requests to do so were refused.

On Monday night the master of the Dendron, finding that she was leaking and might fill and sink, threw off the anchor chain, letting both chain and anchor go, and she drifted on the beach. The next morning it was possible, with the assistance of the life savers, for the Smith to get a line to the other barges and they were towed to a place of safety. She could have towed them to Norfolk if the Dougherty Company had permitted. The foregoing brief outline of the testimony sufficiently states the facts necessary for a determination of the principal questions involved. The details are stated at length in the opinions of the District Judge and the commissioner.

The libel of the Dougherty Company cannot be maintained. The Smith started out with a wrecking crew, but she was turned back and discharged her crew on hearing from the owner of the barges that a salvage service was not desired. On reaching Assateague she found the barges in a location so dangerous that it was impossible to get a line to them, in the then condition of the weather. The Dendron went ashore through the action of her own master. His act in casting the anchor chain overboard probably saved her from sinking in deep water. But whether wise or otherwise his action cannot be imputed to the Smith. If a fault, it was the fault of an agent of the Dougherty Company and not of the Smith or her agents.

That the Smith is entitled to some compensation for her services is too plain for debate. She came from the Delaware Breakwater at

the request of the Dougherty Company to rescue the barges and tow them to Norfolk. She had every reason to believe that they were in no immediate danger. She was a large and powerful tug drawing 13½ feet of water, well manned and equipped for the service for which she was employed, and was occupied at least 50 hours in the service. She was in no way responsible for the loss of the Dendron and would have towed the other two barges to Norfolk had she not been ordered back to the Delaware Breakwater by the Dougherty Company.

There was proof that \$10 per hour was a reasonable compensation for such services as she rendered, and the amount agreed on by the parties—\$500—was not for salvage but for a towage service. It may be that if the case had been tried in the first instance before this court a smaller sum than \$500 would have been allowed, but the question here is—Was the award so excessive as to justify us in setting it aside and awarding a smaller amount? We think not. The Smith was entitled upon the facts to a substantial award and we cannot say that \$500, which amount was approved by the Judge and the commissioner, both admiralty lawyers of large experience, is excessive or unwarranted by the testimony.

The decrees are affirmed with interest and costs.

DICKINSON v. NETHERLAND AMERICAN STEAM NAVIGATION CO.

(Circuit Court of Appeals, Second Circuit. June 30, 1910.)

No. 286.

SHIPPING (§ 81*)—NEGLIGENT MANAGEMENT OF VESSEL—CRUSHING COALING BARGE AGAINST PIER.

A coal barge was placed between a large steamship and a pier at ebb tide, which tended to keep the steamship away from the pier, and remained there until high tide. It was afterward found that her side next the pier was crushed in. The steamship was made fast to the pier by lines, and also breasted off by two booms which extended on an upward slant from the pier to her side. *Held*, on the evidence, that the injury to the barge was caused by her being squeezed between the steamship and the pier when the tide rose, due apparently to the elevation of the outer ends of the booms, which permitted the steamship to come closer to the pier, and that her owner whose employes so placed and left the barge was liable therefor.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 344, 345; Dec. Dig. § 81; * Navigable Waters, Cent. Dig. § 98.]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by G. E. Dickinson against the Netherland American Steam Navigation Company. Decree for respondent, and libellant appeals. Reversed.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, dismissing a libel brought to recover damages alleged to have been sustained by the coal barge

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Index

California through being crushed between the respondent's steamship Rotterdam and the pier at which she was lying.

Wheeler, Cortis & Haight (J. W. Griffin, of counsel), for appellant.

Wing, Putnam & Burlingham (James Forrester, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The decision of the District Judge merely contains the statement that, "there is nothing in *The Adelaide*, as reported in 131 Fed. 1002, to change the view of the evidence expressed at the hearing;" but the record contains no statement of what that view was. We have reached a different conclusion for the following reasons:

(1) The coal barge, which carried 500 tons of coal, was put by respondent's employes in between the steamship Rotterdam and the pier on the evening of June 26, 1908. The steamer lay on the south side of the pier, and was made fast with lines, and was also breasted off with two booms. The tide was then ebb, and its natural tendency was to keep the Rotterdam as far away from the piers as the lines would permit, and also to keep the barge close up against the steamer's side. The coal foreman of respondent testified that there was then a foot and a half to two feet space between the inshore side of the barge and the pier. Also that at that time the steamer was 26 feet out from the dock.

(2) The Government Tide Tables showed that it was low water at Governor's Island at 1:20 a. m. June 27th and high water at 7:23 a. m. That morning (Saturday) the barge was moved to the north side of the pier, with some coal yet on board which on Tuesday she delivered to the Nieuw Amsterdam.

(3) The tide rises and falls at this pier from four to six feet depending on wind and other conditions. The deck of the dock is about three feet above high water. The breasting booms ran from the deck of the dock inside the string-piece to the side of the ship, one forward and one aft. It does not appear whether or not there was greater breadth of beam on the ship elsewhere than at the points they touched. The inshore ends of the breasting booms were securely fastened with chains around the string-piece so that they could not slip, but the fastening acted as a joint so that the outshore ends of the booms could rise and fall.

All of the above, except the Government Tide Tables is from respondent's evidence. The same evidence leaves us somewhat in doubt as to the outshore ends of the booms.

(4) Answering the question where the booms touched the ship respondent's witness says:

"They hang down 20 or 30 feet from the deck down, and the same way up, maybe 30 feet up from the water line. * * * Not 30 feet—no; pretty near 20 feet—somewhat like that; according to the tide and the ship discharging."

"Q1. Does the position of the booms up against the ship's side vary with the tide? A. The booms—that end there—is still. (The record does not disclose which end he pointed to.) That can't move, that end.

"Q2. When the ship rises and falls with the tide, the end that is on the string-piece does that move? A. Only just raises up like that (indicating); that is made fast with a big chain. At high tide the boom slopes up from an elevation 3 feet above the water to an elevation of 20 feet. * * * Under any change of the tide the ship can't move; she might move ahead 2 or 3 feet, but that is all. * * * The crew attend to the lines of a ship lying along a pier as the tide changes."

The master of the barge testified to hearing a crushing sound about 3 a. m. which waked him up. He searched and found the barge squeezed up against the dock, and the next day found that she was leaking. Evidently for some reason the District Judge discredited his statement; so we may leave it out.

(5) Libelant gave testimony, which we see no reason at all to discredit, that upon examination by competent person shortly after June 27th the barge was found in a leaky condition with knees broken and fastenings started and the side shoved in for a distance of the length of the boat, as if she had been squeezed.

The respondent insists that libelant's claim is untenable; that he proved too much, because, if an enormous vessel like the Rotterdam were forced in toward the dock by the flood tide with the barge between, she would have crushed the latter like an egg shell. But we do not understand that any such contention is made by libelant, nor that it is suggested that the Rotterdam was left entirely free to move inwards. The booms concededly breasted her out, and the only question is whether as rigged there was play enough to allow her to come in far enough to squeeze the barge so as to inflict the injuries subsequently found. We find nothing incredible in the theory advanced. The evidence leaves it uncertain whether the outer end of the boom moved up or down as the ship rose and fell. The answer to Q2 would seem to indicate that was the fact, as it would be if the outer end were fastened in place on the ship's side so that it would not slip, but the fastening would act as a joint as it did at the inshore end. If thus rigged, it is manifest that the rise and fall of the ship with the tide would reduce or lengthen her distance from the pier. The answer to Q1 would seem to indicate that the outer ends of the booms were not made fast to the ship, that she slipped up and down over them as the tide rose and fell, while they did not move. If that be so, there must have been some rigging to keep them in place against her push under the influence of a flood tide since they angled up from 3 feet above to 20 feet above the water line. There is nothing to show what that rigging was, but it must be difficult to hold down the outer end of a 35-foot boom against upward thrust, when the only apparent anchorage of the downhaul guy is on a pile of the dock a few feet below the inshore pivot. It would seem that any such rigging would necessarily result in giving some little vertical play to the outshore end. Very little play was required to allow a movement of the Rotterdam towards the dock, after the tide turned, sufficient to absorb the small margin of "one and a half to two feet" which was all there was when the ebb tide operated to keep her off. We have then an injury to the barge of such a character as could result only from her being squeezed transversely, the conceded fact that she lay where the Rotterdam, with a very slight change of posi-

tion, would inevitably have squeezed her, and no satisfactory evidence that the steamer was so breasted out that such a slight change was not possible. Indeed, the evidence rather indicates that it was quite to be expected.

The decree is reversed, with costs, and instructions to enter a decree for libellant for such damages as may be shown, with costs.

In re HOWARD.

(Circuit Court of Appeals, Second Circuit. July 21, 1910.)

No. 318.

1. BANKRUPTCY (§ 409*)—ACTS IN FRAUD OF CREDITORS—FAILURE TO KEEP ACCOUNT BOOKS.

Where the business of a bankrupt was that of mining promoter, not requiring elaborate accounts, and he had no employés and each of his mining deals was separate and complete in itself, and he relied entirely upon pocket memoranda, noting upon them the deposits and withdrawals from his bank account, having his bank book balanced each month, such records and memoranda were sufficient as respects the rights of his creditors; they disclosing substantially the state of his financial affairs.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 409.*]

2. BANKRUPTCY (§ 414*)—FRAUDULENT TRANSFERS.

Suspicious circumstances are not enough to show a fraudulent transfer of property by a bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 414.*]

Appeal from the District Court of the United States for the Southern District of New York.

In the matter of Oliver O. Howard, bankrupt. From an order denying a discharge, the bankrupt appeals. Reversed and remanded, with instructions to grant a discharge.

The bankrupt petitioned for his discharge. Two creditors objected to the granting of the application and filed specifications charging in substance:

(1) That the bankrupt with intent to conceal his financial condition failed to keep books of account.

(2) That the bankrupt fraudulently transferred and concealed his assets and continued to conceal them up to the time of the bankruptcy.

(3) That the bankrupt fraudulently transferred and concealed property within four months of the bankruptcy.

(4) That the bankrupt made false oaths.

The application and objections were referred to a special master, who personally heard the bankrupt, his wife, and another witness, and, by deposition, two other witnesses, and filed a report finding that the objecting creditors had failed to substantiate any of the specifications of objection and recommending that the discharge should be granted.†

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† The report of the special master contains a full examination of the evidence presented before him and a careful consideration of the questions of law and fact arising in connection with each of the specifications of objection. The opinion of the district judge, however, is practically confined to the first specification. Consequently only that part of the report of the special master which relates to the first specification is printed here. This part follows:

"First Specification: Failure to keep books, &c.

"From the great mass of testimony before me it appears that in 1900, when the Ratcliffe mine went to the wall, down to the filing of the bankruptcy petition, the bankrupt was engaged in the business of promoting mines in various parts of the United States and Mexico, and had no office or fixed place of residence where books might be kept; that he had no employés and that each one of these mining deals was separate and com-

The District Court heard the question of granting the discharge upon the report of the special master; found that the first specification of objection was established, and denied the discharge.

Rounds, Hatch, Dillingham & Debevoise (R. S. Rounds, of counsel), for appellant.

Blandy, Mooney & Shipman (J. S. Frank and Arthur B. Williams, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. We think that the special master was right in his opinion that the objecting creditors failed to substantiate their first specification of objection. The business of the bankrupt—that of a mining promoter—did not require any elaborate accounts. The records and memoranda which he kept seem to have been sufficient to disclose substantially the state of his financial affairs, and that was enough. In our opinion the evidence was insufficient to warrant a finding that the failure to keep more complete records arose from any intention upon the part of the bankrupt to conceal his financial condition. Certainly we think the evidence would not warrant such a finding in the face of the report of the special master who saw the bankrupt upon the stand and heard his testimony at length.

We also think that the special master was right in his conclusions with respect to the other specifications of objection. It is true, as pointed out by the district judge, that the evidence concerning the transfer of the Mt. Shasta mining lease from the bankrupt to his wife was not altogether satisfactory. But suspicious circumstances are not enough to show a fraudulent transfer, and, assuming that the doctrine of continuous concealment applies in the case of fraudulent transfers, we think that the objecting creditors failed to substantiate their charges of the fraudulent concealment of assets and the making of false oaths.

The order of the District Court is reversed, with costs, and the cause remanded, with instructions to grant the bankrupt his discharge.

plete in itself; that it was his practice to rely entirely upon pocket memoranda, noting upon these memoranda the deposits and withdrawals from his bank account, having his bank book balanced each month. He has produced and marked in evidence the balance sheet or statement from his book, with the vouchers attached, covering the period from 1902 to the date of the bankruptcy proceedings. Although a system crude in itself, I think the records are sufficient to satisfy the statute and are such records from which his financial condition might be ascertained. Nor have the objecting creditors, in my opinion, sustained the burden of proving intent on the part of Mr. Howard to conceal his financial condition by failure to keep more elaborate books of account and records. *In re Keefer*, 14 Am. Bankr. Rep. 290, 135 Fed. 885; *In re Hamilton*, 13 Am. Bankr. Rep. 333, 133 Fed. 823.

"A discharge should not be refused on suspicious circumstances and mere surmise where proof is lacking. *In re Chamberlain*, 11 Am. Bankr. Rep. 95, 125 Fed. 629.

"I think that this objection should be overruled."

MACEY CO. et al. v. GLOBE-WERNICKE CO.

(Circuit Court of Appeals, Seventh Circuit. April 19, 1910. Rehearing Denied June 10, 1910.)

No. 1,607.

1. PATENTS (§ 129*)—ASSIGNMENTS—EFFECT AS ESTOPPEL—CORPORATION OF WHICH ASSIGNOR IS OFFICER AND STOCKHOLDER.

While a corporation organized by a patentee who has assigned his patent for the purpose of carrying on business in violation of the rights of the assignee is estopped equally with the assignor to deny the validity of the patent when sued for infringement or to invoke an adjudication of invalidity made in a suit against its predecessor in business no such estoppel arises where it was organized in good faith to take over and continue the business of its predecessor, and without any reference to the patent merely because the assignor is one of its stockholders and officers.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 184-186; Dec. Dig. § 129.*]

2. PATENTS (§ 327*)—SUIT FOR INFRINGEMENT—RES JUDICATA—ESTOPPEL.

Complainant brought suit against a partnership for infringement of a patent for a bookcase, which it owned through assignment from the patentee, and the result was an adjudication that the patent was invalid. Pending the suit the partnership was reorganized into a statutory stock partnership with a large increase of its capital and plant, and an enlargement of its business. Some two years after the termination of the suit the active promotor and practical manager of the partnership died, and the remaining stockholders a short time thereafter employed the patentee through whose assignment complainant held its patent as president and general manager on a salary, transferring to him a nominal amount of stock. Such arrangement continued for two years when the partnership, which was solvent, was reorganized as a corporation, having in the main the same stockholders, more than 100 in number. The patentee then became the owner of about one-fifth of the stock, and president of the company. During all of such time the different concerns had made and sold different kinds of office furniture and continued to make and sell, without material change, the alleged infringing bookcases, and complainant brought a new action for infringement against the corporation and its president. *Held* that there was nothing in such facts to show that the defendant corporation was organized for the purpose of infringing the patent or otherwise than in good faith and for legitimate purposes nor to create an estoppel against it or against its president as such which would prevent them from contesting the validity of the patent, and that the corporation was so in privity with its predecessor partnership as to render the decree in the suit against the partnership conclusive of the invalidity of the patent in the second suit.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 327.*]

Operation and effect of decision in equitable suit for infringement, see note to Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co., 68 C. C. A. 541.]

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 180 F.—26

Suit in equity by the Globe-Wernicke Company against the Macey Company and Otto H. L. Wernicke. Decree for complainant, and defendants appeal. Reversed.

The appellants, defendants below, appeal from a decree of the Circuit Court granting an injunction and accounting for alleged infringement of letters patent No. 557,737, under a bill filed against them by the appellee, as complainant and owner of such patent. In the bill special circumstances are averred for the relief sought against the appellants, in substance, that the appellant Wernicke is the patentee in the above-mentioned patent and assignor thereof in favor of the appellee for value, and procured the organization of his codefendant, the Macey Company, as a cloak for the manufacture of competing and infringing products, and was both manager and principal stockholder thereof.

The complainant appellee is an Ohio corporation, located at Cincinnati, Ohio; and the defendant appellant, the Macey Company, is a Michigan corporation, located at Grand Rapids, Mich., but having a place of business (as well) at Chicago, Ill., while the defendant appellant, Wernicke, is president, general manager and stockholder therein, residing at Grand Rapids, Mich., and having neither personal residence location, nor place of business in Illinois. The answer of the Macey Company takes issue upon all material charges of the bill, except that the defendant Wernicke is its president, general manager, and one of its stockholders; challenges with apt averments the validity of the patent; and sets up prior adjudication of invalidity thereof between the complainant and the answering defendant's predecessor in title, business, and interest, with apt averments of its succession to the benefits thereof. On behalf of the defendant Wernicke, appearing specially for such purpose, a plea was interposed that the court was without jurisdiction over him in personam, for the reason that he was a citizen and resident of Michigan and "has no regular and established place of business" in Illinois, and his sole connection with the business of the Macey Company is that of "an officer and employé" thereof. This plea was overruled and Wernicke subsequently filed his answer, reserving the jurisdictional objection, setting up (in substance) the matters of defense averred on the part of the Macey Company, together with averments of his former relations to the complainant and of his present interest in and relations to the Macey Company.

The facts involved in the various contentions of the parties are mainly stipulated of record, and the only substantial controversies of fact arise in such inferences from undisputed circumstances in evidence as are sought by the parties respectively, for affirmance or reversal of the decree. Such facts as are deemed pertinent and material upon the issues are stated in the opinion.

Fred L. Chappell and McGorge Bundy, for appellants.

Robert Parkinson, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The decree appealed from runs alike against both defendants appellants, in effect adjudging infringement and granting relief against the Macey Company, as the manufacturing corporation, and Wernicke, as an individual trespasser; and the opinion of the trial court rests the decree upon this deduction of fact, as we understand the opinion: That the Macey Company was organized as a corporation, at the instigation of Wernicke (patentee and assignor of the patent in suit), for the purpose of carrying on business in violation of the rights of complainant under the patent, and the business thereof was conducted to

that end, so that the corporation and all associates joining in such object were Wernicke's instrumentalities for the alleged infringement. The estoppel which arises against the assignor of the patent and his associates, under a state of facts thus assumed, is well settled; and were such finding in conformity with the evidence, we believe the authorities concur in the rule which excludes both defendants from setting up either defense challenging the validity of the patent—whether through prior adjudication referred to or other evidence. On the other hand, if it is proven that the Macey Company was organized by the body of incorporators, entirely in good faith, as a concern to take over the plant and business of its predecessor therein, having a long-established line of manufacture and sale of sectional bookcases and other furniture, and that it was continuing and carrying on such business accordingly—was neither organized as the instrument of Wernicke to invade rights of the complainant under his patent, nor operating in any just sense as his creature for such object—the doctrine above stated is not per se applicable, through the fact alone that Wernicke is serving it as manager and has interest therein as a stockholder (*Boston Lasting Mach. Co. v. Woodward*, 82 Fed. 97, 98, 27 C. C. A. 69; *Regent Mfg. Co. v. Penn. Elec. & Mfg. Co.*, 121 Fed. 80, 82, 57 C. C. A. 334; *Babcock & Wilcox Co. v. Toledo Boiler Wks. Co.*, 170 Fed. 81, 85, 95 C. C. A. 363); although evidence of mala fides in such engagement and service, doubtless, may create the estoppel with or without fraudulent purpose in organizing the corporation.

The appellants contend that the invalidity of the patent in suit is *res adjudicata*—at least as between the complainant and the Macey Company—and that its invalidity is established as well by other proof in the present record. If the Macey Company, however, is subject to the above-mentioned rules of estoppel under the state of facts in evidence, neither these contentions, nor others discussed in the argument, call for consideration upon this appeal. So, the inquiry is fundamental, whether that rule is rightly applicable to the case; and while the inferences of fact stated in the opinion of the trial court are entitled to great weight thereupon, the circumstances on which they are predicated are mainly stipulated in evidence and entirely uncontroverted. Our independent judgment, therefore, is rightly invoked, and must be exercised for their interpretation.

The facts showing the relations of the complainant to and with the parties and subject-matter of the controversy may be briefly summarized: The Globe-Wernicke Company is a corporation made up of two former corporations—the Globe Company, of Cincinnati, Ohio, and the Wernicke Company, originally of Minnesota, located at Minneapolis. In 1895 the defendant Wernicke assigned to the Wernicke Company his application for the patent in suit, not then granted; and that company was engaged for some time in manufacturing sectional bookcases at Minneapolis, under the patent—with Wernicke appearing to be its chief member—and subsequently removed to Grand Rapids, Mich., where the business was carried on up to 1899. Its entire business, including all patents, was then (1899) purchased by the

Globe Company, engaged in other manufacturing lines of kindred nature at Cincinnati, for \$100,000, paid in an issue of stock for that amount, in a new corporation then organized as the Globe-Wernicke Company (complainant) located at Cincinnati. Wernicke negotiated this sale on the part of his company, became a stockholder, and one of the officers of the consolidation, and so continued until 1903, when he retired, withdrawing all interest therein, for cause not explained, and sought other employment for himself, and his means thus released from the complainant, engaging temporarily in lumber and timber trade. The complainant has carried on from the outset a large and profitable business in its several manufacturing lines, with sectional bookcases, made under the patent in suit, one of its principal products; and Wernicke superintended (mainly) this line of manufacture. In 1900 the complainant filed a bill in the Circuit Court (Western district of Michigan) against Fred Macey Company (a copartnership, predecessor of the defendant corporation in the manufacture of sectional bookcases and other furniture) for infringement of the present patent. This bill was dismissed in 1901, on final hearing, upon the merits; and such decree was affirmed in 1902, on appeal to the Circuit Court of Appeals (Sixth circuit), reported 119 Fed. 696, 56 C. C. A. 304. Both opinions are in evidence, and each declared the patent claims in question to be invalid for want of invention.

In reference to the defendants and appellants, the facts are alike stipulated or undisputed. The present corporation, the Macey Company, was organized in 1906, but it is stipulated (in effect) that its plant is owned and its manufacturing business is carried on in direct succession, through intermediate owners and operators, from the above-mentioned Fred Macey Company, which commenced the manufacture of sectional bookcases at Grand Rapids, in 1899, about contemporaneously with the dissolution of the Wernicke Company and transfer of its business to Cincinnati. Fred Macey and C. W. Matheson constituted the firm known as Fred Macey Company in 1900, when the above-mentioned infringement suit was brought by the present complainant. For enlargement of capital and business, pending such suit, they organized a limited partnership (quasi corporation) under the Michigan statute, called Fred Macey Company, Limited, with an issue of common stock for \$600,000, taken by the partners in exchange for the old business (and excessive in amount), and \$400,000 of preferred stock, of which \$300,000 was sold for cash to numerous local purchasers and \$100,000 retained in the treasury. An extensive plant was built, and (as stipulated) this company "succeeded to the business of the" copartnership. It was managed by Macey until his death, in February, 1904, with the business greatly enlarged; and the manufacture and sale of the alleged infringing bookcases constituted a considerable portion of the business, both before and after the adjudications against the patent. We do not find in the record direct testimony that the expenses of the litigation were borne by the new company—stated in the brief for appellants to be the fact, while appearing only as proof offered upon an application for reopening the

case—but its actual participation therein and knowledge thereof on the part of the complainant may justly be inferred from the undisputed circumstances. Matheson (the original copartner) remained in the statutory reorganization for two years or more, mainly in charge of financial matters, but useful in other departments, and had withdrawn from the concern some time before Macey died. Macey, however, was practical head of affairs and had demonstrated the profitability of the various lines of product, particularly in the manufacture of bookcases after release from the charge of infringement; and his last sickness and ultimate death left the company with a large plant and active business, and no member or employé of experience to manage the affairs. The preferred stockholders, representing \$300,000 of cash capital, were many of them engaged in other business, and it appears that none were qualified or available to take charge permanently; so that all interests were in frequent conference, for several weeks in the early part of 1904, over selection of a manager, with Mr. Wylie (a banker and stockholder) leading therein. As the defendant Wernicke was well known among them (through his former residence and business in Grand Rapids), and information was received that he was entirely free from interest in the complainant and engaged in other business, these stockholders resolved to negotiate with him to become manager. He was secured accordingly, at an annual salary of \$9,000 (with inconsiderable allowances of common stock, to confer a nominal interest) and Wernicke became president and general manager, and so conducted the business, commencing in April, 1904, for about two years; and the evidence establishes that it was carried on without substantial change in the previous lines of manufacture and trade. Nor does any other change appear worthy of note, except (a) that the name of the statutory copartnership was changed July 30, 1904, to Macey-Wernicke Company, Limited, and (b) that an improved "binding strip" was adopted for the bookcases so manufactured (continued under the name of "Macey sectional bookcases") which improvement was devised by F. W. Tobey and patent No. 789,579 granted therefor.

During the second year of operation under Wernicke's management, all parties in interest became satisfied that reorganization under a corporate form was needful for a twofold object: To reduce the existing common stock (largely watered) to a just ratio, and obtain further cash capital as means for discharging a large indebtedness which had long been carried by several local banks. The banks were unwilling to renew these loans; and with or without insistence on their part, the business policy thus proposed on the part of the management and preferred stockholders, who had furnished the bulk of capital, was (to say the least) desirable. It was clearly shown, as the result of the first year's business under Wernicke, that the net earnings had been sufficient to make the business profitable to stockholders under such plan, if existing interests were scaled down to conform to the actual value of the concern. Whether this reorganization project was first suggested and advocated by Wernicke, or by other members, does not clearly appear, nor can the fact thereof be deemed material under

the facts stated. The matter was pending before stockholders' meetings and committees throughout the fall of 1905, upon reports submitted—one by a committee and another by Wernicke—recommending a plan and naming the amount of stock for a new corporation at \$600,000, with \$400,000 preferred and \$200,000 common stock, whereof Wernicke offered "to take or place \$125,000 of the common stock at par" for cash, provided existing stockholders "take not less than \$250,000 of the proposed preferred stock;" and it is unquestionable that the ultimate settlement and valuation of all interests in the existing company, and reorganization accordingly in the new corporation, became effective through the work and co-operation of these stockholders—again under the leadership of Mr. Wylie, but well supported by Mr. Wernicke—for preservation and betterment of their joint interests in the plant and business. Incorporation was commenced by executing preliminary articles in December, 1905, and was completed under the present organization in March, 1906. In these initial arrangements, one fact may be noted in passing—which is pressed in support of the decree, but believed by us to be without force under either issue—namely, that the corporate name first intended was that of "Macey-Wernicke Company." This purpose was stopped, through a bill filed by the present complainant in a state court and a preliminary injunctive order granted (December 14, 1905) thereupon. The issues of unfair competition under such bill are pending for final hearing in the state court, and are in no sense pertinent nor involved under the present issue of infringement of the patent—notwithstanding averments in this bill tending in that direction and discussion of its bearing in the argument. The corporation was finally organized as the Macey Company.

The numerous items of consideration which enter into this reorganization and its membership and shares respectively are stipulated in evidence, but we believe the following general summary to be sufficient to note their utmost import either way on the issue before us: Valuation of all tangible property acquired from the old company, for credit to the stockholders respectively and pro rata, was fixed at \$515,187; from which was deducted \$200,187 for the indebtedness (above mentioned, mainly to banks), leaving the net valuation, for credit, \$295,000; and it is worthy of mention that the usual trade values of "good will" or established business were excluded from consideration in this allowance. The corporate capital was made \$600,000, one half common and the other half preferred; and the \$295,000 net value received from the old stockholders was thus credited: \$263,285 to preferred, and \$31,715 to common stockholders. Wernicke contributed \$80,000 in cash, for which he received common stock at par; other old stockholders contributed \$47,000 in cash for new stock; and new stockholders came in, contributing \$27,000. Thus the paid-in corporate capital was \$447,000, inclusive of the plant and property, of which the above-mentioned valuation stands unimpeached. The old company had 134 stockholders; 121 of these became stockholders in the corporation, together with 6 or 7 new stockholders, making up its

membership; and the share of Wernicke was less than one-fifth of the aggregate stock issued, with no evidence to infer that his control extended beyond his own shares.

We believe, therefore, that neither inference of fact on which the opinion of the trial court predicates the decree is authorized by the evidence; that the solvency of the old company appears as a conceded fact, with its net appraisal of \$295,000, which excluded an asset of undoubted further value; that its burden of indebtedness to the banks, while cause for embarrassment under the circumstances, was not indicative of insolvency, nor that the business "had no chance of success" under good management; that the death of Macey and other conditions stipulated, justified the course adopted by the stockholders to obtain a manager; that no circumstance appears to impute bad faith or ulterior purpose, either on their part in negotiating with Wernicke to undertake the management, or on his part in accepting it; nor that evasion of any rights possessed by the complainant under the patent was contemplated by either party as inducement to such employment, nor in the subsequent operations and ultimate reorganization above mentioned. Were it assumed that conduct appeared, tending to prove unfair competition in the use of Wernicke's association and name in the business—and no intimation of such fact is intended by this remark—it would furnish no support for the estoppel sought under the present bill for infringement of the patent, involving no such issue.

When Wernicke was employed as manager of the company, the manufacture of the sectional bookcases was carried on openly, under the protection (assumed on the part of the company, to say the least) of a final decree against the validity of the patent; and no substantial change therein was either contemplated or made under the new management, in so far as appears. Indeed, while the evidence shows that various other lines of manufacture were carried on before and continued after Wernicke became manager—for instance, together with the so-called "Macey sectional bookcases," the catalogues (introduced by complainant) show "Macey desks," "Macey leather furniture," "Macey filing appliances," and other articles—no testimony is introduced tending to show either the extent of bookcase manufacture, at any stage of the proceedings, or its relative share in the output.

In conformity with the foregoing view, we are of opinion that the employment of the patentee, Wernicke, by the appellant, the Macey Company, and its relations to him are free from the taint which might otherwise make the doctrine of estoppel in question applicable to the corporation; that each of the defenses set up in its answer is open to proof in its favor under the charge of infringement; and that error is well assigned for denial of the benefits thereof, if the evidence establishes invalidity of the patent claims in suit. *Boston Lasting Machine Co. v. Woodward*, ante, and other above-mentioned authorities. Furthermore, if the appellant Wernicke is assumed to be rightly joined as defendant with the Macey Company, in his representative capacity as president and manager of the corporation, he is equally entitled to the

benefits of such defense for all participation, as representative of the corporation in the alleged infringement. *Belknap v. Schild*, 161 U. S. 10, 25, 16 Sup. Ct. 443, 40 L. Ed. 599, and authorities above cited. Neither his assignment of the patent, nor his former relations to the complainant can bar him from such employment by and service with the Macey Company under the circumstances above stated.

The contentions that Wernicke is subject to jurisdiction and liability individually, aside from his position as corporate representative, do not require solution, as we believe, for the reason that no evidence is introduced which tends to prove the alleged infringement otherwise than as such representative for the sole use and benefit of the corporation; nor is the question involved, whether he may or may not, on his own behalf, contest the validity of the patent under the facts in evidence.

The decree, therefore, can be upheld only on the proposition that the Macey Company is guilty of invading a valid patent monopoly, and we believe that question to be settled by the prior adjudication above mentioned, against the validity of the claims in suit. Privity of parties and identity of subject-matter and issues therein, substantially appear, as we believe, under the stipulated facts, to establish the defense of *res adjudicata*, within the authorities applicable to the case, cited in the briefs respectively. Moreover, the final decision and well-considered opinion of the Circuit Court of Appeals referred to (*Globe-Wernicke Co. v. Fred Macey Co.*, 119 Fed. 696, 56 C. C. A. 304), if not strictly *res adjudicata* thereof, is strongly persuasive, and we are impressed with no development in the present record or argument which should lead to a different conclusion.

The decree of the Circuit Court is reversed accordingly, and the cause remanded, with direction to dismiss the bill for want of equity.

NOTE.—The following is the opinion of Kohlsaat, Circuit Judge, in the Circuit Court:

KOHLSAAT, Circuit Judge. Complainant files the bill herein to restrain defendants from infringing patent No. 557,737, granted to defendant O. H. L. Wernicke, April 7, 1896, for sectional bookcases. Complainant is the owner of said patent through assignment from the patentee, Wernicke, who is the president and active manager of the defendant corporation. It appears that Wernicke was for some time after the assignment of the patent interested in and an employé of complainant; that while he so was employed the complainant brought suit in the Sixth judicial circuit for infringement against the Fred Macey Company, a copartnership composed of Fred Macey and Charles W. Matheson; that such proceedings were had in said cause that said patent was declared invalid, as to the claims thereof covering defendant's device, by the Circuit Court of Appeals for the Sixth Circuit on November 5, 1902 (*Globe-Wernicke Company v. Fred Macey Company*, 119 Fed. 696, 56 C. C. A. 304); that pending said injunction proceedings, and in the early part of 1900, said copartnership, being a manufacturing concern, transferred its business to its successor, the Fred Macey Company, Limited; that thereafter, in the year 1904, the defendant became interested in said limited copartnership, and the name was changed to the Macey-Wernicke Company, Limited; that in the fall of 1905, Wernicke, assisted by others, sought to organize a corporation to be called the Macey-Wernicke Company, but was restrained on the application of complainant by one of the state courts of Michigan; and that in the

early part of 1906, Wernicke, as the moving spirit, together with others, some of whom were not members of the Macey-Wernicke Company, Limited, organized the defendant corporation, and was chosen president thereof and made active manager. The defendant corporation thereupon proceeded to manufacture and sell bookcases which were exact copies of complainant's device, plus some minor improvements thereon. It further appears that the defendant company succeeded as it were, by purchase, to the business of its predecessors, if they may be so termed, and acquired the plant, assets, good will, patents, trade-marks, and other property of its immediate predecessor, the Macey-Wernicke Company, Limited.

The defenses are invalidity of patent, noninfringement, and *res adjudicata*. It is defendants' contention that the said decree of the Circuit Court of Appeals for the Sixth Circuit declaring said patent invalid is *res adjudicata* as to the parties hereto. It appears that of the original parties defendant to said Sixth circuit suit Fred Macey died February 2, 1904, and before the defendant corporation, the Macey Company and the partnership known as the Macey-Wernicke Company, Limited, were created; that the other partner, Matheson, had withdrawn from the partnership prior to the date of incorporation; and it becomes pertinent to determine from the evidence whether the corporation defendant can, under the circumstances, be heard to assert its claim, by virtue of its alleged privity with the Fred Macey Company, to the estoppel or benefit of the decree of the courts of the Sixth circuit.

It appears from the record that the Fred Macey Company was then manufacturing a bookcase differing only in minor details from that of the patent in suit. This difference consisted mainly in the substitution of a dovetail interlocking device for a tongue and groove arrangement, whereby the cases are locked together laterally. If there is any one feature upon which the patent in suit can be sustained, it must be found in this as shown by the drawings and specification. This was the intimation of the court on the former adjudication, and is sustained by the evidence. To this extent the alleged infringement differs from that of the former suit. It is a well-grounded rule of law that *res adjudicata* prevails only where the parties and subject-matter actually passed on are identical, and is not a defense which is available in a doubtful case. Courts will examine into the previous adjudication for the purpose of ascertaining what questions were involved. They will also require clear proof as to parties affected by the former decision. Defendants insist that the defendant the Macey Company is in privity with the original copartnership, the Fred Macey Company, defendant in the former litigation, and is therefore entitled to the benefit of the decree in that case declaring the patent here in suit, so far as there involved, to be invalid. It is evident that the article there in suit was not conveyed to defendant; that is, there is no tangible article, no bookcase, here which was there relieved from the charge of infringement by the decision of the court. So that it is not a question of dealing with a device with regard to which the complainant had been denied relief. If defendant succeeded to any benefit of that decree, it could be only as to the right to manufacture and sell the bookcase there before the court. Just how far, if at all, such a right (if it be a property right) may be transferred without affecting the question of privity, is not clear. Generally speaking, the privity here claimed "must be about some specific thing which must necessarily be affected by the termination of the suit." Black on Judgments, § 550. Here the only thing adjudicated was that complainant could not maintain a suit for want of a valid patent. There was no *res* to which the estoppel attached, unless it can be said that the absence of power in the complainant to have the Fred Macey Company restrained from manufacturing and selling the bookcase was a property right.

All the definitions of privities involve relationship to some form of property. "Privies are those whose relationship to the same right of property is mutual and successive." *Strayer v. Johnson*, 1 Atl. 222, 225, 110 Pa. 21, 24. "Privity exists between two successive holders, when the latter takes under the earlier,

as by descent, or by law, grant, or voluntary transfer of possession." *Sherin v. Brackett*, 30 N. W. 551, 552, 36 Minn. 152, 154. "If the rights of two parties have been determined respecting a particular subject, and the subject-matter of the suit is afterwards assigned, the assignee takes it affected by the prior adjudication, and may avail himself of its advantages and is subject to its burdens." Whether complainant's inability to maintain a suit can be said to come within the *res* contemplated in these definitions is a matter of serious doubt. Taking into consideration the several transfers by which the business was eventually vested in the defendant corporation, the death of Fred Macey and the retirement of Matheson, the original members of Fred Macey Company, a copartnership, the changes incident to the creation of a limited copartnership, the advent of a number of new members, and more than 100 common stockholders of defendant corporation, and finally the lack of identity as to subject-matter involved, there seems to be no room for the contention that the former decision constitutes *res adjudicata* in this court.

Complainant insists that inasmuch as defendant Wernicke is estopped from denying the validity of the patent which he assigned to complainant, therefore defendant corporation is, under the facts in this case, also estopped, citing *Siemens-Halske Electric Company v. Duncan Electric Mfg. Co.*, 142 Fed. 157, 73 C. C. A. 375, *Mellor v. Carroll* (C. C.) 141 Fed. 992, and many other cases. It is claimed that the corporation defendant is but a cover for Wernicke, and he is seeking in this way to evade the estoppel. The price paid him by complainant for the patent is alleged to be in excess of \$100,000, so that the estoppel is a matter of considerable interest to complainant. Wernicke was made an officer of complainant company, and the name of the company was changed from that of the Globe Company to the Globe-Wernicke Company. Wernicke had heretofore been manufacturing and selling the book-cases under the name of the Wernicke Company, so that they were well known to the trade. The cases were advertised extensively, both before and during his connection with complainant, as Wernicke's invention. For some reason Wernicke withdrew from complainant company. After the lapse of a year or more he cast in his lot with the Fred Macey Company, Limited. The style of the copartnership was thereupon changed to that of the Macey-Wernicke Company, Limited. After vainly trying to have the business incorporated as the Macey-Wernicke Company, it was incorporated as the Macey Company, the present corporate defendant. This was in 1906. Wernicke was made president and active manager, and proceeded to manufacture the identical device of the patent. When he took charge of the limited partnership, Fred Macey, the organizer of the business was dead and the firm was practically insolvent.

In November, 1905, Wernicke, then manager of Macey-Wernicke Company, Limited, issued a statement to the several partners, of whom there were a large number, advising them that the copartnership had made a small profit during the year ending July 1, 1905, over and above its running expenses and interest on its preferred stock; that a committee appointed for the purpose considered the needs of the firm, whose indebtedness amounted to \$285,418.35, of which \$80,000 was secured by mortgage, \$107,500 bank accommodations, \$27,605 private loans, and \$70,313.35 current bills and accounts payable; that the banks now demanded to be relieved; that the committee recommended that a new corporation be formed with a similar name to take over the business, the authorized capital to be \$600,000, of which \$400,000 was to be preferred stock at 6 per cent. and \$200,000 common stock. Wernicke further says: "The writer has agreed to take or place \$125,000 of the proposed common stock at par and pay the proceeds into the treasury, on condition that not less than \$250,000 of the proposed preferred stock is taken by holders of stock in the present company." He then appeals to the stockholders, as he calls them, to come into the arrangement as a last chance. The company—i. e., defendant corporation—was thereafter duly organized, and Wernicke was made president and general manager.

It is alleged by complainant that he invested the money received by him from complainant for the patent in suit in organizing a corporation to in-

fringe that patent. Thus we see that Wernicke was the mainspring of the reorganization. It was evident that the business would have to be wound up unless the reorganization was effected. Throughout the whole proceeding it is apparent that he was the inspiring medium in the reorganization. He at once began to put life into the company. The main item of manufacture seems to have been the bookcase of the patent in suit. It was advertised extensively as Wernicke's invention in connection with his portrait. He was described as "father of sectional bookcases," "the originator of the sectional idea which has revolutionized the bookcase business of the world," and "the inventor of modern sectional bookcases," all in connection with defendant corporation's business. These notices were placed in the leading newspapers. Wernicke sent out letters to the trade, claiming that the bookcases were made under his supervision at Grand Rapids, signing his own name thereto as inventor. In the Macey Monthly of January, 1905, he published an advertisement of the bookcases in connection with his picture as general manager, with the statement that "O. H. L. Wernicke, the inventor of modern sectional bookcases and sectional office furniture, was the first president of the Wernicke Company, which began the manufacture of sectional bookcases in Minneapolis in 1893," following this with a reference to his having been vice president of the complainant, his retirement therefrom, and his assumption of the management of the predecessor of the corporation defendant.

In fact, it appears that Wernicke was the one person who made the corporation business possible. But for him, the Macey-Wernicke Company, Limited, would have been wound up and distributed. He found a business, to be sure, but it had no chance of success. It was as good as dead. The most that can be said of it is that it constituted a nucleus around which to construct a corporate business. It does not appear to have had any considerable asset other than that attaching to its tangible property. Even Wernicke could infuse no life into it under the limited partnership. Its then moribund condition probably accounts for the failure of complainant to bring suit at that time. Under his inspiration and financial aid, most of the old firm members entered into a reorganization scheme, a corporation into which they put very substantial sums of money. The result justified their confidence in him. Thenceforth he seems to have been the corporation. His name and bookcase became the good will of the business.

Personally he knew he was estopped from infringing the patent in suit. He was active in the litigation against the original Fred Macey Company, which resulted in the adjudication of invalidity. He knew the defendants in that suit. Shortly after leaving complainant's employ, he joined himself to the old enemy of his patent. He seems to have reasoned that, if he could intrench himself and his estoppel behind the barricade of the *res adjudicata* of the Sixth circuit suit, he would be free to ignore his disability. His position was one of bad faith and in defiance of the reason of the rule of law upon which his estoppel was grounded.

It is a general rule of law that a corporation is entirely distinct from any of its stockholders. It is equally a legal principle that one cannot construct a corporation merely as a cover for his personal acts. It cannot be said, under the facts of this case, aside from the subsequent conduct of its business, that the purpose of the organizers, other than Wernicke, was to enable him to evade the estoppel. They had been manufacturing the bookcase for several years. On the other hand, they had, for the purpose of reviving the business, made it possible for him to secure supposed immunity. The corporation placed itself in his hands, as did the stockholders. All went into a scheme which had for its main factor the unfettered, if illegal, activity of Wernicke as against complainant's rights. In *Mellor v. Carroll et al.* (C. C.) 141 Fed. 992, Judge Lowell says: "Mere co-operation in the alleged infringement with the estopped assignor may not, as suggested in *Continental Co. v. Pendergast* [C. C.] 126 Fed. 381, be enough to create the estoppel. If the estopped assignor enters into business with others, who derive from him their knowledge

of the patented process or machine and, availing themselves of his knowledge and assistance, enter with him upon a manufacture infringing the patent which he has assigned, they are bound by his estoppel." Judge Lochren, in *Wire Fence Co. v. Pendergast* (C. C.) 126 Fed. 381, held that where the estopped person engaged with others in constructing and operating an infringing machine, and was very active in the premises, all of the parties would be subject to the estoppel. Judge Townsend held, in *National Conduit Company v. Connecticut Pipe Mfg. Co.* (C. C.) 73 Fed. 491, the estoppel against the assignor of a patent extends to a corporation formed and owned by him, even though another party owns a substantial interest with knowledge of the estoppel.

Wernicke in his answer asserts the invalidity of the patent in suit. His acts cannot be considered as disassociated from those of his corporation. He used the latter, as he uses his tongue, to assail and slander the child of his own brain, which he had sold to others for a large price. He may not be heard under the circumstances to assert the illegitimacy of his own progeny to the harm of those who have acted upon his assurances to the contrary. Having lent itself to his purpose, the defendant corporation must be estopped with him. Infringement is undoubted. Defendant's device is at best only an improvement on the patent in suit.

The injunction may issue as prayed.

BOLTE & WEYER CO. v. KNIGHT LIGHT CO.

(Circuit Court of Appeals, Seventh Circuit. May 11, 1910. Petition for Rehearing Denied June 10, 1910.)

No. 1,635.

1. PATENTS (§ 252*) — "INFRINGEMENT" — DESIGNS — "SAMENESS OF APPEARANCE."

The object in a design patent is, not to identify the article as an article of trade, but to ornament it, so as to make it pleasing to the eye; and while "sameness of appearance" is identity of design, the test of infringement is not whether an ordinary purchaser might be deceived into buying one article for the other, but the sameness of appearance which constitutes "infringement" is the sameness of æsthetic effect on the eye of an ordinary observer.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 394-396; Dec. Dig. § 252.*

For other definitions, see Words and Phrases, vol. 4, pp. 3590-3594.]

2. PATENTS (§ 328*)—INFRINGEMENT—DESIGN FOR LAMPS.

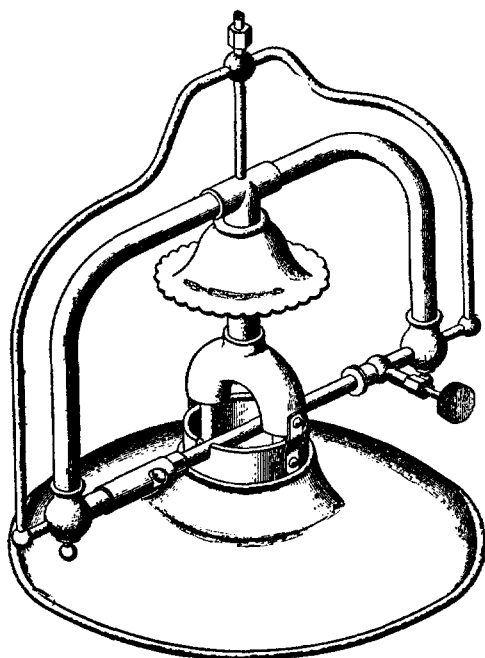
The Weyer design patent, No. 38,638, for a design for lamps, *held* not infringed.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Suit in equity by the Bolte & Weyer Company against the Knight Light Company. Decree for defendant, and complainant appeals. Affirmed.

The appeal is from a decree dismissing the bill for want of equity. The bill was to restrain infringement of letters patent No. 38,638, issued June 25, 1907, to Joseph J. Weyer, for design for lamps. The design is as follows:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



The alleged infringing design is as follows:

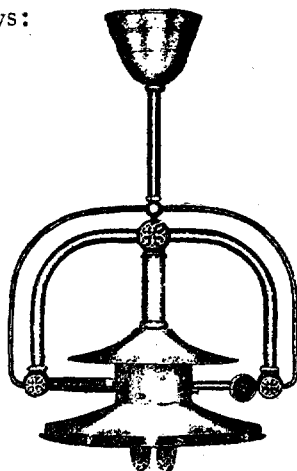
P. C. Dyrenforth & Russell Wiles, for appellant.

Donald M. Carter, for appellee.

Before GROSSCUP, SEAMAN, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge, after stating the facts as above, delivered the opinion:

Counsel for appellant lay down the rule of infringement as follows: "Would an ordinary purchaser, familiar with the design of the patent, be deceived into purchasing the defendant's device, believing it was the device of the patent?" and in support of this test cite the cases of *Smith v. Whitman Saddle Co.*, 148 U. S. 680, 13 Sup. Ct. 768, 37 L. Ed. 606, and *Jennings v. Kibbe* (C. C.) 10 Fed. 669. We do not think that these cases support this test. The rule laid down in *Jennings v. Kibbe* (quoted in *Smith v. Whitman Saddle Co.*) is as follows:



"The true test of identity of design is sameness of appearance—in other words, sameness of effect upon the eye; that it is not necessary that the ap-

pearance should be the same to the eye of an expert, and that the test is the eye of an ordinary observer, the eyes of men generally, of observers of ordinary acuteness, bringing to the examination of the article upon which the design has been placed that degree of observation which men of ordinary intelligence give."

Design patents are to make that, which otherwise is useful, ornamental as well. Many designs, while differing in detail, may present to the ordinary observer the same appearance. "Sameness of appearance" is "identity of design." But the object in a design patent is not to identify the article as an article of trade, but to ornament it so as to make it pleasing to the eye, the true rule being, What is the æsthetic effect? And does the alleged infringing device produce upon the eye of the ordinary observer the same æsthetic effect? The "sameness of appearance" is the sameness of æsthetic effect on the eye.

In the case before us, it does not seem to us that the æsthetic effect of the patented design, and of the alleged infringing design, are the same. Neither, to say the least, is distinctively æsthetic. Whether the patented design is sufficiently so to entitle it to a patent, we do not decide. The alleged infringing device departs from the lines so widely—produces, in our judgment, upon the eye of the observer, in the matter of pleasingness of effect, a result so different—that we cannot hold it to be the same design.

The decree of the Circuit Court is affirmed.

NOTE.—The following is the opinion of Kohlsaat, Circuit Judge, in the lower court:

KOHLSAAT, Circuit Judge. Complainant, who had heretofore been granted a mechanical patent for the device in suit, brings suit to enjoin infringement of design patent No. 38,638 granted to J. J. Weyer for a lamp on June 25, 1907. At the outset defendant insists that inasmuch as section 4933 of the Revised Statutes (U. S. Comp. St. 1901, p. 3399) provides that "all the regulations and provisions which apply to obtaining or protecting patents for inventions or discoveries not inconsistent with the provision of this title, shall apply to patents for designs," therefore it was incumbent on the patentee to file with his application a written description of his design and of the manner and process of making and using it "in such full, clear, concise, and exact terms as to enable any person skilled in the art or science," etc., to make and use the same, and that, not having done this, the patent is void.

It appears from the following decisions of the Commissioner of Patents, viz., *Ex parte Freeman*, 104 O. G. 1396, *Ex parte Remington*, 114 O. G. 761, and *Ex parte Mygatt*, 117 O. G. 598, that descriptions were not only not required, but forbidden, and it further appears that as a general rule they are not furnished; so that a large number of design patents are issued without the furnishing of descriptions. In *Gorham Company v. White*, 14 Wall. 525, 20 L. Ed. 731, the court, speaking by Mr. Justice Strong, says of a design patent: "It is the appearance itself which attracts attention and calls out favor or dislike. It is the appearance itself, therefore, no matter by what agency caused, that constitutes mainly, if not entirely, the contribution to the public which the law deems worthy of recompense." This is approved in *Smith v. Whitman Saddle Company*, 148 U. S. 680, 13 Sup. Ct. 770, 37 L. Ed. 606, where the court, speaking by the Chief Justice, quotes the language of Mr. Justice Blatchford when Circuit Judge in *Jennings v. Kibbe* (C. C.) 10 Fed. 669, viz.:

"The true test of identity of design is sameness of appearance—in other words, sameness of effect upon the eye—that it is not necessary that the appearance should be the same to the eye of an expert and that the test is the eye of an ordinary observer, the eyes of men generally, of observers of ordinary acuteness, bringing to the examination of the article upon which the de-

sign has been placed that degree of observation which men of ordinary intelligence give." This is the settled doctrine. That being so, it is not apparent why any description should be supplied. In *Dobson v. Dornan*, 118 U. S. 10, 6 Sup. Ct. 946, 30 L. Ed. 63, it is held that no description other than a drawing or photograph need be filed. This was approved in *Anderson v. Saint* (C. C.) 46 Fed. 761, and *Britton v. White Mfg. Co.* (C. C.) 61 Fed. 96. Surely this matter should and does come under the "regulations and provisions" which are excepted as "inconsistent" by section 4933 above quoted. Details in the matter and manner of construction of a design patent are unimportant except in so far as they enter into the ordinarily observant man's conception or impression of the whole design. It is the picture made upon his mind in general, which governs, not the minor differences which close examination would reveal, nor those which might catch the scrutinizing eyes of an expert.

Defendant sets up invalidity and want of infringement. Just what is the law with regard to design patents as applied to a mechanical device does not seem to be entirely clear. The statute of 1842 (Act Aug. 29, 1842, c. 264, § 3, 5 Stat. 543) provided for the granting of a design patent to any citizen who "invented or produced any new and original design for a manufacture * * * or any new and original shape or configuration of any article of manufacture," etc. *Gorham Co. v. White*, supra, was based upon this statute. By the amendment of 1870 (Act July 8, 1870, c. 230, § 71, 16 Stat. 209), the word "useful" is added to the last phrase, so that it reads, "or any new, useful, and original shape or configuration" and the benefit of the statute was extended to "any person," instead of "any citizen." *Smith v. Whitman Saddle Co.*, supra, was based upon this 1870 section.

The present section 4929 was enacted in 1902. U. S. Comp. St. 1901, p. 3398. By its terms "any person who has invented any new, original, and ornamental design for an article of manufacture * * * may, * * * obtain a patent therefor." It will thus be seen that the device sought to be patented must be new and ornamental. The statutes of 1842 and 1870 do not in terms require that the design shall be ornamental, although under the former a design patent might issue for an ornament under certain conditions, and in *Smith v. Whitman Saddle Company*, the court, speaking of the act of 1870, says the first three classes named "plainly refer to ornament or to ornament and utility." It should be noted that the act of 1902 has but one class. It is a reasonable conclusion that a device, in order to justify the granting of a design patent, must be such as to satisfy a person of ordinary judgment and good eyesight that it is ornamental, entirely independent of the character of the article to which it is applied. It is not enough that it should present in an unobtrusive form some utility that might otherwise be clothed in less endurable garb. It must disclose inventive genius—a creation which transcends the mere attractiveness almost universally availed of by dealers in every line of trade. That every symmetrical article should be made the subject of a design patent seems unconscionable. Patent monopolies are granted for the purpose of encouraging men of genius to place their mental powers at the service of the public without sacrifice. If every one who makes a graceful adaptation of a utility to the purposes for which it is endured at all can secure a monopoly thereby, one may soon be afraid to twist a wire or whittle a stick, lest he infringe.

For the exercise of such skill as is exhibited in the lamp in suit, the benefits arising from competition are an ample inducement. The courts are quick to restrain any attempts to defraud a rival out of his own peculiar marks—those indicia which signify to the public that certain articles of trade and trade rights are exclusively his.

The several statutes above enumerated have been construed by the courts to apply to chairs, washers, lampshades, bedsteads, bottles, carriage lamps, badges, stoves, harness trimmings, saddles, spoons, and numerous other things, while the humble horseshoe calk and the syringe have been denied the protection of the statute.

While under the older statutes this practice was justifiable, since Congress is the supreme lawmaker, nevertheless, under the changed language of the statute, it does not seem that the further continuation of that practice can be justified, especially in the absence of the evidence of the touch of the hand of

genius. The lamp under consideration utterly lacks in my judgment any approach to this standard. In itself it is no ornament. No person of taste would choose it for house decoration, unless it be to hide something of utility more undesirable in form. Lamps are indispensable. No one may do without their light—whether electric, gasoline, oil, or candle. They have a universal market. New features are constantly being added. Success in trade demands it. The beneficent provisions of the federal statutes were never meant to support contentions such as complainant now urges upon the court.

Assuming, however, that the patent in suit is valid, it becomes necessary to inquire into the question of infringement. The test of identity of the two devices is, as stated in *Jennings v. Kibbe*, supra, "sameness of appearance, in other words, sameness of effect upon the eye" of an ordinary observer. Viewing the two devices in contrast, it at once appears that the alleged infringing lamp frame has a large upturned heat-shield, while that of the patent in suit is small and turned downward, a very marked difference, and one readily discerned by any ordinary observer. Considering the difference in the elements of the two devices, we find in defendant's device:

(1) The nonparallel arrangement of the two loops near their middle is not shown.

(2) The long connection of the loops at their center is absent in defendant's device. This is owing to the parallel arrangement of the loops of defendant's lamp at this point.

(3) The T-pipe, by means of which the pipe running to the burner is connected to the loop of complainant's design, is absent from that of defendant, the connection being made in defendant's lamp by an ornamental globe or ball.

(4) The globules at the ends of the outer loop of complainant's lamp are omitted in that of defendant, the pipe of the outer loop being curved at this point so as to dispense not only with the globule connection but also the short pipe connecting the outer loop with the inner loop at this point.

(5) The pendant globules, one of which performs the function of a plug to let out gasoline which has not been properly vaporized, the other being added for the sake of symmetry, are not present in defendant's lamp.

(6) The form of the shade is different, and is so made that a downward projecting globe may be attached.

(7) The straps of metal by which the shade is attached to the body of the lamp are absent from defendant's lamp.

The arrangement of the so-called parallel feed and supporting pipes in U-shaped loops, one within the other, is old in lamps of the type under consideration. It is shown in electric fixtures (page 139 Defendant's Exhibit, "Electric Appliance Company's Catalogue," cut No. 3987). This cut shows not only the general U-shape of the pipes, but the parallel pipe effect, also a vertical pipe having attached thereto a heat-shield substantially like that of the design patent in suit. There is thus broadly shown in this electric fixture all of the design of the patent in suit except the necessary horizontal vaporizing tube, with its valve and plug, and the bifurcated lower end of the feed pipe just above the shade. When it is considered that with an inverted burner a construction of the feed pipe and vaporizing tube above the shade is almost a mechanical necessity—certainly would be suggested by the most ordinary mechanical skill—and that the bifurcated end of the feed pipe is necessary because it is found desirable to use two burners, it is difficult to see that Weyer has done anything more than add to the Electric Appliance Company cut No. 3987, above mentioned, the necessary mechanism for the use of the inverted mantle.

The charge of infringement is not deemed to have been sustained. The bill is dismissed for want of equity.

GLEASON v. O'MARA.

(Circuit Court of Appeals, Third Circuit. October 6, 1909.)

No. 45 (1,223).

BANKRUPTCY (§ 391*)—STATE COURT PROCEEDINGS—STAY—"FALSE REPRESENTATION."

Where a bankrupt's false representations as to his property, alleged to have induced an attorney to accept his defense on a criminal prosecution, were not made until after the attorney had been employed and had contracted to defend the bankrupt, such representations did not constitute a liability for obtaining property by false pretenses or false representations within the bankruptcy act, and hence an action to recover the fees in which false representations were alleged was subject to stay by the court in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 391.*

For other definitions, see Words and Phrases, vol. 3, pp. 2668-2670; vol. 8, p. 7661.]

Petition to Revise Order of the District Court of the United States for the Western District of Pennsylvania.

Proceedings by Roger O'Mara, as trustee in bankruptcy of Harry K. Thaw, to stay an action brought by John B. Gleason against Thaw in the state court of New York. An order was granted staying Gleason's action, and, on the court's refusal to take off the stay, Gleason filed a petition to revise. Order affirmed.

See, also, 180 Fed. 419.

John B. Gleason, pro se.

Stone & Stone, for respondent.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

LANNING, Circuit Judge. On August 12, 1908, Harry K. Thaw was adjudged a bankrupt on his own petition by the District Court for the Western District of Pennsylvania. On August 28, 1908, John B. Gleason, an attorney and counsellor at law of the city of New York, commenced an action at law against Thaw in the United States Circuit Court for the Southern District of New York. On September 7, 1908, Roger O'Mara was appointed trustee in bankruptcy of Thaw's estate, and on October 24, 1908, the court in which the bankruptcy case was pending, on the application of the trustee and without notice to the plaintiff Gleason, made an order staying Gleason's action in New York, and subsequently refused, on Gleason's application, to take off the stay. This refusal is the subject of our present consideration.

The plaintiff, Gleason, contends that his action is founded on a "liability for obtaining property by false pretenses or false representations," and that under the provisions of section 17 (2) and section 11 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 550, 549 [U. S. Comp. St. 1901, pp. 3428, 3426]) the court erred in staying his action and in refusing to dissolve the stay. By the third paragraph of the complaint filed in the action in New York, Gleason al-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

leges that the defendant Thaw was indicted in the city of New York on June 28, 1906, for murder in the first degree. By the fourth paragraph he alleges that "the plaintiff was retained by the defendant in July, 1906, as his counsel upon his indictment and the matters connected therewith, and the trial and preparation therefor, and all matters touching his sanity, and generally as counsel for the defendant on matters affecting the defendant." By the fifth paragraph he alleges that "the plaintiff was his (Thaw's) chief counsel from July 14, 1906, to February 7, 1907," and by the fourteenth paragraph he alleges that "in July, 1906, the defendant (Thaw) stated to me (Gleason) that there had been a family settlement so that the defendant actually owned interests in his father's estate, or derived therefrom, and property interests more than enough to pay all the expenses of the trial, although these expenses should exceed \$500,000, and that the actual value of the defendant's property interests that he could dispose of or mortgage was largely in excess of that sum." Whether the statement contained in the fourteenth paragraph was made before or after July 14, 1906, the date when plaintiff alleges, in the fifth paragraph, he became the defendant's chief counsel, or before or after the date when, as alleged in the fourth paragraph, he was retained "generally" as the defendant's counsel, does not appear. According to these allegations, the contract for the plaintiff's services was certainly not made later than July 14, 1906. By the fourth paragraph it appears that the contract was broad enough to cover all the services the plaintiff claims to have rendered. Any false statements made by the defendant concerning his property after the making of the contract cannot support an action based on the idea that the contract itself was as to the defendant a fraudulent one. There are numerous allegations in the complaint to the effect that the defendant made false representations to the plaintiff, but all of them, excepting the one in the fourteenth paragraph, expressly appear to have been made long after the date of the contract. We need not therefore consider them. Nor are we at liberty to infer that the statement mentioned in the fourteenth paragraph was made on or before the time of entering into the contract. An ambiguous pleading is always construed most strongly against the pleader. When so construed, the inference must be that the alleged false representation contained in the fourteenth paragraph was made after the date of the contract.

Assuming, therefore, for the purposes of this case, that a liability for an attorney's services is a liability for obtaining property within the meaning of section 17 (2) of the bankruptcy act, we think the plaintiff failed to set out in the complaint in his case in New York a liability for obtaining such property by false pretenses or false representations. The contract for his services seems to have antedated all of the alleged false pretenses and false representations of Thaw. It follows that the action was not one which could not be properly stayed under the provisions of section 11 of the bankruptcy act.

The order of the District Court is affirmed, with costs.

In re THAW.

(District Court, W. D. Pennsylvania. January 26, 1910.)

No. 4,290.

1. BANKRUPTCY (§ 407*)—DISCHARGE OF BANKRUPT—GROUNDS FOR REFUSAL—FALSE REPRESENTATIONS—"PROPERTY."

Since "property" implies dominion, right of user, or of disposition, the services and advice of an attorney are not property within the provisions of the bankrupt law making it a ground to refuse the discharge of a claim that it is one for obtaining property under false pretenses or false representations.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 407.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770.]

2. BANKRUPTCY (§ 407*)—DISCHARGE OF BANKRUPT—GROUNDS FOR REFUSAL—DISCHARGE—FRAUD.

That the gravamen of a complaint against a bankrupt is fraud (not created while acting in a fiduciary capacity) will not prevent the operation of a discharge since the amendment of 1903 to the bankruptcy act (Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1909, p. 1308]), though formerly it would.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 407.*]

3. BANKRUPTCY (§ 391*)—ACTION AGAINST BANKRUPT—STAY OF PROCEEDINGS.

A suit by an attorney for services and advice obtained by a bankrupt by false pretenses or false representations will be stayed in accordance with Bankr. Act July 1, 1898, c. 541, § 11, 30 Stat. 549 (U. S. Comp. St. 1901, p. 3426), providing that a suit on a claim from which a discharge would be a release shall be stayed till an adjudication or dismissal of the petition, and, after adjudication, till 12 months from the adjudication, or till the question of discharge is determined.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 649-651; Dec. Dig. § 391.*]

In the matter of the bankruptcy of Harry Kendall Thaw. Petition to restrain the prosecution of a civil action against the bankrupt. Petition granted.

See, also, 180 Fed. 417.

Houston, Frew & Wilson, for Gleason.

Stone & Stone and A. P. Meyer, for trustee.

ORR, District Judge. The bankrupt has petitioned this court to stay proceedings under section 11 of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426]), and to restrain one John B. Gleason from prosecuting a civil action brought in the Circuit Court of the United States for the Southern District of New York since the adjudication in bankruptcy until the bankrupt may have an opportunity to plead his discharge to such action. Some time since the said Gleason, upon petition of the trustee, was restrained from prosecuting a similar action against the bankrupt in the same court. In that proceeding, as in this, said Gleason insisted that his action is upon the liability of the bankrupt to him "for obtaining property by false pretenses or false representations." The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Court of Appeals for the Third Circuit affirmed the order of this court staying those proceedings upon the ground that the complaint failed to set forth a liability for obtaining property by false pretenses and false representations, and this without determining whether "property," as such, was alleged to have been obtained by the bankrupt. *Gleason v. O'Mara, Trustee* (decided October 6, 1909) 180 Fed. 417.

After that decision, the said Gleason discontinued the action then pending, and brought a new action, which is now the subject of consideration. The cause of action is the same as in the former suit, but the new complaint meets the objections to the former which were specifically pointed out by the opinion of the said Court of Appeals. It is therefore necessary to determine whether the complaint alleges the "obtaining of property." What the bankrupt obtained were professional advice and services from an attorney at law, who undertook the defense of the bankrupt against a charge of murder. The amount of fees to be paid was not agreed upon at any time.

The tendency to commercialize the relation of attorney and client has been deprecated by many. From the honorarium which the lawyer was willing to receive, but could not sue for, there has been an evolution to the right of action against the client for professional services upon a quantum meruit and to the right of action for contingent fees. Is that relationship to be still further commercialized so that either may have a property in the other? "The personal and confidential relation," as the law so often terms it, of attorney and client, would soon be destroyed if the client were held to have a dominion, a right of user, or of disposition, which he may lawfully exercise over the attorney's services. In *Jones v. Vanzandt's Adm'r*, 4 McLean (U. S.) 599, 603, Fed. Cas. No. 7,503, it was held that one who aided slaves to escape was liable to the owner for an injury to his property, because under the laws of Kentucky at that time the property in a slave consisted in the right of a master to his services. This illustration is an extreme case of dominion and of a right of user or of disposition over a man and his services. In every definition of property the foregoing qualities are expressed. They cannot apply, therefore, to anything which is not property. They cannot apply to services and advice received from one who follows the honorable profession of the law.

The complaint does not therefore make out a case of obtaining property by reason of alleged false pretenses and false representations. The mere fact that the gravamen of the complaint is fraud (not created while acting in a fiduciary capacity) will not prevent the operation of a discharge since the amendment of 1903 (Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1909, p. 1308]), though formerly it would. The claim of Gleason is one from which the bankrupt will be discharged, and the proceedings instituted by him should be stayed in accordance with section 11 of the bankruptcy act.

Let an order be drawn accordingly.

FELLOWS v. BORDEN'S CONDENSED MILK CO.

(Circuit Court, S. D. New York. July 12, 1910.)

1. PATENTS (§ 26*)—INVENTION—COMBINATION OF OLD ELEMENTS—"PATENTABLE COMBINATION."

A combination of old elements to be patentable must operate in a new way to produce a new or an improved result, and the change from the old art must be such a one as would not occur to the ordinary mechanic skilled in the art.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-30; Dec. Dig. § 26.*

For other definitions, see Words and Phrases, vol. 6, p. 5234.

Patentability of combinations of old elements as dependent on results attained, see note to National Tube Co. v. Aiken, 91 C. C. A. 123.]

2. PATENTS (§ 328*)—INVENTION—SOLDER-SAVING DEVICES.

The Fellows patent, No. 586,964, for a solder-saving device which consists of two endless belts and means for operating them so that their opposing faces travel in opposite directions at different speed, and so spaced as to receive between them sheet metal cans as they leave the soldering bath and rotate them rapidly as they pass between the belts so as to throw off by centrifugal force any excess of melted solder, is void for lack of patentable invention, there being no invention in the conception of the idea that the solder could be thrown off by centrifugal force and the means being an old mechanism used in the same art for applying fluxing material to the cans before soldering adapted with but slight changes in construction within the skill of any mechanic, and the device as a whole being of no practical utility. The later Fellows patents, Nos. 586,966, 586,967, 595,704, and 595,705, covering further devices for the same purpose in which a brush or a jet of steam or vapor is used to better fill the joints and remove the surplus solder, both of which were in previous use, are also void for lack of patentable invention, being merely for adaptations of mechanism used in the prior art to a new but so nearly analogous use that their applicability thereto would occur to any mechanic, and constituting a case of double use.

In Equity. Suit by Olin S. Fellows against Borden's Condensed Milk Company. Decree for defendant.

Gifford & Bull (Livingston Gifford and Emilius W. Scherr, Jr., of counsel), for complainant.

Masten & Nichols (Walter D. Edmonds, of counsel), for defendant.

RAY, District Judge. The patents in suit are termed by complainant the "Solder Saving Patents of Olin S. Fellows," and, five in number, relate to that subject. They are numbered and dated as follows: No. 586,964, dated July 27, 1897; No. 586,966, dated July 27, 1897; No. 586,967, dated July 27, 1897; No. 595,704, dated December 21, 1897; and No. 595,705, dated December 21, 1897.

In No. 586,964, application filed September 12, 1896, the earliest of the five applications, the patentee says:

"My invention relates to the manufacture of sheet-metal cans in which the end plates are soldered to cylindrical can-bodies. In the ordinary process of manufacture the end plates are applied to the can-bodies, and the exterior edges of the can thus assembled are successively rolled over in contact with baths of molten solder, thereby introducing the solder between the flanges of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the end plates and the opposed edges of the can-body. This method is simple and desirable, because the soldering operation is continuous and rapid, but it is wasteful of solder, since an excess thereof is taken up and carried away by the exterior surfaces of the can, not only adding to the weight and cost of the can, but also impairing its symmetry.

"The object of my invention is to save practically all the superfluous solder taken up by the cans and at the same time to render them more perfect and symmetrical in external appearance; and the invention consists, essentially, in the use of means for imparting to the cans after they leave the soldering-bath and while the solder is in a fluid state a sufficient degree of centrifugal force to throw off the excess of solder from the exterior surfaces of the cans, substantially as herein set forth. * * *

"It is obvious that the necessary degree of centrifugal force may be imparted to the cans after they leave the soldering-bath by various mechanical expedients and that they may be thus treated individually and intermittently. I prefer, however, to treat them continuously and simultaneously as they roll from the soldering-bath, and this I accomplish by passing them between a traveling surface and a support, shown in the present instance as consisting of two endless belts, A and B, speeded to rotate the cans on their axes with sufficient centrifugal force to throw off the excess of solder, one of the belts traveling faster than the other, so that the cans received at one end will be finally discharged at the other.

"In ordinary practice the cans are transferred directly from one soldering-bath, in which one end of the cans is soldered, to another soldering-bath, in which the other end is soldered, the incline of the cans being changed between the baths by a gradual change in incline of the ways. I interpose one of my solder-saving devices between the soldering-baths and place another to receive the cans from the second bath, but they are practically the same in construction and operation, and one description will answer for both. * * *

"I have found by practical test and experience that by my method of utilizing centrifugal force for the recovery of superfluous solder, as set forth, I can effect a material saving in the cost of soldering end caps to can-bodies and at the same time produce cans of superior and more uniform appearance.

"Where one belt moves at a greater speed than the other, as the upper belt in the accompanying drawings, such faster-moving belt not only forwards the cans through the apparatus, but also spaces them so that they pass through without contact with each other. In other words, the faster belt naturally grasps and forwards each can as fed to it in such manner that it will be in advance and out of contact with the next succeeding can, and this relation of the cans is maintained until they are discharged at the opposite end of the apparatus.

"I am aware that it has been proposed to pass cans through a cooling-machine by means of fingers or separators on an endless belt acting in conjunction with the opposed surface of a belt traveling in the opposite direction, as in the patent to Kendall, No. 469,389, dated February 23, 1892, but that patent does not anticipate the essential principle of my invention, neither does it show my special construction and arrangement of parts for giving practical effect thereto. The object of the Kendall device is to effect the cooling of the cans in less time and space than formerly even resorting to a cold-air blast for this purpose, and he utilizes centrifugal force only for the purpose of retaining the excess of solder on the cans by preventing the running and dripping of the melted solder, whereas I drive off the superfluous solder by means of centrifugal force, thereby effecting greater perfection and economy in the manufacture of the can, results entirely new to the state of the art."

His claims, both in issue, read as follows:

"1. In a solder-saving device, the combination of an endless traveling surface and an opposed can-support arranged to receive the cans between them, and means for producing a relative motion between said traveling surface and can-support, whereby a speed of rotation is imparted to the cans sufficient to throw off from said cans, by centrifugal force, any excess of melted solder, substantially in the manner described.

"2. In a solder-saving device, the combination of two endless belts with opposed surfaces arranged to receive the cans between them, said opposed surfaces traveling in opposite directions and at different speeds so that the cans are spaced and forwarded by the faster-moving belt while the slower-moving belt increases the axial rotation of the cans, and means for producing a relative motion between said opposed belt-surfaces whereby a speed of rotation is imparted to the cans sufficient to throw off from said cans, by centrifugal force, any excess of melted solder, substantially in the manner described."

It was conceded on the final hearing and is shown by the proof, and I find as a fact that, while this rapid revolution of the cans fresh from the solder bath would throw off superfluous solder, it would frequently throw off too much at points so as to leave unsoldered places, causing leaks. The result was these defective cans had to be resoldered at such points or discarded. To remedy this defect and the further defect that the solder did not always flow into the seam and fill it so as to make a tight joint, a brush device was added to the apparatus covered by patent No. 586,966, serial No. 606,326, whereby the surplus solder not actually thrown off by the centrifugal force but piled up, so to speak, near the corners of the can, was brushed off so that the removal of the superfluous solder was now effected by the combined action of centrifugal force, tending to throw off the molten solder, and the brush which brushed or swept off the solder not thrown off. The brush action had not only a tendency to polish the flanges and lower ends of the can-bodies, but served the important purpose of, says the patent: "The brush also performs another important function, in that it insures a perfect joint between the opposed surfaces of the end plate and can-body by forcing the solder in between said opposed surfaces, thereby compensating for any lack or inequality in the flow of solder." This means what the evidence shows that in revolving the edge or corner of the can in the solder bath the solder would not always uniformly flow into the space between the can-body and end plates, and if it did not, and the can on leaving the bath was subjected to the rapid whirling motion and the solder thrown off, there would be an unsoldered space or spaces and a consequent leak. It is probably true that the brush not only took off superfluous solder but acted as a polisher where it came in contact with the can, but the main purpose and the real purpose of the brush action is to push the solder into the spaces not filled by it while in the bath; that is, in the language of the specification, "thereby compensating for any lack or inequality in the flow of solder."

Claim 1 of this patent, which is in issue here, we may term the Brush-Fellows patent, and reads as follows:

"In a solder-saving device, the combination with an endless traveling belt and an opposed can-support arranged to receive the cans between them and to impart to the said cans a speed of rotation sufficient to throw off by centrifugal force the main portion of the excess of melted solder adhering thereto while forwarding them and rotating them axially in the direction of their line of progress, of a brush arranged to act upon the soldered edges of the cans, thereby insuring perfect joints by brushing the solder in between the opposed surfaces of the can-bodies and end plates while removing the superfluous solder and polishing the exteriors of the joints, substantially in the manner described."

This brushing process of this patent was performed by an endless brush belt moving in the same direction or parallel with the carrying belts, and it appears from this patent No. 586,966 that Fellows had a patent or an application for a patent, serial No. 605,967, filed September 16, 1896, for saving solder by this endless brush chain process of which he says:

"In my application, serial No. 605,967, also hereinbefore referred to, I accomplish a similar result" (solder saving) "by means of an endless brush belt acting in conjunction with mechanism for passing the soldered cans continuously and severally in contact with an endless brush belt. Both of the above-mentioned methods give good practical results, but I have found by experiment and investigation that the most perfect and satisfactory results are attained by combining the two methods," etc.

The operation of this endless chain brush moving in the same direction as the can was not fully satisfactory as the movement of the solder brushed or carried with it was parallel with the space to be filled, if left unfilled on leaving the bath and not into it, at least not directly into it. This was remedied or corrected as follows: October 12, 1896, Fellows filed an application for patent No. 586,967, issued July 27, 1897 (serial No. 608,597). The specification says:

"The invention consists in the combination and arrangement, with the means for rolling and forwarding a plurality of cans continuously and simultaneously, of a brush acting on the edges of the cans at right angles to their line of motion, substantially as hereinafter described and claimed.

"By my improvement I attain more uniform results, the solder being positively forced under the flanges of the end plates where required and the percentage of leakage being reduced, since all parts of the annular joints are subjected to the same treatment and pressure. The cans obtained by this treatment are stronger and cleaner than any heretofore produced, the soldered joints being continuous and perfect and all superfluous solder being swept off the ends of the cans in line with their longitudinal axes in such manner that the brush cannot spatter the cans, and removes therefrom any splatterings received during the centrifugal action. This treatment of the ends of the cans, as they flow continuously through the apparatus to the action of a brush rotating at right angles to their line of procession and rotation, may be combined with and follow the treatment of the cans to centrifugal force for the purpose of throwing off most of the superfluous solder, especially from the end plates, and of presenting the remainder to the brush in the most favorable position for removal thereby, as set forth in my concurrent application last mentioned, although I do not limit myself to this combination, since I believe myself to be the first to treat a plurality of cans rotated and forwarded by an endless belt or belts to the action of a brush acting at right angles to their line of motion.

"I am aware that it has been proposed to use circular buffers or brushes to remove superfluous solder from cans held and treated individually. I am also aware that it has been proposed to treat cans held and rotated individually to the action of an endless wiper-belt, but neither of these anticipate my invention, which consists, essentially in rotating the cans as they leave the soldering-bath in a continuous procession by means of an endless belt or belts in such manner as to present their freshly-soldered annular joints to a brush acting at right angles to their line of motion, thereby insuring a perfect and continuous joint of solder between the flanges of the end plates and the ends of the can-bodies, at the same time removing all superfluous solder and finishing off or polishing the edges of the cans without interfering with or retarding their continuous flow from the soldering-bath and through the apparatus."

The claims of this patent in issue read as follows:

"1. In a solder-saving device the combination with endless belts arranged to receive and advance the cans between them substantially as described, of a brush arranged to act upon the edges of a plurality of the cans substantially at right angles to their line of motion, substantially in the manner and for the purpose set forth.

"2. In a solder-saving device the combination with endless belts traveling in opposite directions and arranged to receive and advance the cans between them substantially as described, of a brush arranged to act upon the edges of a plurality of the cans substantially at right angles to their line of motion, substantially in the manner and for the purpose set forth.

"3. In a solder-saving device the combination with endless belts traveling at different speeds in opposite directions, arranged to receive and advance the cans between them substantially as described, of a brush arranged to act upon the edges of a plurality of the cans substantially at right angles to their line of motion, substantially in the manner and for the purpose set forth.

"4. In a solder-saving device the combination with an endless traveling belt and an opposed can-support arranged to receive and advance the cans between them and to impart to the said cans a speed of rotation sufficient to throw off by centrifugal force the main portion of the excess of melted solder carried from the soldering-bath, of a brush arranged to act upon the edges of a plurality of the cans in a direction substantially at right angles to that of their line of motion for the purpose and substantially in the manner described.

"5. In a solder-saving device the combination with endless traveling belts, arranged to receive and advance the cans between them and to impart to the said cans a speed of rotation sufficient to throw off by centrifugal force the main portion of the excess of melted solder carried from the soldering-bath, of a brush arranged to act upon the edges of a plurality of the cans in a direction substantially at right angles to that of their line of motion, for the purpose and substantially in the manner described.

"6. In a solder-saving device the combination with endless belts traveling in opposite directions arranged to receive and advance the cans between them and to impart to the said cans a speed of rotation sufficient to throw off by centrifugal force the main portion of the excess of melted solder carried from the soldering-bath, of a brush arranged to act upon the edges of a plurality of the cans in a direction substantially at right angles to that of their line of motion, for the purpose and substantially in the manner described.

"7. In a solder-saving device the combination with endless belts traveling at different speeds in opposite directions, arranged to receive and advance the cans between them and to impart to the said cans a speed of rotation sufficient to throw off by centrifugal force the main portion of the excess of melted solder carried from the soldering-bath, of a brush arranged to act upon the edges of a plurality of the cans in a direction substantially at right angles to that of their line of motion, for the purpose and substantially in the manner described."

These devices not being perfectly satisfactory or being desirous of other improvements in the art, May 10, 1897, Fellows filed application for patent No. 595,704, serial No. 635,904, granted December 21, 1897. This relates to the same subject and the patentee says:

"And the invention consists, essentially, in simultaneously forwarding the cans, rotating them on their axes, and subjecting them to a fluid-blast in such manner as to remove superfluous solder taken up by the exterior surfaces of the cans while passing through the solder-bath during the operation of soldering the end plates to the can-bodies, substantially as hereinafter set forth. * * * I treat the edges of the cans after they leave the soldering-bath continuously and simultaneously to fluid under pressure directed to impinge against the exterior portions of the cans where they have been

exposed to direct contact with the solder in the bath, the rotation of the cans upon their axes as they are advanced through the device subjecting all such exposed portions uniformly to the cleansing action of the fluid-blast, and insuring the removal of superfluous solder from such adjoining portions of the end plates and can-bodies without impairing the hermetical sealing of the joints between said parts of the cans. This I accomplish by passing them between a traveling surface and a support shown in the present instance as consisting of two endless belts, A and B, one of the belts traveling faster than the other, so that the cans received at one end will be finally discharged at the other. * * * I have found by experience that the removal of the superfluous solder from cans by a vapor bath can be accomplished advantageously, the blast leaving the surfaces exposed to the solder clean, clear, and bright."

Claim 1 of this patent is in issue and reads as follows:

"In a solder-saving device, the combination of an endless traveling surface and an opposed can-support arranged to receive the cans between them, means for producing a relative motion between said traveling surface and opposed can-support whereby the cans are simultaneously rotated axially and forwarded, and means for directing fluid under pressure against the cans between said traveling surface and opposed can-support for the purpose of removing superfluous solder from the cans substantially in the manner described."

I think it clear that this patent has nothing to do with removing superfluous solder from cans by means of centrifugal force. The cans are revolved so as to subject all parts of the soldered surface to the vapor or steam bath.

May 10, 1897, Fellows filed an application for patent No. 595,705, dated December 21, 1897, and he says:

"My improvements relate to the removal of superfluous solder from sheet-metal cans for the purpose set forth in my concurrent applications, serial Nos. 605,598, 605,967, 606,536, 608,597, and 635,904.

"The distinguishing feature of my present invention consists in retarding the progress of the cans as they pass through the apparatus for the purpose of treating them individually for the removal of superfluous solder, substantially as hereinafter set forth.

"My invention also includes certain special features in the combination and arrangement of parts for polishing and cooling the cans and controlling and collecting the superfluous solder removed from them. * * *

"It is obvious that by imparting a sufficiently high degree of speed to the forwarding-wheel, F, the cans resting against the rails, C, may be rotated upon their axes in such manner as to throw off by centrifugal force superfluous solder, substantially as set forth in my concurrent applications heretofore referred to, and I do not seek to cover, broadly, herein means for throwing off superfluous solder by centrifugal force. By substituting the driving-wheel, F, for the driving-belts described in said prior applications I am, however, enabled to construct an effective apparatus which is much more simple and compact, and in which the results sought are much more quickly and positively attained. * * *

"Where it is desired to polish the exterior surface of the can by positive mechanical means after it has been subjected to the action of centrifugal force or to the action of the jets of heated vapor, I employ a rotary brush, B, in conjunction with the forwarding-wheel, F, and auxiliary brush-wheel, A^s, arranged, preferably, so as to impinge against the soldered joint, as indicated in Fig. 9. It is obvious that this arrangement may also be used alone for the removal of superfluous solder, the main novelty in this connection consisting in the special combination and arrangement of the forwarding mechanism and auxiliary detaining-wheel and the rotating brush, B, whereby the cans are retarded in progress and the number of revolutions on their axes is increased while being subjected to the action of the brush, B."

The claims in issue are 1, 2, 4, 5, 6, 7, and 10. These read as follows:

"1. In solder-saving apparatus, the combination of a can-forwarding surface, a can-retarding wheel moving in a direction opposite to that of the said can-forwarding surface, and means for effecting the removal of superfluous solder from the cans while rotating between said opposed traveling surfaces, substantially in the manner and for the purpose described.

"2. In solder-saving apparatus, the combination of a can-forwarding wheel, an opposed auxiliary wheel revolving in the opposite direction, and means for effecting the removal of superfluous solder from the cans while rotating between said opposed wheels, substantially in the manner and for the purpose described. * * *

"4. In solder-saving apparatus the combination of a can-forwarding surface, and an opposed auxiliary wheel revolving in the opposite direction for the purpose of retarding the advance of the cans and increasing their axial rotation, substantially in the manner and for the purpose set forth.

"5. In solder-saving apparatus the combination of a can-forwarding surface, opposed rails, and an opposed auxiliary wheel revolving in the opposite direction for the purpose of retarding the advance of the cans, substantially in the manner and for the purpose set forth.

"6. In solder-saving apparatus the combination of a can-forwarding surface, an opposed auxiliary wheel revolving in the opposite direction for the purpose of retarding the advance of the cans and increasing their axial rotation, and means for projecting jets of vapor against said cans substantially in the manner and for the purpose described.

"7. In solder-saving apparatus the combination of a can-forwarding surface, an opposed auxiliary wheel revolving in the opposite direction for the purpose of retarding the advance of the cans, and means for projecting jets of superheated steam against said cans, substantially in the manner and for the purpose described. * * *

"10. The combination of apparatus for removing the superfluous solder from cans, a hood surrounding said solder-removing apparatus, an exhausting device for withdrawing the air from said hood and injecting it into a receiving-chamber, and said receiving-chamber provided with means for retaining the solid particles of matter carried over to it by the air, substantially in the manner and for the purpose described."

The main distinguishing features of this patent seem to be the hood for retaining flying particles of solder and the "retarding wheel" mode of operation which complainant says is "peculiar to Fellows patent 595,705." While Fellows may have been and probably was the first to use centrifugal force for the removal of superfluous solder from cans by rapidly revolving them and thereby saving the thrown off solder, if care was taken to preserve it, he was not the first to conceive a solder-saving device in can construction, as others had used devices for wiping off the superfluous solder, thereby giving the completed cans a neater appearance and lighter weight and saving the superfluous solder. See patent to Norton, No. 382,320, dated May 8, 1888, and patents to Jensen, No. 551,122, dated December 10, 1895, and No. 550,176, dated November 19, 1895. When the superfluous solder was wiped off it was saved or in a condition to be saved if care was taken. See, also, patent to Edwards, No. 301,579, dated July 8, 1884, for Tin Can Soldering Machine, which has a wiper and says:

"After having one seam, *o*1, soldered, the cans are moved up the inclined parts, *D*1, of the rails, *D*, and during this operation the excess of solder may be wiped off by a wiper, *N*, and collected in a box, *n*, thereby saving solder and improving the appearance of the seam. The wiper may be made of any spongy or soft material, which presses against the seam of the can; or a blast

of air or steam or any gas may be blown against the freshly-soldered seam, as shown in Fig. 10, in which nozzles, N¹, having slits N², are directed against the can as it rises out of the solder, and blows the excess back to the rear edge of the seam and off into the solder trough or a box, leaving a highly-finished seam."

It was also common knowledge that water, mud or any molten substance such as lead or solder in what may be termed a molten state would fly off from the outside of any circular body when rapidly revolved. Water thrown from a revolving grindstone or mud from the wheel of a rapidly moving wagon are familiar illustrations. However it does not follow that there was no patentable novelty in conceiving the idea that this motion might be applied to the saving of solder when manufacturing tin or sheet iron cans and providing suitable means for the purpose. The prior art wiped off the superfluous solder by some soft material or by a blast of air or steam or gas, and so saved it, while Fellows first threw it off by centrifugal force—that is, by rapidly revolving the cans; second, by revolving the cans and brushing off the solder; and, third, by spraying or subjecting the superfluous solder to the action of steam or vapor while in rapid revolution.

It may be well to say here that the alleged infringing device used by the defendant removes the superfluous solder by all three methods in succession—that is, as the cans come from the bath, the corners having been revolved in the solder, they pass along held between moving surfaces, one moving in one direction, and the other in the opposite direction, but moving at unequal speed, and some surplus solder is thrown off by centrifugal force, and then, while still moving forward and revolving, they come under the action of the brush whereby solder is swept into the seams if they are not already full, and more of the solder is swept off, and then, still moving forward and revolving the cans come under the action of the steam or vapor blast, and the removal of solder and the polishing is completed. While undergoing this last operation the "retarding wheel" mode of operation comes into play.

These Fellows patents all relate to "means for removing superfluous solder from sheet-metal cans." It is apparent from the reading of them that saving solder was not the only purpose in view. Each of the claims of the patents in suit in issue are for a combination, and a patentable combination may consist of elements some of which are old and some new or of elements all old provided there is a new combination of such old elements operating in a different way (different from the old art) to produce and producing a new or an improved result. *Leeds v. Victor Co.*, 213 U. S. 318, 29 Sup. Ct. 495, 53 L. Ed. 805. Of course, to be patentable, there must be such a change in the combination as would not occur to the ordinary mechanic skilled in the art. In other words there must be what is known as patentable conception. On the argument I was somewhat impressed with the thought that there is not patentable conception accompanied by means to make it effectual in the idea of throwing off and saving surplus solder by centrifugal force—that is, by rapidly revolving the cans.

It seemed to me such common knowledge that any one desirous of throwing off the superfluous solder would use this method.

Claim 1 of the patent first mentioned, No. 586,964, has in combination (1) an endless traveling surface, and an opposed can support which receive the cans between them; and (2) means for producing a relative motion between them whereby a speed of rotation is imparted to the cans sufficient to throw off from said cans, by centrifugal force, any excess of melted solder in the manner described. The patent shows and describes two endless belts each on wheels or pulleys, the one belt above the other. The movement of that part of each belt above its wheels or pulleys is from right to left as shown in Fig. 3, and the movement of that part of each belt below its wheels or pulleys is from left to right, but as the cans are fed in between these belts they are taken hold of by the lower surface of the belt of the upper section moving from left to right, and by the upper surface of the belt of the lower section moving from right to left. Hence the surfaces of the two belts in actual contact with the cans move in opposite directions. As the one belt is made to move faster than the other, a rotary motion is given each can on its own axis and still they are carried forward and discharged at the end opposite the place of entrance. The speed of rotation is regulated by the relative speed of the belts. By having the speed of the one belt but little greater than that of the other the rotation of the can on its axis would be slow. If both belts are of the same size and move with the same speed and exert the same pressure on the can the can would not move forward or be carried forward at all, as the forwarding and retarding process would be equal and neutralize each other, and if the belt surfaces in contact with the cans moved in the same direction and at the same speed the can would be carried forward without rotation. Fig. 3 of this patent shows a bar or rail, gg, to keep the cans in alignment while passing between the belts. Turning to the prior art for this mechanism used to clasp, so to speak, the cans and forward them, we find much of the same mechanism operating in much the same way in the patent to C. B. Kendall, dated February 23, 1892, for "Can Cooling Machinery," except that he does not rotate the cans by moving the one belt faster than the other, but relies wholly on the fact that the face of the one belt bearing on the can moves in the opposite direction from the face of the other belt bearing on the can. He also has pins in the upper belt to keep the cans apart. He has two endless belts each running on its own wheels or pulleys arranged the one above the other. These belts move the same as in the Fellows patent just mentioned, but so far as appear at the same speed, and as the can comes from the solder bath it is moved in and taken between the two belts, the lower half of the upper belt moving in one direction as from left to right, and the upper half of the lower belt moving in the opposite direction, and the patentee after explaining this says that "whenever the words 'oppositely traveling belts' are used they are to be understood as 'oppositely traveling faces.'" He expressly states, in substance, that the pins in the upper belt carry the cans forward while the oppositely moving surface of the lower belt in contact with the

can retards the forward movement and has the effect to rotate the can. He might have separated the cans by having the one belt move faster than the other instead of using the pins, but did not. His purpose was to retain the solder on the seam of the can uniformly and allow it to cool. He expressly says that he imparts enough centrifugal force to keep the solder in position until cool, and to cool the solder rapidly he has pipes along the line of travel through which cold air is blown or forced on the soldered part. If he had caused the one belt to move more rapidly than the other he could have dispensed with the pins, as the cans would have been separated and kept separate automatically, and by imparting sufficient speed he would have thrown off solder. But all he was aiming at was the cooling process. Here I find no anticipation. However, Kendall has trackways, h, which "serve to maintain the outer ends of the cans in true line with the face of the belt."

In a patent to McDonald, No. 506,184, dated October 3, 1893, "machine for fluxing cans," a process which precedes the application of the solder, we have a device for moving the cans much nearer that of the complainant. He says:

"The invention consists in certain devices whereby the cans are rolled along through a machine in contact with belts carrying the flux, so that the joints between the ends and the body will be fluxed as the cans pass through the machine, and the cans will be delivered all ready for soldering, the operation being continuous."

On a frame is supported a long rectangular tank containing the liquid flux. At each end of this tank is mounted a shaft extending across the tank, and each shaft is provided with a pair of pulleys arranged on the shaft at a distance from each other less than the length of the can. On these pulleys are mounted endless belts extending the length of the tank, and these move when the pulleys revolve with the shaft and any speed desired may be communicated. These belts are flat and of considerable width, and support the cans as they move through the machine. These are the fluxing belts, and about one-half of these belts move at all times in the fluxing material in the tank and saturated therewith apply same to the seams at each end of the can as the belts move above the pulleys after leaving the tank. There is an inclined chute at one end of the machine down which the cans roll and are fed to or upon the belts. The fluxing belts or those parts thereof in contact with the cans move from right to left or towards the point where the cans enter from the chute. This is shown in Fig. 2, and it is so stated in the patent. The patent says:

"I will now describe the mechanism by means of which the cans are carried along with a rotary movement upon the fluxing belts from front to rear of the machine."

He then describes an endless belt mounted on pulleys, but above the supporting belts described, and running and traveling parallel with them, which comes in contact with the upper side of the cans midway the ends thereof as they enter the apparatus or between the two lower and this upper belt. All the belts travel in the same direction, but as the cans are in contact with the upper part of the lower belt and the lower part of the upper belt, the surface of the belts in contact with

the cans running on the lower pulleys move in a direction opposite to that of the surface of the belt in contact with the cans moving on the upper pulleys. He gives much greater speed to the upper belt than to the lower ones, and so moves the cans forward and revolves them on their axes as they pass between the upper and lower belts to the discharge end. This upper belt, and the lower belts also, are made adjustable so as to handle cans of different lengths and those of different diameters. There is a difference in the construction and means for propelling the belts of McDonald and those of Fellows, but they are mechanical merely, and would be made by any mechanic skilled in the art. McDonald has the side bars or guides to keep the cans in alignment and between the belts the same as Fellows. The mode of operation of the Fellow apparatus and of the McDonald apparatus is the same, and the result is the same—that is, the cans as they enter from the chute are grasped by the lower or supporting belt (belts with McDonald so as to flux both ends of the can at the same time) and the upper or propelling belt and separated and kept separated because of the more rapid forward movement of the upper belt, and they are moved forward continuously and successively in a flowing stream of cans, and each can while so grasped and flowing or moving forward is rapidly revolved on its own axis. In this grasping, moving, and revolving the cans axially McDonald was applying the flux to the seam at each end of the can, while in so grasping, moving, and revolving them axially Fellows was throwing off the surplus solder from the same seams one end at a time, as he only soldered one end at a time. The two supporting belts of McDonald covered the seams to be thereafter soldered so as to apply the flux thereto while Fellows only uses one, placed between the two ends of the can, so as to leave the solder uncovered and free to fly off. All there is to this first patent is that Fellows uses an old mechanism and mechanical movement then in use in this art for the purpose of applying the fluxing material before soldering for the purpose of removing the surplus solder. He made some necessary changes in belts and location thereof, but they show no improvement on the prior art. It is the case of the adaptation, by slight changes of construction, of a well-known appliance in use in the art of can construction to accomplish a certain purpose, to another use or to accomplish another purpose in the same art, an ultimate purpose it had not been used to accomplish before. Concede that Fellows conceived the idea that in can construction the surplus solder on the can might be removed and thereby saved by the application of centrifugal force, thereby throwing off the surplus solder, what he did was to adapt, by slight changes of construction within the skill of any mechanic, an old device used in the same art for giving the cans the same movement and motion, but with the purpose of applying fluxing material thereto, to the throwing off of such solder. Was he entitled to a patent for doing this? Fellows is presumed to have had the McDonald device before him and to have understood its operation. All he had to do was to feed the cans into this old device after being soldered first, moving the two lower belts so as to grasp or contact with the center of the side of the cans, and then impart sufficient velocity to throw off the solder.

In *Topliff v. Topliff et al.*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658, one question was whether or not the Stringfellow and Surles patent was an anticipation of the Augur patent, one of the patents sued upon. The court said:

"While it is possible that the Stringfellow and Surles patent might, by a slight modification, be made to perform the function of equalizing the springs which it was the object of the Augur patent to secure, that was evidently not in the mind of the patentees, and the patent is inoperative for that purpose. Their device evidently approached very near the idea of an equalizer; but this idea did not apparently dawn upon them, nor was there anything in their patent which would have suggested it to a mechanic of ordinary intelligence, unless he were examining it for that purpose. It is not sufficient to constitute an anticipation that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question, if it were not designed by its maker, nor adapted, nor equally used, for the performance of such functions."

Another patent in suit was the Topliff and Ely patent, and it was claimed that the Augur device fully anticipated this. After pointing out the almost exact similarity of the two devices the court said:

"In the Topliff and Ely patent, to obviate this, and to enable the device to be applied at both ends of the springs, the links are turned horizontally, or somewhat dependent, so that the springs can rest upon them at both ends, and thus secure a more perfect equalization. Trifling as this deviation seems to be, it renders it possible to adapt the Augur device to any side-spring wagon of ordinary construction.

"While the question of patentable novelty in this device is by no means free from doubt, we are inclined, in view of the extensive use to which these springs have been put by manufacturers of wagons, to resolve that doubt in favor of the patentees, and sustain the patent."

In *Potts v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275, the court held:

"The cases treating of letters patent for new applications of old devices considered, and, as a result of the authorities, it is held that, if the new use be so nearly analogous to the former one, that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use; but if the relations between them be remote, and especially if the use of the old device produce a new result, it may involve an exercise of the inventive faculty—much depending upon the nature of the changes required to adapt the device to its new use."

It must be borne in mind that the McDonald patent is for work in the same field, the same industry, as the Fellows patent. The steps in making a can are (1) cut out the metal; (2) connect the body; (3) add the ends and crimp them; (4) apply the acid or flux or resin preparatory to applying the solder; (5) apply the solder; and (6) remove the surplus solder, and clean and polish. Here, in this industry McDonald had his apparatus for applying the flux, step 4 mentioned, and Fellows, in the same industry, by moving the supporting belts away from the seams or substituting one belt for two, as one only was necessary, threw off by the same movement of the cans (made more rapid probably) the solder applied by step 5. Others had wiped off, brushed off, and sprayed or steamed off the surplus solder, but, so far as appears, no one had thrown it off by centrifugal force. It was taking the old device of McDonald, making only one material change—that of the location of the lower or supporting belts—and

using it in the last step of making a can for throwing off the superfluous solder. On this subject in *Potts v. Creager*, supra, after referring to the cases, the court (at page 608, 155 U. S., at page 199, 15 Sup. Ct. [39 L. Ed. 275]) said:

"As a result of the authorities upon this subject, it may be said that, if the new use be so nearly analogous to the former one, that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use, but if the relations between them be remote, and especially if the use of the old device produce a new result, it may at least involve an exercise of the inventive faculty. Much, however, must still depend upon the nature of the changes required to adapt the device to its new use."

Now I do not think that a device for use in can construction which would simply throw off solder while in a molten state was a patentable one. It would not be and was not useful in the art. It is necessary in the art to have a considerable portion of the solder retained on the can, but in the proper place to be of use; that is, in the seams and on them to an extent. The result of operations with the apparatus made under and in accordance with the first Fellows patent, No. 586,964, demonstrated that it possessed no practical utility. True, it threw off the solder taken up while revolving in the solder bath, but if, as was usual with some 30 per cent. of the cans, the solder had not flowed into the seams, or for any cause did not adhere properly, the solder that should be and remain in such seams was thrown off, and such cans were defective and discarded. This device did not go into general use; it was not a success. It was not only desired to throw off surplus solder after the seams were properly filled with solder, but to first fill such seams before any was thrown off and not move or disturb or throw off the solder in the seams, and this the device of the patent did not and could not do. The first patent added nothing of value to the art of can construction. The idea of throwing off surplus instead of wiping or brushing it off as had been done in the prior art was good, we will assume, provided it filled the seams and left them filled and so prevented leaking, the very object of soldering them at all. I do not think it was patentable to conceive the idea that molten solder would be thrown off by centrifugal force applied to the can and molten solder accompanied by means to revolve the can rapidly and so throw it off. In *Potts v. Creager*, supra (at page 605, 155 U. S., at page 197, 15 Sup. Ct. [39 L. Ed. 275]), the court said:

"The employment of two parallel cylinders to co-operate in the performance of a certain task is so common and well known that the court may take judicial notice of such examples as are found in the ordinary clothes wringer, fluting rollers, straw cutters, printing presses, paper manufacturing machines and grinding mills of various kinds."

So here, the court may take judicial notice that it was well known and common knowledge that water, mud, and any soft material not adhesive would fly off from any circular body when rapidly revolved. To put the solder on and then throw it off accomplished no useful purpose in this art as the result proved. It must be pushed into the seams when it had not flowed or run in. After making the reference last above quoted the court in *Potts v. Creager*, supra, said:

"In view of these devices it is too clear for argument that Potts would not be entitled to a patent simply for passing the clay between two grinding or crushing cylinders," etc.

So here, it is clear that Fellows was not entitled to a patent for simply revolving a can rapidly and throwing off solder in a molten state by centrifugal force. In view of the fact that McDonald's device was in the can construction industry, and had to do with properly soldering the can, and that Fellows in the same industry and to complete the soldering process took McDonald's device and by simple changes within the ability of the ordinary mechanic, and by changes which would have occurred to any mechanic of ordinary skill, adapted it to throw off solder, the language of the court in *Potts v. Creager*, supra (at page 606, 155 U. S., at page 198, 15 Sup. Ct. [39 L. Ed. 275]), is very pertinent and instructive. The court said:

"The answer to this requires the consideration of the often recurring question, which has taxed the ingenuity of courts ever since the passage of the patent acts, as to what invention really is. When a patented device is a mere improvement upon an existing machine, and the case is not complicated by other anticipating devices, the solution is ordinarily free from difficulty. But where the alleged novelty consists in transferring a device from one branch of industry to another, the answer depends upon a variety of considerations. In such cases we are bound to inquire into the remoteness of relationship of the two industries, what alterations were necessary to adapt the device to its new use, and what the value of such adaptation has been to the new industry. If the new use be analogous to the former one, the court will undoubtedly be disposed to construe the patent more strictly, and to require clearer proof of the exercise of the inventive faculty, in adapting it to the new use—particularly if the device be one of minor importance in its new field of usefulness. On the other hand, if the transfer be to a branch of industry, but remotely allied to the other, and the effect of such transfer has been to supersede other methods of doing the same work, the court will look with a less critical eye upon the means employed in making the transfer. Doubtless a patentee is entitled to every use of which his invention is susceptible, whether such be known or unknown to him; but the person who has taken his device, and, by improvements thereon, has adapted it to a different industry, may also draw to himself the quality of inventor. If, for instance, a person were to take a coffee mill and patent it as a mill for grinding spices, the double use would be too manifest for serious argument. So, too, this court has denied invention to one who applied the principle of an ice-cream freezer to the preservation of fish (*Brown v. Piper*, 91 U. S. 37 [23 L. Ed. 200]); to another who changed the proportions of a refrigerator in such manner as to utilize the descending instead of the ascending current of cold air (*Roberts v. Ryer*, 91 U. S. 150 [23 L. Ed. 267]); to another who employed an old and well-known method of attaching car trucks to the forward truck of a locomotive engine (*Pennsylvania Railroad v. Locomotive Truck Co.*, 110 U. S. 490 [4 Sup. Ct. 220, 28 L. Ed. 222]); and to still another who placed a dredging screw at the stem instead of the stern of a steamboat (*Atlantic Works v. Brady*, 107 U. S. 192 [2 Sup. Ct. 225, 27 L. Ed. 438]). In *Tucker v. Spalding*, 13 Wall. 453 [20 L. Ed. 515], the patent covered the use of movable teeth in saws and saw plates. A prior patent exhibited cutters of the same general form as the saw teeth of the other patent, attachable to a circular disk, and removable as in the other, the purpose of which patent was for the cutting of tongues and grooves, mortices, etc. The court held that if what it actually did was in its nature the same as sawing, and its structure and action suggested to the mind of an ordinarily skillful mechanic this double use to which it could be adapted without material change, then such adaptation to a new use was not new invention, and was not patentable."

I am satisfied in view of the evidence, common knowledge, and the prior art, and considering the facts that the device of the first Fel-

lows patent, No. 586,964, is of no practical utility in the art, and is not a commercial success and has not displaced or taken the place of anything in this art, and is but the mere transfer of a device of the prior art from use in one step of soldering a can to another step in the same process, that patentable novelty is not disclosed. The next patent, No. 586,966, of July 27, 1897, same date as the other, acts, says the patent, so that the superfluous solder is removed by the combined action of centrifugal force and of an endless brush belt, the centrifugal action throwing off most of the superfluous solder, especially from the end plates, and collecting the remainder in the most advantageous position for removal by the brush substantially as herein set forth. This is substantially the device of the first patent with the endless brush chain added. But it never did effectually what it purported to do, and is but a substantial reproduction of the prior art and defendant does not use such a brush or such brushes. The brush belt of this patent moves in the same direction as the cans, or it might be in the opposite direction. As the cans revolve in contact with the brush, solder is brushed or wiped off, but the seams are not effectually filled. This revolving of the can or of the seams of the can in connection with revolving brushes for the purpose of applying the flux and then the solder and then in connection with long revolving brushes taking off surplus and filling seams were not new. It was patented in 1888, patent to Norton No. 382,320, who said, after describing the application of the flux by the long revolving brushes as the corner of the can rolled between them:

"The invention also consists, in connection with the can carrier and a solder bath in which the corner or seam of the can is immersed, of a pair of long revolving wipers or brushes between which the corner or seam of the can rolls as it advances in the carrier, while the brushes or wipers revolve together and effectually remove any surplus solder from the outside of the can."

One of the brushes takes the surplus solder from the end of the can and the other takes the surplus from the side of the can. This Norton patent says:

"G, G, are a pair of long revolving wiping-brushes, between which the can rolls or revolves after it leaves the solder bath, D. These brushes or wipers may be of any suitable material, but preferably of bristles or asbestos fiber seamed to a suitable head or shaft. These long preferably cylindrical wipers are located immediately after the solder bath, D, and along the path of the can as it advances in the carrier, so that the corner of the can will roll between and in contact with these wipers, and all surplus solder be wiped or removed from the outside of the can."

Then comes the receptacle for receiving and saving the surplus so wiped or brushed off, viz., "These long revolving wipers are journaled on the frame of the machine, and beneath them is arranged a receptacle, G', to catch the surplus solder removed from the can." It required nothing but ordinary mechanical skill to add this device to the first patent mentioned and dispense with one of the brushes, or to substitute an endless brush chain moving or stationary as desired.

The next patent is the same, substantially, as the second except we have the brush so arranged that it acts "on the edges of the cans at right angles to their line of motion." This was old and common in

this art for removing solder and other purposes. Given the old idea that it was better to brush the molten solder directly towards the seam to be filled and left filled than to brush it along parallel with it, and any ordinary mechanic would add such a brush device. All he had to do was to use the Norton idea using only one revolving brush and brushing the side of the can only.

The next Fellows patent, No. 595,704, differs from the others in that the brush or wiper is left out and a line of steam jets is established whereby as the cans pass along between the supporting belts and the impelling belt and rotate axially they are subjected (while hot, of course) to the blast or blasts of vapor against the cans. Fellows refers to his prior application serial No. 605,598, and says:

"The difference being that in said prior application centrifugal force is employed to remove the superfluous solder, whereas in the present case (patent) apparatus is combined and arranged with relation to means for directing a blast or blasts of vapor against the cans. * * * I treat the edges of the cans after they leave the soldering-bath continuously and simultaneously, to fluid under pressure directed to impinge against the exterior portions of the cans where they have been exposed to direct contact with the solder in the bath, the rotation of the cans upon their axes as they are advanced through the device subjecting all such exposed portions uniformly to the cleansing action of the fluid-blast and insuring the removal of superfluous solder from such adjoining portions of the end plates and can-bodies without impairing the hermetical sealing of the joints between said parts of the cans."

Now, this use of a steam or fluid blast for this very purpose was old in this art, and was such common knowledge that I can see no invention in its application. No farmer's boy or helper in a livery stable ever escaped the experience and knowledge that fluid under pressure coming from the nozzle of a hose and directed against any muddy or dirty body would wash off the dirt. The wheels of the vehicle were always put in position to revolve before applying the water under pressure. But in the Edwards patent No. 301,579, dated July 8, 1884, "Tin Can Soldering Machine," we have this very means and idea of means for applying the fluid or steam blast to remove the surplus solder as the cans pass by being carried substantially as by Fellows. Unless kept hot by a furnace or otherwise, steam or some hot vapor must be used to avoid cooling the solder on the cans before wiped or brushed off or blown off. After being crimped the cans are first fluxed, then soldered and then subjected to the steam or fluid blast applied under pressure for removing the surplus solder, such cans being automatically delivered into and carried through the machine and treated continuously and in close succession. Edwards says:

"Fig. 12 is a side elevation of the solder wiper, in which a blast of air or gas under pressure is used. * * * After having one seam, o', soldered the cans are moved up the inclined parts, D' of the rails, D, and during this operation the excess of solder may be wiped off by a wiper, N, and collected in a box, n, thereby saving solder and improving the appearance of the seam. The wiper may be made of any spongy or soft material, which presses against the seam of the can; or a blast of air or steam or any gas may be blown against the freshly soldered seam as shown in Fig. 10, in which nozzles, N₁, having slits, N₂, are directed against the can as it rises out of the solder and blows the excess back to the rear edge of the seam and off into the solder trough or a box leaving a highly finished seam."

Now, the means used by Fellows for applying the steam blasts consist in this patent of a line of nozzles extending the length of the course traveled by the can, but this defendant does not use. The defendant uses more nearly the appliance of Edwards.

The last patent in suit, No. 595,705, takes up and appropriates the idea of means, etc., of the patent to E. F. Holden, No. 555,244, dated February 25, 1896, for a crimping machine for crimping cans, in which, says the Holden patent, "the can is revolved between two moving surfaces." In can construction the end pieces are bent over on the edges so as to form a flange receiving the ends of the body part, and to press this flange down on the body so as to hold firmly before soldering is called crimping. Holden has two sets of wheels or revolving disks, and, says Holden:

"These disks as above explained are revolving in opposite directions, one set slightly more rapidly than the other. This revolves the can between the two sets of disks, and the strip, G, bearing upon the end of the can crimps it."

"G" is a strip on one of the iron wheels or disks, and as the can passes between the two sets of disks the pressure is such as to press or crush slightly the flanges of the end pieces into close contact with the body. The cans are carried into engagement with the wheels by smaller wheels as the cans come down a chute. As already explained with reference to the endless belts the one wheel carries the can forward and the other moving in the opposite direction retards its forward movement, but as one wheel turns more rapidly than the other the can is revolved on its axis between the wheels before it is carried out of engagement with them. Here we have the can spun about on its own axis while between the wheels, but they are set so as to engage with the cans near their ends so as to crimp the flange. Two wheels on each side of the can, or two sets of disks, are used, as it is necessary to crimp at both ends of the can. One wheel or disk above and one below the can would give the motion and revolution. The speed of the revolution of the can would depend on the speed imparted to the wheels or disks. Fellows is presumed to have been acquainted with this device used in the same art and in the very step preceding the application of flux and solder. All he had to do was to leave off G, the crimping iron, substitute one wheel or disk above for two and one for two below, and arrange them to grasp the can midway the ends and he threw off solder by centrifugal force or action. He added the apparatus for applying the steam to the end of the can as it revolved. By comparing Fig. 1 of Holden with Fig. 4 of Fellows, we see at once that the idea of means for taking cans to and from the wheels or disks and revolving them axially while in contact therewith and passing through is the same. Holden in this very art and industry and in the step preceding that of soldering had taught Fellows how to take a can between two wheels fed in by a chute, and revolve it rapidly or slowly and for a longer or a shorter period of time on its own axis while passing through. Whether he would wash the can, or throw off solder, or polish by steam, or brush off solder, or apply the crimping iron while thus passing between the wheels or disks was a mere matter of choice. The skill of the ordinary mechanic was adequate

to the task of so modifying Holden's apparatus as to adapt it to a mere apparatus for rapidly revolving the can, as all he had to do was to take off the crimping device, G. To expose the soldered seam all he had to do was change the location of the two wheels, upper and lower, and a steam jet could be applied from any source at any exposed point. But it is said that claim 10 of this last patent has a hood surrounding this solder removing apparatus, and an exhausting device for withdrawing the air (supposed to be charged with particles of solder) and injecting it into a receiving chamber. There is nothing new or novel in the hood or the exhausting device, or the receiving chamber, and it was not patentable to apply them to this purpose in this art. All this is but a return to the doctrine of *Potts v. Creager* and *Topliff v. Topliff et al.*, supra.

It seems to me clear that the new use (so far as there is a new use) of the devices of the prior art—this very industry of making cans—which includes every step and purpose of the Fellows patents, were so nearly analogous to the former uses in the same art, so closely allied, that the applicability of the devices to the new use would necessarily occur to a person of ordinary mechanical skill, and that this is a case of double use. The necessary changes and modifications of the old devices were so simple, so patent and obvious, and the results obtained, especially by the use of centrifugal force for throwing off solder which has been practically abandoned, of so little importance, that they would occur to any mechanic of ordinary skill in this art. In *Brown et al. v. Piper*, 91 U. S. 37, 23 L. Ed. 200, the Supreme Court of the United States held that:

"The court can take judicial notice of a thing in the common knowledge and use of the people throughout the country."

The basic conception of these patents claimed is that molten solder will fly off from a rapidly revolving can. The next idea is to revolve the cans. The next is to have a succession of cans passing through this operation. The next is to brush off the solder not thrown off. The next drive off by a steam or vapor bath what is not thrown or brushed off, and finally put a cover over the apparatus to confine the flying particles and apply a suction to draw such air and particles contained therein into a chamber where the particles may settle. There is no new idea presented unless it be that Fellows first "thought" that hot solder on a hot can would fly off if the can were rapidly revolved. I cannot accept this as a fact. I think it was perfectly obvious and generally well known that it would. Assume that Fellows and Fellows alone applied the idea to saving solder. Was it a patentable conception if he provided means? Assume so. He did nothing new. He made some ordinary changes in old apparatus, and found that some solder was on the can and some thrown off, too much, and that applied to the industry of can construction his idea and his means were a failure as it was of no practical utility, and the evidence shows that solder saving by centrifugal force in the art of can construction is an utter failure. Revolve the cans and use the brush is the way to do, but this was done before. Revolve the cans and apply a jet of

steam or fluid under pressure is the way, but this was done before. In the language of the Supreme Court in *Brown et al. v. Piper*, *supra*:

"The answer is that this was simply the application by the patentee of an old process to a new subject, without the exercise of the inventive faculty, and without the development of any idea which can be deemed new or original in the sense of the patent law."

It is of course settled patent law that, "if a new combination and arrangement of known elements produce a new and beneficial result never attained before, it is evidence of invention." *Krementz v. S. Cottle Co.*, 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558. See, also, *Wicke v. Ostrum*, 103 U. S. 461, 26 L. Ed. 409. "When the other facts in the case leave the question of invention in doubt, the fact that the device has gone into general use, and has displaced other devices which had previously been employed for analogous uses, is sufficient to turn the scale in favor of invention." *Krementz v. S. Cottle Co.*, 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558. "The fact," says the Supreme Court in *Grant v. Walter*, 148 U. S. 547, 13 Sup. Ct. 699, 37 L. Ed. 552, "that the patented article has gone into general use is evidence of its utility, but not conclusive of that and still less of its patentable novelty." See, also, *McClain v. Ortmayer*, 141 U. S. 419, 425, 12 Sup. Ct. 76, 35 L. Ed. 800. But the apparatus of Fellows for throwing off solder from a can has not gone into general use, as it is plain and not denied that such a device is of no practical utility. Fellows immediately resorted to the old expedient of brushing or wiping and then to the added old expedient of adding and using a steam jet or blast. In the prior art the soldered can was revolved while being brushed or wiped, and in the old or prior art it was also revolved while being subjected to the steam blast. How rapidly it should be revolved was a question of election, choice and expediency. The function of the two endless belts on appropriate pulleys was to revolve the cans. This is what such belts did in the prior art, and the work they would do was well known. The rapid revolution threw off any soft and non-adhesive substance as was well known. The real or true function of the two wheels or disks moving in opposite directions, the one more rapidly than the other, is to whirl the can between them on its own axis and this was well known; they were employed in this art for that very purpose, although not used for the express purpose of throwing off solder, but they are not used for that purpose in the Fellows patents, but to rapidly revolve the can while the brush or the steam jet is being applied. The belts and wheels operate in substantially the same way on the cans and this was well known. The use of the wheels or disks gives a shorter run to the cans—that is, they hold the cans at a certain point, substantially, long enough for the brush or steam jet to do its work. With belts a succession of steam jets was found necessary as the belts did not hold the cans at a given point long enough.

We now have a new art, the construction and operation of flying machines. Whoever takes old elements and adapts them to the successful operation of a flying machine, although the changes be slight, will undoubtedly rank with inventors. He is in a new field, and in that field there are no mechanics skilled in the art. See opinion of Cox, Circuit Judge, in *O'Rourke Eng. C. Co. v. McMullen*, 160 Fed.

937, 938, 88 C. C. A. 115. When the arts of telegraphy and electricity were in their infancy the adaptation of old devices and elements to their new use in these new fields, not arts analogous to some other well known and understood, the courts found patentable invention in the adaptation of many things to these new arts for the reason it required something more than the work of the ordinary skilled mechanic to solve the problem. Thought and study and experimentation and mental conception were required. True, such adaptation seemed simple when done, but there was, many times, a brilliant conception in the thought that it could be done at all. In *O'Rourke Eng. C. Co. v. McMullen*, supra, Coxe, Circuit Judge, said:

"No one can read this patent without being impressed with the fact that the inventor is an accomplished engineer thoroughly conversant with the art and impressed with the importance of the difficulties which confronted him. It was no ordinary problem which he undertook to solve. He had to deal with the tremendous force of compressed air in its relation to a continuous passage of the bucket through the lock. The old air locks, hoisting falls and single gates were useless here. Nothing which had been produced before could be utilized to subdue and hold in check the persistent pressure of the air while the journey through the lock was taking place. The lock of the patent in its most minute details was constructed to meet and overcome this difficulty, and to treat the problem as one of ordinary mechanics does injustice to the inventor. Previous to Moran's invention no one had ever taken material through the lock by a continuous hoist. The defendant's expert says: 'No instance has come to my knowledge where material was hoisted straight through prior to the date of the Moran patent.' The idea of doing this was a bold and brilliant one, and was at first deemed chimerical and impossible by hydraulic engineering. When, however, it became an accomplished fact, it made a decided sensation among contractors, engineers and builders, and was hailed as 'a flash of genius.' The Moran locks were at once adopted and are now in general use. * * * Bearing in mind that Moran's invention relates solely to an air lock so constructed that material can be hoisted 'straight through' it, and confining it to this feature alone, it may be said truly that there was no prior art. No one had ever done this before, although the necessity for such action was generally recognized. Moran's idea was new and brilliant, and he carried it out by constructing a new air lock bringing together elements, several of which were old, but which were never combined before. In other words, the combination was new and produced a new and highly useful result. To do this, we think, involved invention."

In *Hobbs v. Beach*, 180 U. S. 383, 392, 21 Sup. Ct. 409, 413, 45 L. Ed. 586, the court said:

"While none of the elements of the Beach patent—taken separately or perhaps even in a somewhat similar combination—was new, their adaptation to this new use and the minor changes required for that purpose resulted in the establishment of a new industry, and was a decided step in advance of any that had theretofore been made."

But here we have no new industry established, no new art, no new result, for Fellows was compelled to fall back upon and rely upon the old ideas and methods of brushing off the solder or of removing it by the application of the steam jet under pressure or both. He has added nothing of importance to the sum of human knowledge, unless it be the fact that in can construction the superfluous solder cannot be removed by the application of centrifugal force and produce a reasonable proportion of cans suitable for use. The court is to lean with favor to the true inventor, the person who adds to the sum of human knowl-

edge, creates a new industry by the use of his inventive faculties, or who in the same way substantially improves an old one so as to confer a substantial benefit on mankind. However, it is neither every improvement nor every change in mechanical combinations used in old and established industries that constitutes invention. The skilled mechanic has his field and the inventor has his, and it is, many times, very difficult to draw the line. Judges have differed and always will differ in arriving at a satisfactory conclusion when the question is that of invention or noninvention in adapting old devices with slight modifications to a new use, or rather to the doing of work not done by that mechanism before. Here in the final wind up of the Fellows invention and as used by the defendant there is a succession of devices operating the one after the other. Entering from a chute the cans are taken by the endless belts, and, guided by side bars or rails, rapidly whirled for a short distance when they come in contact with the brush revolving at right angles to the path of the cans and, passing it, come to the two wheels between which they are revolved as described while the steam jet or blast is applied. These operations on a can succeed each other after the cans leave the solder bath. They are not in operation on the same can at the same time. It is contended that this is not a mere aggregation, and probably this is true although dangerously near it. It is saved, if at all, by the fact that the surplus solder is being removed all the time—that is, first by centrifugal force, then by the combined action of centrifugal force and the brush, and lastly on arriving at the two wheels by the whirling of the can and the action of the steam jet. The brush and steam also act to polish the can at the points of contact. If the centrifugal force first applied and operating tends to move the solder out of the seams and away from them and not into them, as is necessary, it is said the brush moves or drives it in, and that then the steam jet operates to disintegrate or reduce to fine particles that which remains outside and wash it off, and that this is aided by the throw-off action in the rapid revolution of the can. Hence, it is said, a better, more perfect result is produced after undergoing all these operations than was attained before. But no one of the patents in suit is for such a combination as already seen. True, in patent No. 595,705, of December 21, 1897, Fellows has the forwarding wheel, F, concentric rails, C, and shows, in Fig. 4, four of the minor wheels or "auxiliary wheels," A¹, A², A³, and A⁴, and as the can is taken by F and A¹ it is subjected to centrifugal force, and when taken by F and A² it may be brushed, and when taken by F and A³ it may be subjected to the steam jet. But I fail to find evidence that defendant has ever appropriated or used such a combination or succession of wheels. This is but a succession of auxiliary wheels moving in conjunction with the main wheel, F, used for subjecting the cans to a series of operations. Indeed, Fellows says that the number of auxiliary wheels required depends on the number of operations the cans are to undergo. To my mind, in view of the prior art, there was no patentable novelty in duplicating the auxiliary wheels and placing a brush at one and a steam jet at another and so on. Rapid revolution of the cans and the application of centrifugal force to keep the solder from running and dripping was in the prior art; more rapid revolution would throw it off, and this was a well-

known and understood law. Indeed, in the specifications of patent No. 595,705, Fellows says:

"It is obvious that by imparting a sufficiently high degree of speed to the forwarding wheel, F, the cans resting against the rails, C, may be rotated upon their axes in such manner as to throw off by centrifugal force superfluous solder."

This was a well-known and understood law. Rapid revolution of the cans and the application of a brush to brush off the solder was in the prior art. Rapid revolution of the cans and the application of the steam or vapor, etc., was in the prior art to pulverize and drive off the surplus solder. To subject the cans to these well-known operations, the one after the other, and by slight changes adapt old means to the end did not elevate Fellows to the rank of an inventor having in view the prior art.

It is claimed by defendant that it is at liberty to use all these devices in its milk business (and it is conceded it has not infringed, if the patents be valid and defendant has infringed at all, except by using the device or devices in its milk business) by virtue of a certain license to the Anglo-Swiss Company, of which this defendant is the assignee and to whose rights it has succeeded, and that there is a defect of parties, the Anglo-Swiss Company being a necessary party complainant or defendant, etc. I do not deem it necessary or proper for me to go into these defenses as they will be fully considered by the Circuit Court of Appeals when it passes on the case. I am dealing with the case finally as it impresses me on a careful study of the claims, the specifications, the prior art, the evidence of Fellows himself, and that of the experts on both sides, and applying thereto the decisions of the Supreme Court of the United States and of the Circuit Court of Appeals in this circuit.

There will be a decree dismissing the bill, with costs.

MALIGNANI et al. v. JASPER MARSH CONSOL. ELECTRIC LAMP CO.

(Circuit Court, D. Massachusetts. July 19, 1910.)

No. 223.

1. PATENTS (§ 132*)—TERM—EFFECT OF TREATY.

Article 4 bis provided by the International Convention for the Protection of Industrial Property of December 14, 1900, at Brussels, ratified by the United States Senate, and proclaimed by the President to take effect September 14, 1902 (President's Proclamation Aug. 25, 1902, 32 Stat. 1940), did not repeal the limitation of a United States patent to the term of a previous foreign patent for the same invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 188½–191; Dec. Dig. § 132.*]

2. PATENTS (§ 99*)—VALIDITY—SUFFICIENCY OF SPECIFICATION AND CLAIMS.

That a patent of a method for evacuating incandescent electric lamps by first introducing into a tubular elongation of the bulb suitable substances capable of being gasified by heat and combining with the gases generated by the filament when brought to incandescence to form solid or liquid precipitations, and then exhausting the bulb by means of a pump and sealing the elongation, then bringing the filament to intensive incandescence and simultaneously heating the substance in the elongation, and finally sealing off the elongation, in the specification and claim directs that, after the partial exhaustion of the bulb by the pump, the pump connection is to be sealed off, did not mention

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

specifically the ordinary "working" of the filament during the pump action, would not render the patent process inoperative.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 133-139; Dec. Dig. § 99.*]

3. PATENTS (§ 157*)—CONSTRUCTION.

When two constructions of a patent are permissible, the court will adopt that which will give to an inventor the protection to which, under the law, he is entitled.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 229-232; Dec. Dig. § 157.*]

4. PATENTS (§ 118*)—VALIDITY—SUFFICIENCY OF DISCLOSURES.

That the claim of a patent for a method of exhausting incandescent electric lamps contains no limitation as to the extent to which the bulb must be exhausted before sealing, and the specification only states it approximately, would not render the disclosure of the patent insufficient to enable one skilled in the art to practice the process, though it might be necessary to make several tests to determine with exactness what the patentee meant by the expression "exhausted to the extent of about two millimeters of mercury."

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 118.*]

5. PATENTS (§ 314*)—INFRINGEMENT—ACTION—REOPENING CASE FOR ADDITIONAL PROOF.

A suit for infringement of a patent will not be reopened after final hearing to admit proof to support a defense set up by answer filed more than four years before final hearing, where the importance of the issue was as apparent at that time as later, and the matters sought to be proved were accessible during the four years.

[Ed. Note.—For other cases see Patents, Cent. Dig. §§ 550-553; Dec. Dig. § 314.*]

6. PATENTS (§ 328*)—VALIDITY—INFRINGEMENT.

Malignani patent, No. 537,693, for a process of evacuating incandescent lamps, *held* valid and infringed.

7. PATENTS (§ 118*)—PROCESS—SUFFICIENCY OF DESCRIPTION.

The naming of nonessential conditions by a patentee, so long as the essential conditions of a process to accomplish the desired results are set forth in the patent, is immaterial; it not appearing that the patentee describes as essential a condition which would defeat the successful performance of the process, or omits an essential condition not implied by a familiar knowledge of the art.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 118.*]

8. PATENTS (§ 118*)—PROCESS—DESCRIPTION.

Erroneous statements of a patentee as to the theory of his process are immaterial, so long as the patent clearly directs the reader what to do to successfully practice the process.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 118.*]

9. PATENTS (§ 161*)—CONSTRUCTION—SUFFICIENCY OF DESCRIPTION.

Where the language employed in a patent is indefinite or ambiguous, it should be read in the light of the reader's knowledge of the prior art.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 236½; Dec. Dig. § 161.*]

10. PATENTS (§ 328*)—PROCESS—DESCRIPTION.

In the practice of the process of the Malignani patent, No. 537,693, for exhausting incandescent lamps, phosphorus (though not mentioned in the patent) *held* to be the equivalent of arsenic, sulphur, and iodine.

11. PATENTS (§ 230*)—PROCESSES—SUFFICIENCY OF DESCRIPTION.

Evidence proving the operativeness, in the practice of a process, of three substances specifically named in a patent under conditions varying slightly from those indicated in the specification, but under the same conditions met with in the commercial practice of the process when another substance (not named in the patent) is employed, *held* sufficient to establish the equivalency of all four substances.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 230.*]

12. PATENTS (§ 118*)—VALIDITY—FRAUDULENT SUPPRESSION.

It is not necessarily improper for a patentee, believing himself to be the inventor of a new process, to so frame his claims and specification as to anticipate and cut off attacks in the Patent Office that may be based upon a prior art which he considers irrelevant, and for this purpose to omit mention of a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

substance capable of use in the practice of his process which may have been described in prior patents.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 118.*]

13. PATENTS (§ 123*)—VALIDITY—FRAUDULENT SUPPRESSION.

Where a patentee, about the time of the issuance of his patent, makes public disclosures of his process which remove any doubt as to the meaning of his specification, that act is so inconsistent with an intention to reserve to himself the advantage of secrets that it negatives an attempt to deceive.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 175; Dec. Dig. § 123.*]

14. COSTS (§ 154*)—DEPOSITIONS OF EXPERTS—IMPROPER TESTIMONY.

Complainant held not entitled to costs for taking, transcribing, and printing the depositions of an expert, which consist of argumentative departures from the province of expert testimony and which deal in vituperative personalities.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 154.*]

In Equity. Bill by Arturo Malignani and another against the Jasper Marsh Consolidated Electric Lamp Company. Decree for complainant.

Richard N. Dyer and John Robert Taylor, for complainants.

A. Parker-Smith, for defendant.

BROWN, District Judge. The patent to Malignani, No. 537,693, dated April 16, 1895, is for a process for evacuating incandescent lamps. The patent has been sustained by the Circuit Court for the District of New Jersey, in *Malignani v. Germania Electric Lamp Co.*, 169 Fed. 299, and by the Circuit Court for the Southern District of New York in *Malignani et al. v. Hill-Wright Electric Co.*, 177 Fed. 430.

In the latter opinion it was held that the Malignani patent expired March 31, 1909, by reason of the expiration on that date of the term of a prior Italian patent to Malignani.

It was contended that by "article 4 bis" provided by the International Convention for the Protection of Industrial Property of December 14, 1900, at Brussels, ratified by the United States Senate and proclaimed by the President to take effect September 14, 1902, the limitation of the United States patent by the expiration of the Italian patent was repealed. President's Proclamation, Aug. 25, 1902, 32 Stat. 1940. This contention was overruled; the court following the decision of the Circuit Court of Appeals for the First Circuit in *United Shoe Co. v. Duplessis Shoe Co.*, 155 Fed. 842, 84 C. C. A. 76, and stating that it did not feel bound to follow the contrary conclusion as to the effect of article 4 bis expressed in the opinion of Judge Archbald in *Hennebique Construction Co. v. Myers*, 172 Fed. 869, 97 C. C. A. 289. See, also, *Union Typewriter Co. v. L. C. Smith (C. C.)* 173 Fed. 288.

The complainants have filed a special brief of 95 pages relating to the question of the limitation of the term of the patent in suit. I have carefully examined this brief, but find in it no sufficient reason to justify this court in declining to follow the decision of the Circuit Court of Appeals for this circuit.

The complainants in this brief cite the opinion of the Supreme Court in *French Republic v. Saratoga Vichy Co.*, 191 U. S. 427, 24 Sup. Ct. 145, 48 L. Ed. 247, as containing no intimation that the treaty was not

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

self-executory. That case, however, though cited to this special point, seems on the whole against the complainants, for the court construed the special provision concerning the commercial name or trade-mark in connection with article II of the treaty (25 Stat. 1375), saying:

"That article was evidently designed merely to protect the citizens of other countries in their right to a trade-mark or commercial name, and their right to sue in the courts of this country, as if they were citizens of the United States. It could never have been intended to put them on a more favorable footing than our own citizens, or to exempt them from the ordinary defenses that might be made by the party prosecuting.

"This is made the more apparent from article II of the treaty, which reads as follows: 'The subjects or citizens of each of the contracting states shall enjoy, in all the other states of the Union, so far as concerns patents for inventions, trade or commercial marks, and the commercial name, the advantages that the respective laws thereof at present accord, or shall afterwards accord to citizens or subjects. In consequence they shall have the same protection as these latter, and the same legal recourse against all infringements of their rights, under reserve of complying with the formalities and conditions imposed upon subjects or citizens by the domestic legislation of each state.'

"If there were any doubt about the rights of the plaintiffs under the eighth article, they are completely removed by the wording of the second. The rights of the French Republic are the same, and no greater under this article than those of the United States would be."

Section 4887, Rev. St. (U. S. Comp. St. 1901, p. 3382), as it stood at the time of the grant of letters patent to Malignani, limited every United States patent to expire at the same time with a previous foreign patent for the same invention. It made no discrimination between American and foreign inventors in this respect. It applied as well to a citizen of the United States who first patented his invention in a foreign country as to a citizen of a foreign state who first patented his invention in a foreign country.

It was no part of the scheme of the treaty to enlarge the terms of United States patents granted to citizens of the United States.

To give to article 4 bis the effect of enlarging the terms of United States patents granted to citizens of foreign states, without enlarging the terms of United States patents granted to citizens of the United States, would put citizens of other countries on a more favorable footing than our own citizens. This would directly conflict with the terms of article II, and with the rule of construction applied in *French Republic v. Saratoga Vichy Co.*, 191 U. S. 427, 24 Sup. Ct. 145, 48 L. Ed. 247.

To avoid this inequality by holding that the treaty so changed the domestic law as to enlarge also the terms of grants of United States patents to citizens of the United States would raise a question of the constitutional power of the President and Senate, even if the power to admit citizens of foreign states to equal rights with citizens of the United States be conceded. Opinion of W. H. H. Miller, Atty. Genl., 47 O. G. 397.

Construing article 4 bis with article II, it seems to have no proper application to a statute which is a part of the domestic law concerning the terms of United States patents, affording equal legal rights to citizens of foreign countries and to citizens of the United States.

We must conclude, therefore, that the patent in suit expired on March 31, 1909. The question remaining is of the complainants' right to an accounting up to that date.

Claim 1 is in suit:

"A process for producing a vacuum in the bulbs of incandescent lamps consisting in first introducing into a tubular elongation of said bulb suitable substances capable of being gasified by heat and combining with the gases generated by the filament when brought to incandescence to form solid or liquid precipitations, then exhausting the said bulb by means of a pump and sealing the said tubular elongation up, then bringing the filament to intensive incandescence and simultaneously heating the substance in the elongation aforesaid and finally sealing off the said elongation in the manner and for the purpose substantially as described."

The first defense is based upon the contention that the patent, both in the specification and claim, directs that, after the partial exhaustion of the bulb by means of a pump, the pump connection is to be sealed off before the filament is incandesced at all. This, it is said, has never been done in any lamp factory, and is impractical. In the prior art of exhaustion by a pump it was the common practice to incandescence or work the filament during the final stages of the exhaustion, in order to heat the contents of the bulb, and to generate the hydrocarbon gases contained in the filament and paste joints. The pump action was continued during the evolution of these gases, and served in removing not only the air but the gases as well.

I find nothing in the specification which negatives the use of the ordinary process for producing the partial vacuum of "about two millimeters of mercury."

The defendant contends that, as the gases from the filament are to combine with a gas introduced for the express purpose of combining with the filament gases, it was the intention of Malignani to bottle up all the gases that might be generated by the filament. This, however, is mere inference.

Another inference, equally permissible, is that he intended to avail himself of all the benefits of the usual practice during the pumping process, and that the specially introduced gas was intended to combine with such filament gases as remained after practicing the usual process of exhaustion down to about two millimeters of mercury.

That he should seek to retain that proportion of filament gases which could be pumped out with the air in the ordinary way, in order to precipitate all filament gases by his new process, would seem to be putting an unnecessary burden upon his novel step of substituting precipitation for further pumping.

The specification states that the bulb is provided with a "small glass tube, T, for the purpose of extracting the air and gases therefrom, etc." This is consistent with the view that the pumping preliminary to precipitation was to remove gases generated from the filament and from the paste as well as air.

Upon the ordinary principle of construing a patent with reference to the common knowledge of the prior art, the direction that the filament be brought to intensive incandescence after sealing is not inconsistent with incandescence or "working" during the pumping process. The claim uses the expression "then exhausting the said bulb by means of a pump and sealing the said elongation up." Does this mean according to the usual rules of construction, by means of a pump alone, or does it fairly mean by a pump used in the ordinary way with such ordinary incidents or accompaniments of pump use

as are familiar in the art? The latter interpretation is entirely permissible unless inconsistent with the specification.

The Italian patent, January 7, 1894, 3,550, gives some support to defendant's contention that Malignani intended to bottle up the filament gases, since in one mode of practicing the process the carbon filament is to be coated with a layer of powdered and readily volatile carbon. The coating of the filament with carbon powder is an indication that it was not intended that the filament gases were to be generated and pumped out before sealing.

But assuming that it was his expressed intention to utilize in the new process of precipitation, which is to occur after sealing, filament gases generated by incandescing the filament, he is at liberty before the sealing which precedes the final exhaustion of the bulb to prepare his filament for the final step of the process in any suitable way. Whether the filament is so prepared during the pumping which precedes the sealing of the bulb, or at any previous time, seems immaterial. The patented process cannot be said to be inoperative because it does not mention specifically the ordinary "working" of the filament during pump action. This is permissible to the patentee as an ordinary step accompanying the use of the pump, and is not excluded either by the terms of the specification or by its expressions concerning the theory of combination of gases after the sealing of the bulb. The working of the filament does not constitute a departure from the described process, whose novelty resides, not in the preliminary steps for securing a partial exhaustion, but in the completion of the vacuum after sealing the bulb by a gas specially introduced while the filament is highly incandescent.

The fact that in ordinary practice the filament is made incandescent during pump action and before final closing off of the pump does not constitute a substantial departure from the patented process by either the complainants or the defendant. It tends to show neither the inoperativeness of the process described in the patent nor noninfringement by the defendant.

Even if we assume in favor of the defendant the much-contested point that the filament gases remaining after the final stroke of the pump and the sealing of the bulb are negligible in quantity, and if we also assume that Malignani's theory of operation was entirely erroneous, and that the vacuum was completed merely by the presence of the specially introduced vapor and the highly incandescent filament in a sealed bulb having an attenuated atmosphere, regardless of the presence of filament gases, this, in my opinion, does not affect the result. Malignani directs the reader what to do after sealing the bulb; raise the filament to high or intensive incandescence, i. e., a higher incandescence than is used in the normal operation of the lamp. It was old to do this in working the filament before sealing the bulb, but I do not recall any instance cited from the prior art where this was done in presence of a vapor after sealing the bulb to finish the vacuum without resort to pump action.

If Malignani was mistaken in the belief that there were emanations of gas from the filament which played an essential part in securing the final result, he is yet entitled to whatever benefit results from doing what he directs shall be done.

It is true that he states that the vapor specially introduced is capable of combining with gases generated by the filament; but if there are in fact no such gases, or if they are negligible in amount, and he nevertheless accomplishes the result, it follows simply that he has named more than the essential conditions, and if he has named all the essential conditions he should not be prejudiced because of error in also naming nonessential conditions.

Having said that the doing of certain things will take out of the bulb everything that will interfere with the ordinary life of a properly evacuated lamp, it is immaterial whether or not he enumerates specifically the nature or components of the contents of the bulb after sealing.

It seems reasonable to suppose that, after partial evacuation by the old method and sealing of the bulb, its contents were the residual air and filament gases. Malignani apparently had principally in mind as the objectionable part of the contents, filament gases. Mr. Wadsworth, the defendant's expert, has principally in mind the oxygen of the residual air.

A very large part of the record is devoted to testimony concerning what in fact are the contents of the bulb immediately after sealing. But this seems immaterial, for the reason that Malignani, by saying that a final vacuum will be obtained, has said that whatever is there will disappear and the lamp will be ready for use if two things only are done after sealing; bring the filament to incandescence, and vaporize the suitable substance. Whether it is the disappearance of oxygen, or of filament gases, or of both, that completes the vacuum, is of no consequence if in fact the vacuum is completed, and if in fact no one before Malignani got this result by the same steps following the sealing of the bulb.

It is of course true that if the patentee describes as essential a condition which will defeat the successful performance of the process, or omits an essential condition not implied by familiar knowledge of the art, this should not be overlooked in determining the sufficiency of the specification and the validity of the patent. But the mere omission of the patentee to mention the working of the filament before sealing is not equivalent to an express direction that it shall not be worked. We may concede that one skilled in the art of lamp exhaustion by the old methods, upon reading the patent in suit, might infer, as defendant's counsel and expert infer, that Malignani's idea was to bottle up all his filament gases and by omitting to work the filament during pumping fail in an attempt to apply the process. We could not for this reason pronounce the patent invalid; for with ordinary intelligence his second inference would be that Malignani intended to proceed in the old way in getting his partial vacuum, and that he did not intend to introduce a novelty into this step in the process, but only in the final step.

In determining whether as a document the patent is a sufficient description, the law implies a certain degree of intelligence in the reader, and, if there is some indefiniteness or ambiguity in the language, that he should read it in the light of his knowledge of the prior art. That the reader of the Malignani patent might be required to try more than

once to get the result would not bring him within the doctrine of those cases which hold a patent insufficient where, in addition to the information contained in the patent, extensive experiments are essential to success.

The next point for the defense is based upon the fact that in practice both complainants and defendant use phosphorus, a substance not named by Malignani, to produce the vapor which is introduced for the purpose of precipitating the residual gases. The claim describes the material to be used as:

"Suitable substances capable of being gasified by heat and combining with the gases generated by the filament when brought to incandescence to form solid or liquid precipitations."

The specification enumerates "arsenic, sulphur, or iodine," and does not mention phosphorus. The defendant contends that these substances are useless; that phosphorus is the only substance that can be used with success; that Malignani knew that the best way was to use phosphorus, and avoided mentioning it in his patent. It is urged that with the substances named the process is inoperative, and that the patent is void for an insufficient specification; also, that it is void under section 4920, Rev. St. (U. S. Comp. St. 1901, p. 3394), for the reason that for the purpose of deceiving the public the description and specification were made to contain less than the whole truth relative to his invention or discovery. Mr. J. W. Howell testifies specifically to the successful exhaustion of bulbs with the substances named, and produces as exhibits bulbs that have been so exhausted. He also testifies that in the production of these exhibits he did not carry the step of mechanical exhaustion by the pump beyond that commercially used in the practice of the process with phosphorus.

This testimony seems insufficient to show that these substances can be successfully used when the pump action exhausts the bulb only to the extent of about two millimeters of mercury, as directed in the patent. There being evidence that with improved mechanical pumps it is usual in commercial practice to secure a much lower pressure than that named by Malignani, it amounts merely to saying that the same degree of preliminary exhaustion may be used with the three substances named as with phosphorus.

So far as this goes it is consistent with the complainants' contention as to the equivalency of phosphorus with the substances named, though insufficient to show the operativeness of the three substances named at a pressure such as is indicated in the patent in suit. Moreover, the character of the experiments made by the complainants' experts for the purposes of this case are not such as to show that the process is operative at the pressure named.

These experiments have been vigorously attacked by the defendant on the ground that the lamps were pumped to very low pressures before the experiments with arsenic, sulphur, and iodine were made, and that conditions were created foreign both to the Malignani described process and to commercial practice.

As the gist of the Malignani invention lies not in the production of a practical vacuum, since that was obtained by pumping alone, but

in the substitution of a quick precipitation process for the slow final stages of pumping, it is quite important to know how much pumping is saved; and also it is important to know whether this pumping is saved by the adoption of an improved pump, or by a new precipitation process.

The defendant attacks the experiment with sulphur with the statement that:

"In order to prove that sulphur could produce the 'almost perfect vacuum' called for in Malignani's patent, they (the experts) pumped down to a practically perfect vacuum before beginning, so there was nothing left for the sulphur vapor to do but condense naturally, when the torch flame was removed, and leave the vacuum where it found it."

The complainants' brief in reply, in answer to this and similar criticisms, states that these tests were never intended to exactly duplicate the commercial practice of the Malignani process either by complainants or defendant.

The complainants also say that so far as these tests are concerned the degree of initial vacuum secured is unimportant, and that the tests were designed to annihilate the theory of defendant's experts that in the use of phosphorus the vacuum was produced merely by the absorption of oxygen and not by a combination with filament gases.

Upon the whole it seems fair to say that the complainants have failed to offer proof that the substances named by Malignani are capable of completing a vacuum if the partial vacuum procured by pump action is left at two millimeters of mercury.

On the other hand, I am of the opinion that the defendant's contention that in using phosphorus the vacuum is completed by its combination with the oxygen of the air in the bulb is not proved, and I am inclined to the opinion that it is disproved. But under the practical rules, which courts are accustomed to apply, we may disregard a very large part of the controversy between the experts. It seems to be established that the Malignani patent in claim 1 in suit describes in more or less general terms a novel way of completing a vacuum and a quick substitute for prolonged pumping.

It directs that after preliminary pumping in the ordinary way the bulb be sealed and that the filament be raised by the current to a state of "intensive incandescence." Clearly this term means a condition of the filament due to a certain intensity of current. The only indication of a degree of intensity is in the specification which describes its effect, i. e.; generating the gases contained in the filament.

One of the complainants' experts says:

"This term 'intensive incandescence' made use of by Malignani is aptly descriptive of the peculiar luminous blue haze which fills the body of the lamp and surrounds the glowing filament, and which, as we now know, is a significant and characteristic physical manifestation of the ionization of the space within the body of the lamp produced by the electric current used in overheating the filament, and constituting the critical condition disclosed by the Malignani patent for the effective vaporization of the chemical in the tubuline."

This is an entirely unjustified interpretation of the terms of the Malignani patent, and must be regarded as an attempt to read into

the Malignani patent a statement of an important condition to which Malignani makes no reference either direct or indirect.

While "intensive incandescence" in the sense attributed to it by the expert may be a novelty, though this is perhaps doubtful in view of Edison's patent 274,295, wherein he describes "a light blue halo very much spread out," yet the natural meaning of the term according to a proper construction of the Malignani patent as a document is more correctly given by the defendant's expert; and his conclusion that intensive incandescence as described in the Malignani patent was not new, but old in many patents of the prior art, is entirely justified.

In raising the filament to a high incandescence to drive out the filament gases before closing off the pump connection, both the complainants and defendant are merely following the prior art. Moreover, it was old to inject into the bulb at this stage of the process of evacuation the vapor of various substances, including phosphorus, for the purpose of assisting the action of the pump.

But the important question is not whether it was old to use intensive incandescence as an aid to pump action, or to use phosphorus as an aid to pump action; but was it old to use both together after the closing off of the pump, thereby securing a vacuum in a shorter time than by pump action aided by intensive incandescence and by the vapor of phosphorus or other substance.

In *Malignani v. Hill-Wright Co.* (C. C.) 177 Fed. 430, it was said:

"The essence of the process is found to exist in the intensive incandescence of the filament in the attenuated atmosphere at a time when the vapor of a suitable solid substance is present in the bulb, so that the precipitation of its gaseous contents is effected and the desired vacuum obtained."

This it may be said disregards the feature of the presence, in addition to the vapor of a suitable substance, of gases generated by the filament.

It is fair for the defendant to contend that according to the specification there should be in the bulb something to combine with the introduced vapor; but I am of the opinion that the contention of the defendant's expert and of defendant's counsel that there must be a chemical combination is not a necessary conclusion. It is a fair argument to say that one who was seeking for equivalents would naturally choose such vaporizing substances as chemical knowledge would indicate to be likely to form chemical combinations with hydrocarbons, or with such gases as would be generated from a filament. But the patentee has not limited himself to chemical combinations, and the views of defendant's expert on this point must be regarded as somewhat illiberal, though reasonable enough. Malignani has enumerated certain substances which the defendant's expert says do not combine chemically; nevertheless Malignani has stated that they do combine in a partial vacuum in the presence of a highly incandescent filament. If, under these conditions, they do combine in any way, this is within the strict terms of the patent, as well as within a reasonable view of the matter. A still more liberal view is entirely proper. The patentee says, create these conditions and a vacuum will quickly follow. If this can be done, then it seems entirely immaterial what the actual elemental action is—chemical or electrophysical. The statement that

they do combine is not a necessary part of the description of the process of getting a vacuum with these substances. It is only of consequence when we have to consider the question of the equivalency of other substances not indicated for use, and then it implies not necessarily substances that combine chemically, but substances that have properties in common with those used and that will act in substantially the same way under like conditions.

If it is true, as the defendant contends, that the substances named are such as according to ordinary chemical knowledge do not form chemical combinations with filament gases, this would indicate to one skilled in chemistry that under the special conditions named a result followed that was not explainable upon familiar chemical principles.

Upon the proofs offered by the complainants I am of the opinion that it has been shown that in exhausting lamps a substantial amount of time is saved by using the old method of exhaustion merely to secure a partial vacuum and by completing the required vacuum by a step new in the art at the date of Malignani's application, namely, sealing the bulb, raising the filament to a high incandescence, and introducing a vapor with the result that a practically complete vacuum follows, and that this can be accomplished with substances named by Malignani to an extent that is of practical importance.

If it be true that Malignani's patent discloses means for the final exhaustion of a lamp that are new and, as Mr. Howell testifies, capable of practical application as a substitute for older methods, and if it be true that the experiments of Mr. Howell made with arsenic, sulphur, and iodine were started with the same partial vacuum ordinarily used in commercial practice with phosphorus, it seems to follow that at this pressure, whatever may be their differences in chemical character, arsenic, sulphur, iodine, and phosphorus in the presence of a highly incandescent filament, are equivalents even if they are not all equally efficient or quick in action.

If we assume, however, that in order to make a demonstration of efficiency or of equivalency it is essential to pump down below the pressure of two millimeters of mercury, can it fairly be said that this is a substantial departure from the directions of Malignani's patent? In the claim in suit there is no limitation as to the extent of exhaustion by means of a pump. Of course it is implied that the pump action is to stop something short of the prolonged pump action of the prior art, so that there is a substantial time saving or other result of value. The fact that in ordinary practice it is customary to pump down to a lower pressure than that named by Malignani, and then to use a new step instead of pump action, shows that there is practical value in the final step of the process that follows sealing of the bulb, even if that final step is unable to perfect a vacuum if started at two millimeters of pressure.

Assume for the purposes of the argument that only phosphorus is capable of perfecting the vacuum if the pressure at the end of pump action is two millimeters, yet if in practice it is found advantageous to continue the pump action to a lower pressure, and to seal the bulb at a lower pressure, then the conclusion follows that with all the improvements in pumps it has not yet been found desirable to complete the vacuum by pumping to the end. In other words, improvement in

pumps has shortened the time of producing a partial vacuum, and made it practicable in a shorter time to obtain a lower pressure by pump action alone, but has not obviated the need of supplementing pump action by a process substantially described in Malignani's patent. The novelty and the gist of the Malignani process is in the step following the sealing of the bulb. If, in this final step, the defendant follows Malignani, it appropriates the gist of his invention.

Were it conceded that with either of the substances named by Malignani a practical vacuum could be produced if the bulb were sealed at a pressure of two millimeters, it is obvious that the defendant could not avoid infringement by using his pump to create a pressure lower than that named by Malignani. A mere change in the proportional parts taken by the pump and by the new step in completing the vacuum would be immaterial. So long as the defendant continues to use this final step, it is difficult to deny that in the whole process of exhaustion it has a quantitative value, since if it had not such value the defendant would complete the exhaustion by the pump as in the prior art. The point of consequence, therefore, is the contention that the process as described is inoperative.

Upon the testimony of Mr. Howell as to actual experiments and results I find that the process is operative with the substances named by Malignani if the pressure obtained by the pump be considerably less than that named by Malignani. I find no direct evidence that it would be operative at the pressure named by Malignani, and the fact that the elaborate experiments of complainants' experts Messrs. Little and Thatcher were off the main lines of the case and were not directed to this important point, but to subordinate issues, such as the correctness of the respective theories advanced to explain the phenomenon, makes it necessary to base the finding that the process is operative upon the testimony of Mr. Howell and upon the fact that the defendant does not meet this positive testimony by evidence as to experiments, but places too much reliance upon the inconclusive proposition that it cannot operate upon the principle which Malignani sought to apply.

That Malignani had invented and put into practical operation a new and very important process of exhausting the bulbs of lamps is satisfactorily shown by the testimony. I do not find in the prior art anything that anticipates the conditions created by Malignani in a sealed bulb, partially exhausted. Intensive incandescence, phosphorous vapor, and various other vapors were used, but in connection with pump action. I do not find sufficient evidence to show that any one before Malignani had learned that it was practical to finish the exhaustion of a globe by suspending pump action, sealing the bulb, introducing a vapor, and making the filament highly incandescent. The case, therefore, is not based upon a paper patent granted to a mere speculator, but is a grant to the actual inventor of a practical process of great value. We are dealing with a document granted to the person who actually advanced the art, and not with a patent that is brought forth to obstruct the advance of a practical art. Under such circumstances the courts are disinclined to so interpret the terms of a patent as to reach a conclusion that is opposed to well-established fact, and to hold that the process described is inoperative, though the process which manifestly the inventor intended to patent is operative and valuable

in the art. When two constructions of the terms of a patent are admissible, the court will adopt that construction which will give to an inventor the protection to which, under the law, he is entitled, rather than that which defeats his right by an illiberal reading of the terms in which he has described his invention.

As the claim contains no limitation as to the extent to which the bulb must be exhausted before sealing; as the specification does not state this definitely, but only approximately; as one who failed to get a vacuum at about two millimeters would naturally use the pump to create a somewhat lower pressure and try again—I am of the opinion that the disclosures of the patent are sufficient to enable one skilled in the art to practice the process, and that the patent is not inoperative because it might be necessary to make several tests, involving more or less variation in the number of strokes of the pump, to determine with exactness what the patentee meant by the expression “exhausted to the extent of about two millimeters of mercury.”

Reference to prior foreign patents named by Malignani shows that he named phosphorus and had observed the blue haze which is a guide to the operator and an indication of suitable conditions in the practice of the process. That in the United States patent he failed to mention phosphorus, the best substance for use, gives rise to a question as to his reason for doing so. It has aroused the suspicion of the defendant's counsel as to his motives, and upon his undoubted knowledge of the material phosphorus and his failure to disclose it is predicated a charge of fraudulent concealment, under section 4920. But a fraudulent motive is not a necessary inference from the omission to mention phosphorus. Assuming that the reason suggested by defendant's counsel is true, that it was omitted for the reason that phosphorus had been used in connection with old processes of procuring a vacuum, and that the desire was to preclude the defense of anticipation by former processes, it is not necessarily improper, in a patentee who believes himself the inventor of a new process, to so frame his claims and specification as to anticipate and cut off attacks that may be based upon a prior art that he considers irrelevant. If the process will work with substances named and with phosphorus also, then he is justly entitled to claim that his process does not operate upon the principle which former users of phosphorus sought to apply, but upon a different principle; and, if he omits the mention of phosphorus to avoid an entanglement in the toils of a particular branch of the prior art, it can hardly be said that this is more than a skillful and cautious patent solicitor might be justified in doing. This is quite a different thing from an attempt to obtain a patent on an old thing by mere novelty in the terms in which it is described.

It is true that the public is entitled to such full description as will enable it to practice the art at the expiration of the patent, and that the patentee is not entitled thereafter to continue his monopoly by reason of secret knowledge.

In considering whether a patentee was acting with an intention to deceive the public, by withholding information to which they are entitled, it should be remembered that patent disclosures are available for the use of the public only upon the expiration of the patent; therefore

where a patentee, about the time of the taking out of letters patent, makes such public disclosures of the actual process as to remove any doubt or uncertainty as to the meaning of his specification, this act is so inconsistent with an intention to reserve to himself the advantage of secrets that it negatives an intent to deceive, and equally so whether the disclosure precedes or shortly follows the date of the patent. Both before and soon after the date of the Malignani patent the process, including the use of phosphorus, was fully described in scientific papers and was practiced on a large scale in various establishments under license. The great publicity given to the process seems inconsistent with a belief that Malignani could have seriously entertained the intention to deceive the public or that his process was imperfectly described for that reason.

After final hearing the defendant moved that the taking of proofs be reopened to permit the defendant to prove that Malignani's Hungarian and Austrian patents were secret patents; that the word "phosphor" was introduced into the application for German letters patent on the requirement of the German Patent Office, and to produce other testimony bearing upon Malignani's failure to disclose phosphorus in his specification.

This defense was set up by answer filed April 2, 1906, more than four years before final hearing, and the importance of this issue was as apparent at that time as now. The matters which defendant now seeks to prove were accessible during the four years which have elapsed, and it is now too late to reopen the case. I am further of the opinion that the fact that certain of the patents mentioning phosphorus were secret patents would, if proved, not amount to a decisive factor in the case, and would not change the result.

I am of the opinion that the patent is valid and has been infringed by the defendant, and that the complainants are entitled to an accounting for the period prior to March 31, 1909, the date of the expiration of both the patent in suit and the prior Italian patent.

To the rebuttal deposition of one of the complainants' experts defendant's counsel made the following objection:

"Defendant's counsel also objected to the entire deposition of the witness on the ground that it is merely argumentative and vituperative of defendant's expert instead of being confined to the competent statements of such scientific facts and theories as might be known to the witness and have bearing on the elucidation of matters of the art involved in this case."

To much of this deposition in rebuttal this objection is properly taken. Though I have not excluded the deposition, but have considered it, yet in view of the large amount of offensive and unjustifiable attacks made upon the defendant's expert, and of the great extension of the record due to "vituperative personalities" and to argumentative departures from the proper province of expert testimony, I am of the opinion that the costs to complainants should not include the expense of taking, transcribing and printing this deposition.

The defendant's motion for leave to take further proofs is denied.

The prayer for an injunction is denied.

A draft decree for the complainants may be presented accordingly.

UNION SWITCH & SIGNAL CO. v. GENERAL RY. SIGNAL CO. (two cases).
GENERAL RY. SIGNAL CO. et al. v. LONG ISLAND RY. CO.

(Circuit Court, S. D. New York. May 27, 1910.)

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—BLOCK SIGNALING SYSTEM
FOR ELECTRIC RAILWAYS.

The Struble patents, No. 819,322 and No. 819,323, for automatic block signaling systems for electric railways, so far as relates to the generic claims for a system using a direct current for operating the car motors and an alternating current for energizing the signal relays, were not anticipated and disclose patentable invention; nor are they invalid because of the new matter introduced into the applications by amendment in the Patent Office which was merely to more clearly and specifically describe the invention. As to the specific claims covering as a specific form of the generic invention what is termed the "two-rail return" system, Struble is entitled to priority of invention over Young, to whom patents Nos. 757,537, 762,370, 815,890, and 815,891 were issued on later applications. The Struble patents also *held* infringed by the system of the Young patents.

[Ed. Note.—Amendment of application, see note to Cleveland Foundry Co. v. Detroit Vapor Stove Co., 68 C. C. A. 239.]

In Equity. Suits by the Union Switch & Signal Company against the General Railway Signal Company, two suits, and by the General Railway Signal Company and Samuel Marsh Young against the Long Island Railway Company. Decrees for complainant in the first two suits, and for defendant in the last suit.

Gifford & Bull (Geo. E. Cruse and Livingston Gifford, of counsel), for the Union Switch & Signal Company and the Long Island Railway Company.

Clifton V. Edwards (Lawrence K. Sager and Thomas Howe, of counsel), for the General Railway Signal Company and another.

RAY, District Judge. The first two suits are for alleged infringement of United States letters patent No. 819,322 and No. 819,323, issued to Jacob B. Struble, while the third suit pending in the Eastern District of New York, but ordered to a final hearing by Judge Lacombe in the Southern District with the other suits, is for alleged infringement of the Young patents, No. 757,537, No. 762,370, No. 815,890, and No. 815,891. For convenience, the Union Switch & Signal Company will be referred to as the "Union Company." It owns the Struble patents. For convenience the General Railway Signal Company will be referred to as the General Company. The General Company is the sole licensee of the Young patents. The Union Company sues the General Company on the signaling installation made by it on the New York Central Railroad Company in its electric zone, while the General Company sues the Long Island Company because of its use of its signaling system made by the Union Company on the electrified part of its railroad. The Union Company defends the Long Island Company.

The invention described and claimed in the two Struble patents relates to automatic block signaling on electric railways. The Young pat-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ents relate to the same subject. The Union Company contends: That in Struble No. 819,322 application, filed November 16, 1901, it has claims for a generic invention, the distinctive current and distinguishing apparatus idea of means as explained by its expert, Mr. Waterman, viz., claims 4, 11, 12, 13, 18, 19, 20, 21, and claim 22 for the specific invention, viz., the use with the generic invention of inductive resistances between the blocks, enabling the propulsion current to return by both rails. That Struble No. 819,323 application, filed March 12, 1902, has the generic invention in claims 1, 9, 10, 15, 31, and the specific in claims 19, 20, 22, 32, and 33. That Young does not have claims for the generic invention except in combination with the specific invention, but does for the specific, viz., in No. 762,370, application, filed January 19, 1903, claims 6 and 10; in No. 815,890, application filed February 21, 1903, claims 18 to 24, inclusive; in No. 815,891, application filed April 25, 1903, claims 2 and 3; in No. 757,537, application filed November 6, 1903, claims 1 to 8, inclusive, and claims 10 and 11. The Union Company claims that Struble was and is the pioneer in the matter of block signaling on electric railways; that he was the first to provide a system of electric block signaling on electric railroads; that he was the first to provide such a system wherein interference between the signaling and power circuits was prevented, and that he accomplished this by using a current for signaling which was different from the car propulsion current; that is, by using a direct current for operating the car motors and an alternating current for energizing the signal relays. The Union Company contends that no prior patent or publication shows this, and that, as the claims of the Struble patent do, the fact of pioneership is established.

The defendant, the General Company, insists that the Struble patents are void for want of patentable novelty, that defendant does not infringe, and that during the pendency of the applications the claims were unwarrantably amended by including new matter. The defendant says that these patents relate simply to the application of the ordinary block signaling system then in common use on steam railways to an electric railway system; that is, that the patents in suit merely add or apply the old block signaling system to the electric railway without making any changes of adaptation or securing any new and different results and refers to several prior patents which it claims show this. The defendant says there was "no invention involved in adding Schreuder, Roome, and Spang systems to an electric railway"; (2) "the Struble patents are anticipated"; (3) "defendant does not infringe"; and (4) that the patents in suit contain new matter not disclosed in the original application, and that, while an application for a patent and the claims may be amended, under no circumstances can the application be amended into a new or a different invention than that first claimed. The defendant insists that the new matters introduced into the Struble applications were not only not disclosed in the original application, but were and are directly contradictory thereto. Also, that the rights of Stillwell and of Young accrued before Struble made either of the claims upon which suit is brought.

The following claims of Struble, No. 819,322, dated May 1, 1906, on application filed November 16, 1901, are in issue, viz., 4, 11, 12, 13, 18, 19, 20, 21, and 22, and they read as follows:

"4. In a signaling system, the combination of a closed track-circuit, an alternating-current supply therefor, a signal and means to control the operation of said signal, said means responding to the absence or presence of the alternating current in the track-circuit and not responding to continuous or direct currents traversing said track-circuit in its control of the signal.

* * *

"11. In a signaling system for use on railways employing an electric current as a motive power and the track as a return for the electric current, the combination of a circuit which includes portions of both rails, an alternating-current supply for such circuit, and a translating device responsive to the presence or absence in it of the alternating current in said track-circuit to control a signal and not responsive to the motive-power current or continuous or direct currents in said circuit in its control of a signal.

"12. In a signaling system for use on railways employing a direct current as a motive power and the track as a return for the direct current, the combination of a circuit which includes portions of both rails, an alternating-current supply for such circuit, and a translating device responding to the presence or absence in it of alternating current in said circuit in its control of a signal and not responding to continuous or direct currents in said circuit in its control of a signal.

"13. In a signaling system the combination of a track-circuit, a constant source of alternating-current supply therefor, a signal, and means to control the operation of said signal, said means responding to the absence or presence of the alternating current in the track-circuit and not responding to continuous or direct currents traversing said track-circuit in its control of the signal. * * *

"18. In combination, a source of electric energy, a distribution-circuit for said source of energy, motor vehicles operated from said source of energy, a number of circuits electrically independent of each other for controlling signaling devices supplied with current differing in character from the current supplied from the other source of energy, signaling devices, and means carried by a vehicle for electrically isolating a signal when the vehicle moves into one of said independent circuits.

"19. A signaling system for electric railways employing the track as a return for the car-propulsion current, having in combination a number of circuits electrically independent and each formed in part by the track, a source of current for each circuit, a translating device for each circuit responsive to control a signaling device to the current intended for its operation and not to the propulsion-current, and the signaling devices.

"20. In an electric-railway system, a source of power-current, vehicles operated thereby, a power-circuit comprising two conductors extending from the power-current source to the cars, one of which is formed by the track, a signal-circuit of which the track forms both sides, a source of current for said signal devices connected to both rails of the track, and signal devices completing such circuit.

"21. In an electric-railway system, a source of power-current of one character, vehicles operated thereby, a circuit for said power-current comprising two conductors with which the cars make moving contact, one of which is formed by the track, a signal-circuit of which the rails of the track forms both sides, a source of current for said signal-circuit furnishing current of a different character and connected to both rails, and signal devices completing such signal-circuit.

"22. In an electric-railway system, a source of power-current, a power-circuit in which the track forms one side and conducts current in the same direction, signaling-circuits formed by the track in which the two rails conduct current in opposite directions consisting of a series of rail-sections having adjacent ends electrically separated from each other and inductive resistances connecting said adjacent ends and forming a path from section to section for the power-currents."

The following claims of Struble, No. 819,323, dated May 1, 1906, on application filed March 12, 1902, are in issue, viz., 1, 9, 10, 15, 19, 20, 22, 31, 32, and 33. They read as follows:

"1. A railway signaling system, having in combination a source of alternating current, a track-circuit in circuit with the source of alternating current, a reactance-coil connected across the track-rails of the track-circuit, and a translating mechanism operative to control a railway-signal by an alternating current in the track-circuit. * * *

"9. A track-circuit for railway signaling purposes comprising an alternating-current supply, a translating mechanism and a reactance coil.

"10. In a signaling system, the combination with a closed track-circuit including a source of alternating-current supply, a reactance-coil and a translating mechanism, of a signal, and a circuit for said signal which is controlled by said translating mechanism. * * *

"15. A closed track-circuit for railway signaling system comprising a source of alternating current located at one end of the track-circuit, a translating mechanism located at the other end of the track-circuit and a reactance-coil. * * *

"19. In combination with a railway the rails of which are employed as a return for direct current employed for the motor of cars traveling along the railway, a signaling system, said system comprising a series of track-circuits, an alternating-signaling current generator, means for supplying alternating-signaling current to said track-circuits from the alternating-signaling current generator, and means for limiting the effect of the alternating-signaling current to the track-circuits, but permitting the direct current to pass from the track-rails of one track-circuit to the track-rails of another track-circuit.

"20. In combination with a railway the rails of which are employed as a return for direct current employed for the motors of cars traveling along the railway, a direct-current generator a feed-conductor extending along the line of railway, and a signaling system, said system comprising a series of track-circuits, an alternating-signaling current generator, means for supplying alternating signaling current to said track-circuits from the alternating-signaling current generator, and means for limiting the effect of the alternating-signaling current to the track-circuits, but permitting the direct current to pass from the track-rails from one track-circuit to the track-rails of another track-circuit. * * *

"22. In combination with a railway the rails of which are employed as a return or ground for the propulsion-current for the car-motors, a signaling system, said system comprising track-circuits, a translating mechanism and a source of alternating-signaling current for each track-circuit and means for limiting the effect of the alternating-signaling current to the track-circuits, but permitting the propulsion-current to flow from the rails of one track-circuit to the rails of another track-circuit. * * *

"31. In combination, two sources of electric energy, a distribution-circuit for each source of energy, motor-vehicles operated from one of said sources of energy, a number of circuits electrically independent of each other for controlling signaling devices and supplied with current from the other source of energy, and signaling devices.

"32. In a signaling system for railways the trackway of which is divided to form block-sections, a signaling-circuit for each block, a source of alternating signaling-current for each of said signaling-circuits, a translating mechanism for each signaling-circuit, and reactance-coils connected across the rails of the block-sections.

"33. In an electric railway system, a source of power-current of one character, vehicles operated thereby, a circuit for said power-current comprising two conductors with which the car makes moving contact, one of which is formed by the track, independent signal-circuits in each of which the rails of the track, form both sides, a source of current for said signal-circuit furnishing current of a different character and connected to both rails, a signal device completing each signal-circuit, and reactance-coils connected across the track-rails of the signal-circuits."

These may be conveniently referred to as the first and second Struble patents, although Struble had another patent No. 590,600, dated September 28, 1897, application filed May 20, 1897, which is claimed to anticipate the claims of the Struble patents in suit. It will be referred to by its number. This old Struble patent, No. 590,600, says:

"The invention described herein relates to certain improvements in signaling for electric railways, and has for its object the employment of signal-controlling circuits and relays so constructed and arranged as to prevent the currents used for operating the motors from interfering with the proper operation of the signals. In signaling for steam railways the track is divided into a series of blocks or sections, one or both rails of each block or section being insulated from the rail or rails of the adjoining sections. The rails of each section are connected at one end to the poles of a suitable battery and at the opposite end to the poles of any ordinary relay whose armature forms part of a signal controlling circuit. As the direction of flow of current through the relays heretofore employed is immaterial as regards the energizing of the latter, it is apparent that when such system is applied to electric railways a leakage of dynamo-current might set the signal to clear position when a car is on the section controlled by such signal.

"The present invention consists in the employment of a polarized relay so connected to the rail-sections that when energized by any current than that from the track-battery its armature will be so shifted as to cause the setting of the signal to danger. * * * In the practice of my invention the generator, A, has one pole, as the positive, connected to the trolley main feed-wire or third rail, 1, in accordance with the system employed, and the negative pole connected to the return rail 2, which in the form or arrangement shown in Fig. 1 is continuous or unbroken. The other rail is divided into a series of insulated sections, 3, 3a, 3b, etc. Each rail section, 3, 3a, 3b, etc., is connected at or near its end to one pole of a battery, BB'; while the opposite pole of the latter is connected to the rail. The batteries are so connected to the rail of each section that the current will flow through the track-relays in the opposite direction to that of the generator, A. * * * Any suitable form of battery or generator may be used in the signal circuits, but it is preferred to connect one branch of the signal-circuits to the main feed or trolley wire, or third rail, and the other branch to the return rail so as to employ a portion of the current from the generator, A, for operating the signals. * * * With the currents flowing in reverse directions it will be readily understood that when a car enters upon a section, as III its battery, B2, will be short circuited, and the armature, 5, of the relay, 4b, will be moved by gravity or a spring from the stop, 6, thereby breaking the signal circuit and sending the signal to danger."

The Union Company says that the first work of closed track-circuit signaling on electric railways was done by it in 1900-01 on the Boston Elevated Railway under this last mentioned patent and under the direction of Struble and employed what it terms the "all-direct current idea of means for the reason there was a direct current for the signaling current and a direct current for the car propulsion current." Waterman (plaintiff's expert) says of it:

"Struble's Boston Railway system was based on a definite and positive direction of flow of the propulsion current in the rails and a signal current, which was also a direct current applied to flow in an opposite direction in the rails, and hence was limited to special cases where uniform direction of flow of the propulsion current could be secured."

The complainant (Union Company) says that the art rested here until Struble made the next advance step by introducing into the art the "distinctive current idea of means" shown by the patents in suit, in

which an alternating current, differing in character from the direct current used for propulsion purposes, was employed in the track signaling circuit. This is what the complainant says is the generic invention of the patents and that it solves the problem of applying the closed track circuit system of signaling to electric railways, and that this idea of means involves a distinguishing apparatus in its embodiment, and this irrespective of whether one or both track rails are used to return the car propulsion current; that the specific two-rail return invention in all its forms is one of the advantages growing out of the generic invention, and that, because of this distinctive current idea of means, it is possible to retain the ordinary two-rail return by the use of "reactances" in various locations on the track way. Waterman says:

"The fundamental idea of means upon which the arrangements of the patents in suit are made may properly be designated for brevity as the distinctive current idea of means, since the fundamental conception was the application to the rails of a signal current of distinctive characteristics from that necessarily existent in the rails for purposes of propulsion."

This distinctive current idea of means prominent and plain in the first and second Struble patents, those in suit, is absent from the first Struble patent, No. 590,600. The Struble patents in suit call for the alternating current for signaling purposes. In the old Struble patent, No. 590,600, the signal current passed in one direction, while the propulsion current passed in the opposite direction. Both were of the same character, and, if the one current would operate the signal apparatus, the other would, of course, if by any means it flowed thereto or therethrough. This system practically required a constant direction of flow of the propulsion current in the rails, but the flow of current in the rails of electric railways is not ordinarily in one direction only. It follows that such a system was not of universal application in electric railroads. It was good and sufficient so far as it went, and reasonably safe and reliable under certain conditions. It could be applied, and was applied, in an elevated electric railway. It would not do on surface roads. It could be used only where uniform direction of flow of the propulsion current could be secured. It seems to me that patentable invention is disclosed, having in view the prior art which I have examined with considerable care. Struble provides means for carrying his idea into practical effect, and its great utility has been practically demonstrated. I think the evidence and prior art discloses that both direct and alternating currents were in use for signaling on steam roads prior to Struble, but signaling on steam roads was quite a different problem from signaling on electric railroads. A train operated or propelled by steam entering on a section of road having an electric signal circuit and apparatus is quite different from a train of cars, one or more, propelled by a powerful direct current of electricity entering on a section of road having the same electric signal circuit and apparatus. In my judgment to have attempted the experiment of doing the latter and relying on the proper operation of the electric signal for safety would have been foolhardy. The problem presented demanded far more than the work of the mechanic skilled in the art, and it seems clear that Struble is en-

titled to the credit of solving the problem for all conditions and circumstances. The Spang, the Roome, and the Schreuder patents were for steam roads. I think each describes an alternating current for the track circuit, but they had no apparatus capable of distinguishing between a direct and an alternating current. Either current could be used. In Roome there was a single source for the track circuits with a transmission system, not an individual or distinct source for each track circuit. I do not find it necessary to discuss or describe the open track circuit system and the closed track circuit system. What I decide in this aspect of the case is that the claims of the patents of Struble in suit for the generic invention are valid, and that patentable invention is disclosed. As to the new matter, it seems to me that the changes were to make the specifications and the claims plain and specific, and describe the invention clearly. If a claimant has failed to fully and clearly describe his invention and make claims in proper form clothed in suitable language, it is not unusual to reject with suggestions of amendments. Of course, a claimant cannot file a claim for one invention, and then by amendment claim another and distinct invention. If it be true that a system of automatic electric signaling has been devised for electric roads and put in successful operation, and this system is such that the direct propulsion current by leakage or going astray does not seriously interfere with the signals, or their operation, or operative effectiveness, we have a most valuable discovery and invention, one the value of which cannot be overestimated. I think this has been done, and that Struble is entitled to the credit. I do not find it anticipated, or that by taking the suggestions of the prior art and bringing them together and applying them to electric railway signaling Struble was doing the work of the mechanic skilled in this art. It was an important field and an open one. It was not an obvious thing to do. I am clear that the inventive faculties of many were exercised in the effort, but that those of Struble accomplished the desired object.

Specific Invention and Young Patents.

Coming to the specific invention as found in claim 22 of Struble, No. 819,322, and claims 19, 20, 22 and 23 of Struble, No. 819,323, we find that what is termed the "two-rail return" is not claimed in and of itself, but rather as a limitation or specific form of the so-called generic distinctive-current heretofore mentioned. I think Young in his patents, those set out in the Young patents in suit of which the General Company is the sole licensee, makes the same claim. The Union Company claims it under the Struble patents and the General Company as sole licensee and Samuel Marsh Young as patentee and owner claims it under the Young patents in suit. Each party concedes invention, but "priority of invention" is the issue here.

I have already mentioned the claims of the Young patents in issue here. The Young patent, No. 757,537, dated April 19, 1904, application filed November 6, 1903, says:

"My invention relates to a method of automatically operating block-signals on an electric railway."

Also:

"Considered in its broadest sense, my invention contemplates the employment, first, of two sources of electric energy differing in character, the use of the current from one of said sources to effect the movement of the vehicles upon the railway and the current from the other of said sources to actuate the signaling devices in the respective blocks; second, the employment of the traffic-rails as a common return for both currents used; third, the employment of means for segregating the two currents between the devices designed to be operated thereby; fourth, the employment of reactance-bonds, condensers, and the like as said segregating means; fifth, the employment of the vehicles upon the railway as the means for short-circuiting the signaling devices in a block when a vehicle moves into and during the time that it is within the block."

The claims of this patent in issue read as follows:

"1. A method of operating signals upon an electric railway where the signals are adapted to be controlled by the movement of the motor-vehicles in said system, which consists in impressing an alternating current upon the conductors which separately form return-paths for the power-circuit, normally transmitting such alternating current through the signaling devices employed, and shunting said alternating current around successive signaling devices.

"2. A method of operating signals upon an electric railway where the signals are adapted to be controlled by the motor-vehicles in said system and where the traffic-rails separately form return-paths for the power-circuit and are divided into blocks, which consists in impressing an alternating current upon the traffic-rails, normally transmitting such alternating current through the signaling devices in all of the blocks and shunting said alternating current around a signaling device in a block when a motor-vehicle moves into a block.

"3. A method of operating signals upon an electric railway, which consists in creating a difference of potential between the traffic-rails of the system which separately form return-paths for the power-circuit and over which a current differing in character is flowing, actuating signaling devices by the current due to such difference in potential and shunting said current around certain of said signaling devices through the instrumentality of apparatus actuated by the power-current transmitted.

"4. A method of operating signals upon an electric railway, which consists in impressing a current upon conductors which separately form return-paths for the power-current and through which a power-current differing in character is flowing, segregating said currents, actuating signaling devices by said impressed current and shunting said impressed current around certain of said signaling devices through the instrumentality of apparatus actuated by the power-current.

"5. A method of operating signals upon an electric railway, which consists in creating a difference of potential between the opposite rails of each block of a railway, and over each of which rails a current differing in character from that due to the created difference of potential is separately flowing, employing the current due to such difference of potential for actuating mechanism for carrying signals to the clear position, and in short-circuiting such current in a block by the movement of a car into a block, whereby the signal will automatically be moved to the clear position.

"6. A method of operating motor-vehicles and signals upon an electric railway, which consists in generating two currents differing in character, transmitting said currents to a distribution-circuit, wherein the traffic-rails are divided into blocks and separately form return-paths for the power-current, segregating such currents by means of apparatus located in the blocks, employing one of such currents to operate the motor-vehicles upon the railway, the other to operate the signaling devices, and in short-circuiting the signaling devices of a block as the motor-vehicle moves into a block.

"7. A method of operating motor-vehicles and signals upon an electric railway, which consists in generating two currents differing in character, transmitting such currents to a distribution-circuit, wherein the rails are divided

into blocks and separately form return-paths for the power-current, segregating such currents by means of apparatus located in the blocks, employing one of said currents to operate the motor-vehicles upon the railway, and the other of said currents to create a difference of potential between the opposite rails of a block to actuate the signaling devices in the block, and in short-circuiting such signaling devices when a motor-vehicle moves into a block.

"8. A method of operating motor-vehicles and signals upon an electric railway, which consists in generating two currents differing in character, transmitting said currents to a distributing-circuit, wherein the rails are divided into blocks and each rail separately serves as a return-path for the power-currents, segregating said currents by means of induction apparatus included within the blocks, using one current to operate the motor-vehicles, the other to actuate the signaling devices in the blocks, and in short-circuiting said signaling devices as a motor-vehicle moves into a block. * * *

"10. A method of operating motor-vehicles and signals upon an electric railway, which consists in generating two currents differing in character, transmitting such currents to the rails of a railway, causing one of said currents to divide and separately flow through each of the rails of said railway as the return-path for the power-circuit, separating the other of said currents and segregating it between different blocks of the railway, using one of said currents to operate motor-vehicles upon the railway, and the segregated currents to actuate signaling devices in the blocks of the railway.

"11. A method of operating motor-vehicles and signals upon an electric railway, which consists in generating two currents, transmitting said currents to a distribution-circuit, wherein the traffic-rails are divided into blocks, form the return-path for the power-current, and are rendered electrically independent of each other so far as relates to one of the currents transmitted by means of reactance devices interposed between the blocks, using one of said currents to operate the motor-vehicles upon the railway, dividing the other current between the blocks, limiting its action to individual blocks and using such current to actuate a signaling device in each block, and employing the motor-vehicles to short-circuit the signaling devices as they enter a block."

In Young patent, No. 762,370, dated June 14, 1904, application filed January, 1903, he says:

"Described in other terms, my invention consists, broadly, in providing means for operating an electric-railway system by a direct current, as is usual, and signaling or other similar devices by an alternating current and utilizing the movement of the cars actuated by the direct current to control the movements of the devices actuated by the alternating current.

"My improved signaling system may also be used for other purposes, and I wish it understood that I consider myself to be the first to suggest and show how an alternating current may be impressed upon a direct current and transmitted through the conductors upon which a direct current is flowing and utilized through devices actuated by the direct current to actuate mechanism for signaling or otherwise."

The claims in issue, 6 and 10, read as follows:

"6. A signaling system comprising two sources of current differing in character, a system of distributing-conductors over which both currents are transmitted and formed in part by both rails of a railway, a motor-vehicle on such rails, a series of signaling-circuits over which only one of such currents is transmitted, signaling devices in said signaling-circuits, means for maintaining the electric separation of the two currents and confining their individual action to certain apparatus; one current to the operation of the motor-vehicle and the other to the operation of the signals; together with means carried by the vehicle for cutting a signaling device out of circuit. * * *

"10. A signaling system comprising two sources of energy differing in character, a working circuit of which the rails form a part, and over which the said currents differing in character are transmitted, means for dividing said working circuit into blocks, a signaling device in each block, a moving vehicle, means for differentiating the currents differing in character between the sig-

naling devices and the moving vehicle, and means for cutting a signal device out of circuit as a vehicle moves into a block."

In Young patent, No. 815,890, dated March 20, 1906, application filed February 21, 1903, divided and this application filed October 18, 1904, he says:

"Considered broadly, my improved system involves the employment of a power-current conveyed along the railway through a feeder-conductor and back to the power-generator through each rail separately as the means for operating the cars upon the railway, an alternating current segregated between the block-sections as the means for normally operating the signaling devices, and in utilizing the movement of the cars into and while in a block-section to shunt the alternating current around the signaling device of such block-section."

The claims in issue, 18 and 20 to 24, inclusive, read as follows:

"18. A system of automatic signaling comprising a source of power-current, a source of alternating signaling-current, a trackway divided into block-sections with each rail arranged to serve as a separate and independent return-path for the power-current, means for exciting an alternating difference of potential between the rails of each block-section, means for limiting the difference of potential excited in a block-section to that section, a signaling device in each block-section, and means controlled by the movements of the cars, which will control the movements of the signaling devices. * * *

"20. A system of automatic signaling comprising a source of power-current, a source of alternating signaling-current, a trackway divided into block-sections with each rail arranged to serve as a separate and independent return-path for the power-current, an induction device interposed between the source of signaling-current and the rails of each block-section for exciting an alternating difference of potential between said rails, reactance devices for limiting the difference of potential excited in a block-section to that section, a signaling device in each block-section, and means controlled by the movements of the cars, which will control the movements of the signaling devices.

"21. A system of automatic signaling comprising a source of power-current, a source of alternating signaling-current, a trackway divided into block-sections with each rail arranged to serve as a separate and independent return-path for the power-current, means for exciting an alternating difference of potential between the rails of each block-section, means for limiting the difference of potential excited in a block-section to that section, a signaling device in each block-section, and an induction device interposed between the rails and the signaling device adapted to be controlled by the movements of the cars and which will control the movements of the signaling devices.

"22. A system of automatic signaling comprising a source of power-current, a source of alternating signaling-current, a trackway divided into block-sections with each rail arranged to serve as a separate and independent return-path for the power-current, means for exciting an alternating difference of potential between the rails of each block-section, means interposed between the blocks which will freely permit the passage of the whole power-current back to the source of power-current but limit the difference of potential between the rails of a block-section to that section, a signaling device in each block-section, and means controlled by the movements of the cars, which will control the movements of the signaling devices.

"23. A system of automatic signaling comprising a source of power-current, a source of alternating signaling-current, a trackway divided into block-sections with each rail arranged to serve as a separate and independent return-path for the power-current, means for exciting an alternating difference of potential between the rails of each block-section, means interposed between the blocks which will freely permit the passage of the whole power-current back to the source of power-current, but limit the difference of potential between the rails of adjacent block-sections to the sections which at the time are unoccupied, a signaling device in each block-section, and means controlled by the movements of the cars, which will control the movements of the signaling devices.

"24. A system of automatic signaling comprising a source of power-current, a source of alternating signaling-current, a trackway divided into block-sections with each rail arranged to serve as a separate and independent return-path for the power-current, means for exciting an alternating difference of potential between the rails of each block-section, means which will permit the free passage of the power-current, but present high impedance to the passage of the alternating current from block-section to block-section, a signaling device in each block-section, and means controlled by the movements of the cars, which will control the movements of the signaling devices."

In Young patent, No. 815,891, dated March 20, 1906, application filed April 25, 1903, divided and this application filed October 18, 1904, he says:

"I will describe my invention as applied to a system employing a direct current for operating the car-motors and an alternating current for actuating the signaling devices, which system is intended as a modification of that described in my prior patents."

Claims 2 and 3, in issue, read as follows:

"2. A system of electrical distribution and signaling for railways, comprising two sources of electrical energy delivering currents differing in character, a system of conductors from each of said sources of energy, one of said systems of conductors electrically insulated from the current traversing the second system of conductors, and the second system of conductors having impressed upon its return-legs an alternating current, motor-cars driven from the second source of electricity, and signaling devices energized from the first source of electricity and adapted to be controlled by the movement of the motor-cars.

"3. A system of electrical distribution and signaling for railways, comprising two sources of electrical energy delivering currents different in character, a system of conductors from each of said sources of energy, one of said systems of conductors electrically insulated from the current traversing the second system of conductors, and the second system of conductors having impressed upon its return-legs a current different in character from that derived from the second source of electricity, motor-cars driven from the second source of electricity and signaling devices energized from the first source of electricity and adapted to be controlled by the movements of the motor-cars."

It is obvious that the claims of the Struble patents now being considered, but which were not issued until 1906, cover the same elements and combination described in the Young patents. The Young patents were issued first in 1904, but the Struble patents were first applied for. Now, it is presumed, until the contrary is shown, that the patent granted is for the invention claimed and described in the application therefor filed. *Loom Company v. Higgins*, 105 U. S. 580, 594, 26 L. Ed. 1177; *Walker on Patents*, § 190. There was an interference declared in the Patent Office between Struble and Young involving the very questions presented here. The examiner of interferences awarded priority of invention to Young, but this was reversed by the board of examiners in chief, and the decision of this board was affirmed by the commissioner. On appeal to the Court of Appeals, District of Columbia, this decision of the commissioner was affirmed. *Samuel Marsh Young, Appellant, v. Jacob B. Struble, Respondent*, Patent Appeal No. 597, opinion by Mr. Justice Van Orsdel, filed December 14, 1909 (34 App. D. C. 218). This thorough examination of the question of priority of invention as between Young and Struble by four tribunals, so to speak, examiner, board of examiners, commissioner and Court of Appeals, and the conclusion reached, while

not binding on this court, is entitled to great consideration and respect. I would not follow the judgment of the commissioner and the Court of Appeals did they not agree with my own judgment. I have carefully examined the authorities cited by the learned counsel for the General Company, the evidence, and the able argument presented, but am forced to the conclusion that the decision was right. While the opinion of Mr. Justice Van Orsdel does not embrace all that might be said, it covers all the salient and determining points and is quite conclusive.

The General Company says the interference is not relevant, but I fail to see why it is not. The General Company says: 'The two-rail system of the interference was not one with each rail carrying 50 per cent. of the current, and therefore having independent return rails. That the Young patents are limited to separate and independent return, each rail carrying approximately 50 per cent. of the current. That the interference was not between either of the Struble applications for patents, 819,322, and 819,323, and either of the Young applications for patents. That the application of Struble in interference was filed in 1904, and that "the interference involved different Young applications from those of the patents in suit." I do not see that Young limits his two-rail system to one where each rail must carry 50 per cent., or approximately 50 per cent., of the current. If he does, it is merely an improvement on (if patentable at all in view of Struble in case Struble was prior in the two-rail system) on Struble. If Struble was not first in this two-rail system applied to electric roads, Young was. If Struble was first and applied legally for a patent—that is, if his first application or amended application was good—it takes preference over Young, as the applications were ahead of Young's claims of invention. If Struble's claims are valid, they embrace the two-rail system for the return current, and, even if a patent to Young for an improvement insuring a return of approximately 50 per cent. of the current by each rail is valid, it is for an improvement merely, and does not justify the use of the two-rail system covered by Struble's patents. So we are turned back to the question of priority of invention. Now, what did the interference involve? The opinion of Mr. Justice Van Orsdel, after giving the prior art (steam roads), says:

"When the need for electrical signaling arose for use on electric railways, a different and more serious problem was presented. It was customary to utilize the rails as conductors for the return of the propulsion current. In adapting this system to electric railways, it was necessary, prior to the invention here in issue, to divide one of the rails into blocks insulated from each other, and confine the power current to the other rail, which was made electrically continuous. Thus only one rail could be used as a return conductor. This proved objectionable for many reasons, one of which being that, should the electrical connection formed by this single rail become broken at any point along the line, it would stop the operation of the entire road. To obviate this difficulty, what is known as the two-rail system was devised, in which an alternating current, differing in character from the direct current used for propulsion purposes, was employed in the track-signaling circuit. Inductive resistances, which would permit the direct or propulsion current to flow freely, but which would choke back the alternating or signaling current, were substituted for the insulation between the rails. By this means, it was possible to utilize both rails for the return of the track current to the generator. This latter system is the invention involved in this interference.

"The issue comprises 13 counts. Count 1 presents the invention in its broadest aspect, and reads as follows:

"1. In an electric railway signaling system, employing a closed signal controlling track-circuit, a plurality of block sections, one rail being divided into insulating sections corresponding to the block sections, a signal for each block section operable by an alternating current, a source of alternating current for said signals, a source of direct current for propelling the railway cars, and means for permitting the direct current to pass from one insulated rail section to another and for preventing alternating current from passing from one insulated rail section to another."

"Counts 2 to 6 and 10 to 12 are merely restatements of the same invention. Counts 8 and 9 contain the limitation that each rail separately serves as the return for the direct current, and counts 7 and 13 include reactance bonds connected across the rails. Count 7 is as follows:

"7. In an electric railway signaling system employing a closed signal controlling track circuits, a plurality of block sections, one rail being divided into insulated sections corresponding to the block sections, a signal for each block section operable by an alternating current, a source of alternating current for said signals, a source of direct current for propelling the railway cars, means for permitting the direct current to pass from one insulated rail section to another and for preventing alternating current from passing from one insulated rail section to another, and one or more inductive bonds connecting the rails."

"Appellant filed his application April 25, 1903; while appellee's application was not filed until March 4, 1904. The earliest date alleged by appellant for conception and disclosure of the invention is December, 1902. Appellee has introduced in evidence two applications, one filed on November 16, 1901, and the other on March 12, 1902, which he claims disclose, as originally filed, the invention here in issue; or, if not, it is disclosed by certain amendments filed in April, 1902. On the other hand, it is contended by appellant that these applications relate to the one-rail system, and neither before nor after amendment disclose the invention in controversy; and that, conceding that the amendments of April, 1902, do disclose the invention, such disclosure would constitute new matter, and therefore not properly made in these applications. The application of November, 1901, contained a fragmentary view (Fig. 3), showing the contiguous ends of a pair of rails with a helix connecting them and described as 'a detail view of the rail joint.' The only reference made to this figure in the specification, and which would suggest a two-rail system, is the following: 'As an alternating current is employed in the track-circuit, resistance 5° may be substituted for the insulation.' Whether this statement discloses the elements of the counts of the issue we need not discuss, for on April 8, 1902, the following amendment was filed, which was not considered by the examiner of interferences in awarding priority to appellant, and which was held by the majority of the board of examiners in chief and the commissioner, with whom we agree, to unquestionably describe the invention: 'As an alternating current is employed in the track-circuit provision may be made for utilizing both lines of rails as return conductors for the direct or motor current by connecting the insulated or electrically separated ends of the rail sections, 2, by inductive resistances, 5°, as shown in fig. 3. As is well known, these resistances will prevent the flow of alternating currents through them, but will not present any material resistance to the flow of direct currents.'

"The following claims also formed part of this amendment:

"3. In an electric railway signaling system, the combination of a series of rail sections having adjacent ends insulated or electrically separated from each other, and inductive resistances connecting the rails of adjacent sections whereby alternating currents are confined to the track-circuits and the direct or motor-currents are permitted to flow from rail section to rail section.

"4. In an electric railway signaling system, the combination of a series of rail sections having adjacent ends insulated or electrically separated from each other, said rail sections forming portions of track circuits, a source of alternating currents included in the track circuits, inductive resistances connecting adjacent ends of rail sections and forming a path from section to section for direct currents, and a source of direct currents having one pole connected to the lines of rails, substantially as set forth."

"In the course of the proceedings in the Patent Office, the question of new matter was passed upon by three primary examiners, all of whom agreed that

the original specification and drawings warranted the amendments. * * * But counsel for appellant contends that this amendment should not be considered, for the reason that no evidence was presented by appellee to show that he conceived the subject-matter of the amendment prior to the filing of the November application. We are not impressed with this contention. The amendment was accompanied by a supplemental oath setting up that fact. Appellee's sworn statement furnishes prima facie proof of its truth, which must be overcome by evidence to the contrary. No such evidence appears in this record. * * * It must therefore be held that appellee has proven conception and disclosure of this invention at least as early as April, 1902, eight months prior to the date claimed by appellant. Whether or not these earlier applications, as contended for by counsel for appellee, and as found by the commissioners and board of examiners in chief, constitute a constructive reduction to practice of the invention in issue, we may pass without opinion. We have concluded that they fully establish conception and disclosure, and, if appellee was exercising due diligence between December, 1902, the time appellant entered the field, and March 4, 1904, appellee's filing date, he must prevail. During this period appellee was prosecuting the earlier applications, which contained claims to the subject-matter of this issue; and it must be held that he was justified in awaiting the final rulings of the Patent Office in order to determine the advisability of filing a separate application. But it is contended on behalf of appellant that appellee was not prosecuting these applications with diligence, in that he took no action between the date of the amendments, April 8, 1902, and January, 1903. This, we think, is not an unreasonable length of time in which to amend an application, especially in view of the fact that one year is allowed before an application is declared abandoned."

It seems clear, if the Court of Appeals was talking to the point involved, that the commissioner and court decided the question of priority of invention of this two-rail return system in combination with the use of the alternating current for signaling and direct current for propulsion both currents using the same rails, the one current not mixing, so to speak, with the other, and the use of a signal and signaling apparatus capable of distinguishing between the two currents and answering to the one and not to the other, etc., all in electrical signaling on electric railroads. The court points out the dates of filing by Struble and Young and also the amendments of Struble to his applications for his patents now in suit, and discusses and determines his right to make such amendments. I cannot read that opinion other than as deciding between Struble and Young that Struble was the first to invent, claim, etc., and that he had the right to make and file the amendments now challenged.

But the General Company contends that it has introduced evidence not before the Patent Office, Commissioner of Patents, and Court of Appeals, and that in the light of this evidence the decision of this court should be the other way. Reference is made to the Stillwell letter and the Westinghouse reply. It is quite true that the Stillwell letter of April 1, 1902, proposes the use of both rails for a return of the propulsion current, the use of an alternating current for signaling, and the use of inductive bonds. The letter has considerable to say about the bond. April 4, 1902, Osborne, of the Westinghouse Company, to whom the Stillwell letter was sent, wrote that he would put the matter in the hands of their engineers, and April 15th, wrote that Mr. Scott had been directed to fully investigate the scheme, and that a conference was had with a Mr. Schreder and other engineers of the Union Switch & Signal Company, but I find nothing that in-

volves Struble in this matter, or which indicates, much less proves, that he gained his inspiration or knowledge from the Stillwell letter. Really Osborne's letter of April 15th is not a declaration that a two-rail return system has been pronounced inoperative, but rather refers to the proposed bond for use in such a system for the uses desired. It is true that Struble's amendments closely followed the Stillwell letter, but this is far from proving that Struble saw the letter and made his amendments because thereof or of the information therein given or suggestions made. True it may have been so, but such a conclusion would be speculation. I do not see that it would serve any useful purpose for me to go into all the arguments, etc., relating to this part of the controversy. I have read all the evidence and all the briefs, additional briefs, and answering briefs, and, after long deliberation, have arrived at the conclusion stated above. The question of due diligence on the part of Struble in regard to his invention is involved. It seems to me that, in view of the importance of the matter, the necessity for experimentation, interferences, etc., that all diligence was exercised.

These being my conclusions, there will be a decree in favor of the Union Switch and Signal Company, complainant in the suits brought by it against the General Railway Signal Company, and in favor of the Long Island Railway Company in the suit brought against it by the General Company and Young. I think the successful party in each case should have costs. In view of the interests involved, and assuming the defeated parties will desire to take an appeal, the issue of an injunction will be suspended pending such appeal or appeals, provided same is taken within 30 days and prosecuted with diligence, but a suitable bond should be given to pay all costs and damages awarded by the final decree in case of affirmation, and suitable orders to that effect may be submitted with the proposed decrees. This will save formal applications.

SPIRELLA CO. v. NUBONE CORSET CO.

(Circuit Court, W. D. Pennsylvania, June 7, 1910.)

No. 2.

1. PATENTS (§ 312*)—INFRINGEMENT—EVIDENCE.

The employment by a defendant as its superintendent of a former employé of complainant, familiar with its patented article, and the manufacture by defendant of an article very similar to complainant's under the claimed protection of a patent subsequently obtained by such superintendent, are facts which would determine the issue of infringement in favor of complainant if otherwise doubtful.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 543-549; Dec. Dig. § 312.*]

2. PATENTS (§ 328*)—INFRINGEMENT—CORSET STAY.

The Beeman patent, No. 507,875, and the White & Rider patent, No. 643,444, each for a dress or corset stay of wire, construed, and both held infringed by the corsets made by defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. PATENTS (§ 283*)—INFRINGEMENT—DEFENSES.

That a defendant is operating under another patent does not avoid liability for infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 448-452; Dec. Dig. § 283.*]

4. PATENTS (§ 239*)—INFRINGEMENT—COLORABLE CHANGES.

Infringement is not avoided by making in a plurality of pieces something which under the patent consists of a single piece.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 377, 378; Dec. Dig. § 239.*]

In Equity. Suit by the Spirella Company against the Nubone Corset Company. Decree for complainant.

F. W. Winter, for complainant.

Hugh C. Lord, for defendant.

ORR, District Judge. Complainant seeks to restrain infringement of letters patent of the United States No. 507,875, issued to Marcus M. Beeman on October 31, 1893, and of letters patent of the United States No. 645,444, issued to John P. F. White and Samuel S. Rider, on March 13, 1900, each of which is for an improvement in dress or corset stays. The bill is in the usual form, and prays the customary relief. Although the answer denies all the allegations of the bill, excepting the issuance of the patents and the corporate existence and domicile of the complainant, yet the validity of neither patent is attacked in the proofs. The real defense is that the defendant's stays and corsets do not embody anything which was novel with either Beeman or White and Rider, in view of the prior art and the proceedings in the Patent Office resulting in the issuance of the said patents. In brief, the only defense is noninfringement. The complainant being the owner of said two patents is using them jointly and separately in the manufacture of corsets. It has met with great success in the sale of its product, which has always embodied the construction of the Beeman patent, and for some years past has embodied the essential features of the White & Rider patent. The utility of the inventions became known to many, among whom was John R. Dean, who for perhaps two years was employed by complainant, and who while in such employ made a corset stay but very slightly different from those of complainant. He subsequently procured letters patent of the United States No. 868,763, to protect his stay, became connected with defendant corporation, and is now its superintendent. The stays made by the defendant are claimed by them to be protected by the Dean patent. This employment of Dean and use of his patent would throw the scales in favor of complainant if the issue were doubtful. *Regina Music Box Co. v. Paillard* (C. C.) 85 Fed. 644; *Kelsey Heating Co. v. Spear Stove & Heating Co.* (C. C.) 155 Fed. 976. An examination of the patents shows beyond doubt that defendant's stay is a mere evasion of complainant's patents.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Beeman Patent.

In his specification Beeman says:

"My invention relates to the construction of dress stays or stiffeners for corsets and other garments." "My object is to produce the stays or stiffeners for corsets and other garments in which the elasticity, usually imparted by the whalebone, is produced by a round or flattened wire bent as herein-after described and shown so that the stay may be bent laterally or otherwise, at the same time assuring its speedy return to its normal position."

Complainant's expert, Mr. Wadsworth, has carefully and satisfactorily analyzed the patentee's description of a particular form of stay in the following language (*italics his*):

"A is the flexible metallic body, consisting of a continuous piece of spring wire, bent laterally forward and back, as shown in Figs. 1 and 2, and in such manner that (1) the eyes or openings between the bands are circular at their outer ends; and (2) taper in the line of their length, or traverse of said body; and are formed (3) by bending the wire first to form the circular outer ends and then bending the wire toward the starting end of said body—*so that it touches and overlaps the side of the adjoining round bend of said wire. This bending of the wire so that the sides of the eyes on both sides of the body are in close contact with and overlap each other gives each side of an eye a bearing upon the side of the adjoining eye, whether the body is bent (1) flatwise, (2) forward or back, or (3) laterally and edgewise.*

"The overlapping of the eyes one upon each other (1) *readily permits the sliding of the eyes, one over the other*, which tends to decrease the length of the radius of the curve when the body is bent in any direction, forward, back, or sidewise, and (2) *absolutely prevents any short bends and consequent breakage, or (3) consequent destruction of the resiliency of the spring*, at the apex of the short bend, which causes the body to stay bent; and (4) *on the other hand, largely increases the resilient action of the wire*, (5) *stiffens the body*, (6) *prevents the wire from becoming 'set' when the body is bent*, and thus causes the body to always spring back to its normal position.

"A covering, 1, consists of a piece of fabric pasted or secured upon the front or back, or both, having a protecting end adapted to be folded over the end of the spring body, as a protection, as shown in Fig. 3."

The claim of the patent is as follows:

"As an improved article of manufacture, a dress stay comprising a body, consisting of a wire bent to form a series of oppositely disposed pear-shaped eyes, each side of which normally bears against and partly overlaps the adjacent side of the adjoining eye, and a protecting covering secured to and inclosing said body as specified."

The prominent feature of this claim is the overlapping of the eyes. It is clear that none of the 22 United States patents, 5 British patents and 2 German patents set forth in the amended answer, so far as they are embodied in the proofs, indicate anticipation either of this prominent feature of the Beeman patent or of the prominent feature of the White & Rider patent hereinafter mentioned.

Defendants seriously contend that the stays made by them do not infringe because they are made with two or three wires, while complainant is limited in construction to one wire. They insist that there is no infringement because the loops in their wires are not pear-shaped, and that Beeman limited himself by amendments to his claim, as shown in the file wrapper and contents, to a particular shaped eye, "pomological" in character. It is plain that "pear-shaped" is purely figurative. What Beeman actually described was a loop longer than

it was broad. To have the loops made from a single wire, and to have them oppositely disposed would result in that kind of a loop. Beeman did not limit himself to pear-shaped loop or eye. Defendants also state that while their stays have oppositely disposed loops or eyes, which overlap adjacent loops or eyes, yet there is no infringement because their overlapping loops or eyes are not overlapping loops or eyes of the same but of different wires. These and other contentions less strongly urged are wholly without merit. Defendants are using the main features of the Beeman patent, to wit, wire bent to form a series of oppositely disposed loops or eyes, each side of which normally bears against and partly overlaps the adjoining loop or eye.

White & Rider Patent.

As it is not insisted that the subject-matter of claim 2 of this patent is present in any of the stays made by defendants, claim 1 only is to be considered. It is as follows:

"1. A garment stay or stiffener formed from a single piece of wire capable of being flexed in all directions, and comprising a series of flattened loops or convolutions overlapping one another, said stay or stiffener being bent longitudinally between its edges, whereby the said overlapped portions of the convolutions are brought into more intimate contact with each other and the stay or stiffener rendered more rigid, substantially as described."

The prominent feature of this claim is the longitudinal bending of the overlapped loops. Defendants here again insist that their stays do not infringe the White & Rider patent because they are not made from a single wire, and because their loops, while overlapping, are not overlapping loops of the same but of different wires. They further insist that there is no infringement because their stays while composed of flat loops are not composed of flattened loops.

They further contend that the longitudinal bending of the stay does not render the stay more rigid. I find that fact against them. The defendant's stays (both the two and three wire stays) are concaved or bent longitudinally between their edges. It is seen by a cursory glance along any one of them. In this they infringe the White & Rider patent, prior to which there was nothing in the art to describe or suggest the longitudinally concaved feature so apparent. Defendants are making a two-wire stay and a three-wire stay. The first is clearly described in the Dean patent. The latter, while somewhat different, is the equivalent of the former. This defendants should not deny for they stamp all their stays with the date of the Dean patent. That defendants are operating under a patent does not relieve them from infringement. *Smith v. Uhrich* (C. C.) 94 Fed. 865, and *Morley Sewing Machine Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299, 32 L. Ed. 715, are but two of many cases sustaining this principle. It seems unnecessary to cite authorities to the effect that infringement is not avoided by making in a plurality of pieces something which had been made in a single piece. If authority be wanted, it may be found in *Strobridge v. Lindsay* (C. C.) 6 Fed. 510; *Kelsey Heating Co. v. Spear Stove & Heating Co.*, supra; *Sharp & Smith v. Physicians and Surgeons* (C. C.) 174 Fed. 424.

The improvements both of Beeman and of White & Rider were broadly stated or shown in the original application and were never receded from. The complainant, being the assignee of both patents, is entitled to have included within the claims of each, all wire stays having the above stated novel feature of the respective patents. Defendants' stays are within the claim of the Beeman patent and claim 1 of the White & Rider patent. Complainant is entitled to the relief sought.

Let a decree be drawn in conformity with this opinion.

GREENWALD et al. v. WEISS.

(District Court, W. D. Wisconsin. June 7, 1910.)

(No. 23.)

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—CHEESE STIRRING APPARATUS.

The Deal patent, No. 772,701, for a cheese stirring apparatus, was not anticipated and is valid, being for a new combination of old elements which act together to produce an improved result by securing a more uniform stirring of the milk in making brick or Swiss cheese, and shortening the operation, also, *held* infringed.

2. PATENTS (§ 81*)—PATENTABILITY—PRIOR USE—BURDEN OF PROOF.

To avoid a patent on the ground of prior use, the burden rests on the defendant, and the evidence must be clear and convincing.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 104; Dec. Dig. § 81.*]

In Equity. Suit by Henry C. Greenwald and John D. Deal, as co-partners, against Ernest Weiss. Decree for complainants.

H. N. B. Caradine and Sam T. Swansen, for complainants.

Rufus B. Smith, for defendant.

SANBORN, District Judge. This is a bill filed September 8, 1908, for the infringement of patent No. 772,701, applied for February 15, 1904, issued to complainant Deal October 18, 1904, for an improvement in cheese stirring apparatus. The inventor thus describes it:

"The invention relates to apparatus used in the manufacture of cheese; and its object is to provide a new and improved stirring apparatus more especially designed for stirring milk in the cheese kettle and arranged to allow of moving the kettle over or off the fire without interruption of the stirring process."

Counsel for complainant describe the process as follows:

"In the making of brick and Swiss cheese, it is necessary that the milk be heated over a fire at a uniform temperature, for a period of about two hours, and during that process that the milk be continually stirred. Prior to this invention, the stirring had been done by hand and required the service of one man for about two hours at each cheese making. As the court probably knows, in factories making brick and Swiss cheese, cheese is made twice a day, and the season lasts about six months. This machine takes the place of the hand stirring, and is naturally capable of stirring more evenly, without being affected by either heat or exhaustion, and in addition

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

is so constructed that the kettle can be swung off the fire without interrupting the process of stirring, and swung back on the fire as may be desired. The stirring, however, is uninterrupted and continuous."

The first three claims are for combinations of the elements of the device specifically claimed in counts 4 and 5.

Claim 4:

"A stirring apparatus comprising a kettle, a stirrer in the kettle, a swinging support for the kettle, to move the latter over or from the fire, and a driving device for driving the stirrer in the kettle, arranged to drive the stirrer in any position the kettle may be in, the said driving device consisting of a gearing on the said support, connected with the shaft of the said stirrer, a counter-shaft, and a self-adjusting connection between the said counter-shaft and the said gearing, as set forth."

All the elements of the combination are old, but the latter is new, with a useful result, in an improved way. When the kettle is swinging off and on the fire, in order to keep a uniform temperature, all the elements act together to improve and shorten the period of the cheese stirring operation, secure uniform heat, and thus get better results. Even within the strict rule of *Hailes v. Van Wormer*, 20 Wall. 368, 22 L. Ed. 248, *Reckendorfer v. Faber*, 92 U. S. 347, 23 L. Ed. 719, and *Pickering v. McCullough*, 104 U. S. 310, 26 L. Ed. 749, *Matthews, J.*, this combination is patentable. By the doctrine of those cases the combination must produce a different force or effect or result in the combined forces or processes from that given by their separate parts. "There must be a new result produced by their union. If not so, it is only an aggregation of separate elements." "All the constituents must so enter into it, as that each qualifies every other." This rule has been somewhat broadened and modified by later cases. *Stephenson v. Brooklyn*, 114 U. S. 149, 5 Sup. Ct. 777, 29 L. Ed. 58; *Dane v. Chicago, etc., Co.*, 131 U. S. cxxvi, App'x, 23 L. Ed. 82; *National, etc., Co. v. American, etc., Co.*, 53 Fed. 367, 3 C. C. A. 559; *Brinkerhoff v. Aloe*, 146 U. S. 515, 13 Sup. Ct. 221, 36 L. Ed. 1068. While the device under consideration is simple, yet it comes nearer to answering Mr. Justice Matthews' narrow rule than thousands of combinations which have been sustained as novel and useful.

In regard to the defense of anticipation by defendant's prior use of the device, the evidence falls far short of being satisfactory. Such evidence, in order to avoid a patent, must be clear and convincing. There is a heavy burden of proof on the defendant. *Coffin v. Ogden*, 18 Wall. 120, 21 L. Ed. 821. "Every reasonable doubt should be resolved against him." *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017. The evidence tends to show that the device made by defendant's brother was not constructed until after Deal's application was filed, and it had neither a sleeve nor union joint.

As to infringement, there is only a faint attempt at denial. It is clearly shown. Complainants are entitled to decree for a perpetual injunction, and for damages and profits.

OEHRING et al. v. WILLIAM GARDAM & SON.

(Circuit Court, S. D. New York. April 30, 1910. On Rehearing, July 27, 1910.)

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—MULTIPLE DRILL.

The Oehring patent, No. 560,171, for a multiple drill, claim 3 was not anticipated, and discloses patentable invention in the element of the two-part bracket-support for each drill-carrying spindle. The remaining claims are void for anticipation. Claim 3 also *held* infringed.

In Equity. Suit by August J. Oehring and the Pratt & Whitney Company against William Gardam & Son. Decree for complainants.

Poole & Brown and Briesen & Knauth (Arthur v. Briesen and C. Clarence Poole, of counsel), for complainants.

Philipp, Sawyer, Rice & Kennedy (M. B. Philipp and James Q. Rice, of counsel), for defendant.

HAZEL, District Judge. This suit was brought to restrain the infringement of United States letters patent No. 560,171, dated May 12, 1896, issued to complainants for an improvement in a multiple drill. The object of the invention was to provide a machine of the multiple drill type to enable drilling simultaneously a plurality of holes of varying depth arranged in a horizontal, vertical, or curved line or in a circle. To accomplish this, it was necessary to provide means to enable lateral or axial adjustability of the drill spindles, and to regulate the depth of the holes to be drilled. Machines having single drills or a series of rigid drills for drilling in hard rubber, wood, and metals were old at the date of the patent in suit. To operate multiple drills, a movable table was necessary in one type of drill and in another the drills were so arranged and affixed to the spindle head as to enable vertical adjustment only. The proofs show that there were other multiple drills which were used for a particular class of workmanship, but they were costly and limited in their field of operation. Indeed, such drills were not adapted to perform the functions of the Oehring drilling machine, which concededly is capable of doing the work of the first-mentioned machines and those of special construction. The machines of the prior art were so constructed that in operation the table attachment received the thrust of the drill as it came in contact with the drilled material, while in the patent in suit a table support for the drill is not used. In its place the patentee adopted a rigid frame and pivoted a series of sliding brackets in the interior thereof, each bracket being constructed to hold a drill and capable of sliding or moving to a desired direction. The brackets are normally in a horizontal position, and include in their construction a vertical auxiliary bracket which is movable and designed to receive the strain or thrust of the drill at its lower end, and, in addition thereto, it permits raising and lowering the drill to facilitate drilling in uneven material or holes of varying depth.

The defendant, while admitting that the earlier multiple drills do not precisely disclose the complainants' structure, insists that they point out

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the way to the skilled mechanic for adapting the elements employed by the patentee to produce results of the kind described in the evidence. The drilling machine used since 1887 in the factory of Gardner Governor Company, the defendant's closest reference, has received my careful attention. It has four adjustable drills capable of simultaneous use in metals or wood, and concededly it is capable of drilling holes of varying depths and at varying positions within the field of the slot through which the drills project. The spindles to which the drills are attached are driven by a telescopic shaft, and the drill can only be operated obliquely with the slotted opening in the frame or table. Prior to the patent in suit, it was the custom to pivotally mount drills in a slotted bracket so as to enable sliding them in any desired direction. The patent to Hunter, No. 101,466, April 5, 1870, shows a bracket in combination with a drill which may be adjusted in various directions within the pivotal range of the bracket, and in the patents to Lauback, No. 41,516, of 1864, and No. 46,478, of 1865, and to Cottrell, No. 144,745, of 1873, similar structures are shown with flexible driving shafts. The expert witness, Freeman, for the defendant, supplementing the exhibit patents of the prior art and the Gardner machine, testified that in his opinion the patentee merely adapted old and well-known mechanical expedients to enlarge the range of adjustment of the drill spindle carrying bracket. In this view I think he is right except as to the element of the two-part bracket-support contained in claim 3. Claim 3 reads as follows:

"3. In a multiple drill, the combination with the drill-carrying spindles and their flexible driving-shafts, of a frame and a two-part bracket-support for each spindle, one member of which is horizontally adjustable on the frame, and the other member of which is vertically adjustable on said first-mentioned member and carries the spindle, substantially as set forth."

The elements of said claim, as has been indicated, except the two-part bracket-support, were old and are disclosed in the patents herein-before mentioned. The open frame of the Oehring patent upon which the brackets are adjustably fastened is sufficiently indicated by the Morgan patent, No. 238,244, and the Woodcock & Gwyn machine, to deprive the patentee's frame construction of novelty. The alteration or improvement made by the patentee principally exists in the fact that he has abandoned the table or plate which in prior structures received the drill in its downward motion, and in its place he uses an open frame in which the drills are contained and extends such drills through the slides in the movable brackets. To enable such brackets to resist the upward thrust of the drill, he constructed at the front end of the horizontal bracket where the spindle is held in place an auxiliary bracket which performs the double function of receiving the thrust at its bottom, and also enables adjusting the height of the drill point. This improvement, though narrow and limited, nevertheless was an advance in the art of sufficient importance to entitle the patentee to a construction of the claim broad enough to include a feature which manifestly operates to perform the function of the Oehring drill.

Does the defendant's machine infringe the patent in suit? All the elements of claim 3 are embodied in defendant's structure including the two-part bracket-support for each spindle. The bracket hold-

ing the drilling spindle is attached horizontally to the inner side of the open frame as in complainant's structure by a screw or bolt. The drill spindle supporting bracket has a vertical adjustment on the front end thereof which is constructed in two parts, and in such a manner as to enable positioning the drill spindle in relation to the open frame at different heights. By this construction defendant's bracket receives the thrust in the upward and downward movements of the drill as in that of complainants, and, even though its vertical adjustment is slight, in operation the drill is capable of performing all the functions of the Oehring drill.

The defense of laches has been considered, and is thought insufficient. Complainant may have a decree and accounting for infringement of claim 3. The other claims in issue are thought anticipated by the patents hereinbefore mentioned and the Gardner Governor Company machine.

On Rehearing.

Application for rehearing on newly discovered evidence is granted on condition that the defendant pay the entire expense of taking and transcribing such testimony, which shall solely relate to the Dwight drilling machine, and pay complainant's counsel \$100 to defray his traveling expenses for attending the taking of such testimony in appearing on this motion. Testimony to be taken within 30 days unless otherwise stipulated by parties in interest.

So ordered.

GREENWALD BROS. v. ENOCHS et al.

(Circuit Court, E. D. Pennsylvania. June 6, 1910.)

No. 209.

PATENTS (§ 328*)—NOVELTY—SKIRT.

The Feuchtwanger patent, No. 662,714, for a skirt consisting of three parts, the lower part being of nonelastic material, the hip portion of a material having some elasticity, and the waistband of still more elastic material is void for lack of patentable novelty.

In Equity. Suit by Greenwald Bros. against William S. Enochs and others. Decree for defendants.

Fraley & Paul, for complainant.

Stanley Folz and Horace Pettit, for defendants.

J. B. McPHERSON, District Judge. The patent in suit, No. 662,714, is for an improvement in skirts. The specification describes the invention as follows:

"My invention relates to improvements in skirts; and the object of the same is to produce an underskirt which will fit neatly over the hips without wrinkling and be secured snugly about the waist. To accomplish this object, I construct my skirt of three parts, each of a different kind of material. The first part or lower skirt portion is of nonelastic material, the second or hip portion is of material with a medium modulus of elasticity, and the third portion or waistband is of material having a large modulus of elasticity.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"The novel construction is fully described in this specification and claimed and illustrated in the accompanying drawings, forming a part thereof, in which

"Figure 1 is a side view of my skirt. Fig. 2 is a modified form of the same. Fig. 3 is a rear view of the preferred form of my skirt.

"Like numerals of reference designate like parts in the different views of the drawings.

"The numeral 1 designates the skirt portion of my garment, which is made of nonflexible material and uniformly tapered from the bottom up, as is usual. This skirt is secured to a hip portion 2, made of elastic material, such as jersey or other kind of goods of moderate elasticity. This portion is wider at the bottom than at the top and is designed to fit snugly and smoothly the hips. With this end in view the sides 3 may be slightly rounded; but in general the elasticity of the material is sufficient to insure a perfect fit. This hip portion is open down the back and provided with a row of fasteners or buttons, 4; but these may be dispensed with, as is done in the modified form shown in Fig. 2, and the portion 2 made continuous.

"The third portion of my skirt is the waistband 5, which is constructed of some material having a large modulus of elasticity, such as silk elastic ribbon. This band is cut to correspond with the opening in the hip member, 2, the ends being united by a clasp or fastener of any suitable kind; but it may be made integral, as in the modified form shown in Fig. 2. This band fits tightly the waist.

"I do not wish to be limited as to details of construction, as these may be changed in many particulars without departing from the spirit of my invention."

The drawings show a skirt in conformity with the specification, the "hip portion" being only a few inches in length and barely covering that part of the body. The two claims are practically identical and only the first need be considered.

"1. In a skirt, the combination, substantially as described, of a hip portion of elastic material, a skirt portion secured to the bottom edge of said hip portion, and a band of greater elasticity than said hip portion, said band being secured to said hip portion at a point near the upper edge thereof."

The complainant does not make the skirt shown in the drawings, but has elongated the "hip portion" until it reaches at least to the knee, and has shortened the "skirt portion" until it has become a mere flounce. The defendants' skirt is of a similar construction, and infringes unless the patent must be confined to the specific construction shown in the drawings, or is altogether invalid. The defendants take both positions, declaring that they do not use either the hip portion or the skirt portion as these elements are specifically described in the patent, and therefore that no infringement of that combination has been shown. There is force in this position, but I do not pass upon it, believing that the patent should be declared void for want of patentable novelty. To my mind this is so clear that it is not easy to give the reasons for it. I am well aware that patentable novelty is a subject upon which minds may readily differ, but it seems to me that a brief inspection must produce the conviction that the patentee displayed no more than the skill of the dressmaker's calling. In my opinion the so-called combination is a mere aggregation of old elements. If there is anything novel about the invention it consists in the "hip portion," but even that seems to be an obvious device. It can hardly be said to require invention to take advantage of the well-known fact that elastic material will cling closely to the lines of the figure.

A decree may be entered dismissing the bill, with costs.

UNITED STATES v. GEDDES.

(District Court, S. D. Ohio, E. D. August 19, 1903.)

COMMERCE (§ 27*)—SAFETY APPLIANCE ACT—VIOLATIONS—"ENGAGED IN INTERSTATE COMMERCE."

Safety Appliance Act Cong. March 2, 1893, c. 196, § 6, 27 Stat. 532 (U. S. Comp. St. 1901, p. 3175), as amended by Act Cong. April 1, 1896, c. 87, 29 Stat. 85, requiring common carriers "engaged in interstate commerce by railroad" to equip their cars with automatic couplers, etc., must be construed with the "Act to regulate commerce," etc., approved February 4, 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) as thereafter amended, and known as the "Interstate Commerce Act" (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1149]), which relates to "any common carrier engaged in the transportation of passengers or property wholly by railroad," etc., "under a common control, management, or arrangement, for a continuous carriage or shipment" from one state to another, such laws being part of one scheme, which is limited strictly to interstate commerce, and not intended to affect railroads operated wholly within a state independent of outside connections, and it is only when there is an arrangement with outside carriers for a continuous carriage from one state to another that the act applies; and hence, where the difference in gauge between defendant's line and that of a connecting carrier prevented a continuous carriage in the same car, and there was no through bill of lading and no conventional division of through charges, each company receiving its own charges according to its own rates, defendant was not "engaged in interstate commerce" within the meaning of the act though the goods carried were intended for shipment beyond the state.

[Ed Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

Duty of railroad companies to furnish safe appliances, see note to *Felton v. Bullard*, 37 C. C. A. 8.]

Suit by the United States against one Geddes. Judgment for defendant.

See, also, 131 Fed. 452, 65 C. C. A. 320.

William F. Bundy and John M. Gitterman, for the United States.
W. F. Hunter, for defendant.

THOMPSON, District Judge. This suit on behalf of the United States was brought by the United States district attorney for this district to recover penalties under section 6 of the act of Congress approved March 2, 1893 (Act March 2, 1893, c. 196, 27 Stat. 532 [U. S. Comp. St. 1901, p. 3175]), as amended April 1, 1896 (Act April 1, 1896, c. 87, 29 Stat. 85), known as the "Safety Appliance Act." It is alleged in the petition that the defendant is a common carrier, engaged in interstate commerce by railway among the several states of the Union and connecting said interstate commerce between the towns of Bellaire and Zanesville, in the state of Ohio, and it is charged that as such common carrier it used cars in interstate commerce which were not provided with the safety appliances required by said acts of Congress; and for specific violations of these acts in that respect, set forth in the petition, judgment is asked for \$400.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r. Indexes

The acts of Congress referred to must be construed in connection with the "Act to regulate commerce," etc., approved February 4, 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), as thereafter amended, and known as the "Interstate Commerce Act" (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1149]). To that act we must look in order to ascertain what is meant by the words "engaged in interstate commerce by railroad," as applied to a common carrier by the first section of the act of March 2, 1893. Manifestly the common carrier described in the act of March 2, 1893, is also the one which is more fully described in the original act as—

"any common carrier engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia."

These laws are parts of one scheme and in furtherance of the same general purpose, which is limited strictly to interstate commerce and was not intended to affect railroads operated wholly within a state independent of outside connections, and it is only when there is an arrangement with outside carriers for a continuous carriage or shipment from one state or territory to another state or territory that such railroad becomes subject to the operation of these statutes.

In the case of Cincinnati, New Orleans & Texas Pacific Railway v. Interstate Commerce Commission, 162 U. S. 193, 16 Sup. Ct. 700, 704, 40 L. Ed. 935, it was said that, when goods shipped under a through bill of lading from a point in one state to a point in another are received in transit by a state common carrier under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce. In that case it appeared that the complainants shipped their goods, at first-class rates, by through bills of lading, from Cincinnati to Atlanta, to Social Circle, and to Augusta; that through rates of \$1.07 per 100 pounds were charged to both Atlanta and to Augusta, of which the Cincinnati, New Orleans & Texas Pacific Railway Company received 55.7 cents, the Western & Atlantic 22.9 cents, and the Georgia Railroad Company 28.4 cents. Social Circle is a local station on the Georgia Railroad, 52 miles east of Atlanta, and 119 miles west of Augusta. When goods were shipped to Social Circle, the complainants had to pay \$1.07 per 100 pounds, of which 75.9 cents went to the Cincinnati, New Orleans & Texas Pacific Company, 31.1 to the Western & Atlantic, and 30 cents to the Georgia; the said amount of 30 cents per 100 pounds being the local charge made by the Georgia Company on similar freight carried by it from Atlanta to Social Circle. Now, as will be seen, under the "arrangement" between these three railroad companies each participated in a division of both rates, and that in the division in the rates to Social Circle each received more than it did in the division of the rate to Atlanta or Augusta, and, although in the division of the rate to Social Circle the Georgia road received its

regular local charge, yet the court, in view of the arrangement covering both rates, properly held that the mere fact that the division of the rate to Social Circle resulted in allowing the Georgia road to receive its usual local charge did not withdraw the traffic from federal control.

In this case, however, the evidence fails to show any arrangement between the defendant and the Baltimore & Ohio Railroad Company, and fails to show any arrangement between them other than for the collection at the point of final destination of the freight charges due both companies, and weekly settlements of such collections, and the payment of any balance found to the company to which it may belong. There was no through bill of lading, and no conventional division of through charges; but each company received its own freight charges in accordance with its own rates. The defendant delivered the goods on its platform at Bellaire, and the Baltimore & Ohio Railroad Company, when notified, removed them to its own cars, and the defendant did the same with goods carried to Bellaire by the Baltimore & Ohio Railroad Company. The difference in gauge prevented a continuous carriage in the same car from the point of original shipment to the point of final destination. The goods were delivered and received by the defendant as a connecting carrier, and there can be no inference from that fact alone of an arrangement between the two companies for a continuous carriage or shipment of the goods within the meaning of the interstate commerce laws. In the absence of special contract or "arrangement," the common-law duty of the defendant as a common carrier was only to safely convey over its own route and safely to deliver to the consignee or to the next connecting carrier, and the evidence fails to show any "arrangement" between the two companies for a continuous carriage or shipment other than such as is imposed by the common law. See *Myrick v. Railroad Co.*, 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325, and *Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791.

Notwithstanding the eggs were destined to be carried into another state and the defendant knew that fact, yet they were to be so carried by another independent agency, and the defendant's connection with their carriage ended within the state of Ohio when it delivered them to the Baltimore & Ohio Railroad Company as the next connecting carrier and the coils of rope were received for carriage by the defendant as the next and as an independent carrier for carriage and delivery within the state.

Judgment will be entered for the defendant.

UNITED STATES V. OREGON SHORT LINE RY. CO.

(District Court, D. Idaho. June 4, 1908.)

1. RAILROADS (§ 254*)—FEDERAL SAFETY APPLIANCE ACT—VIOLATION—PLEADING—SUFFICIENCY.

In an action against a railway company for penalties for violating the safety appliance acts (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]; Act April 1, 1896, c. 87, 29 Stat. 85; Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1909, p. 1143]), the government need not allege that the company acted knowingly and negligently; it being sufficient that the dereliction was set forth in the language of the statute, with specification of the time and place, the car, the particular part of the car where the defect existed, and the nature of the defect.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 254.*]

Duty of railroad companies to furnish safe appliances, see note to *Felton v. Bullard*, 37 C. C. A. 8.]

2. ACTION (§ 18*)—PENAL ACTIONS—NATURE.

A penal action is not necessarily a criminal prosecution.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 96; Dec. Dig. § 18.*]

Nature and form of actions, whether civil or criminal, see note to *United States v. Atlantic Coast Line R. Co.*, 98 C. C. A. 117.]

3. INDICTMENT AND INFORMATION (§ 110*)—SUFFICIENCY OF ALLEGATIONS.

It is sufficient in an accusation to follow the words of the statute describing the offense, if by doing so the act constituting the offense is fully, directly, and expressly alleged, without uncertainty or ambiguity.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.*]

Action by the United States against the Oregon Short Line Railway Company. On demurrer to the complaint. Demurrer overruled.

N. M. Ruick, U. S. Atty.

P. L. Williams and D. Worth Clark, for defendant.

DIETRICH, District Judge. The action is brought to recover penalties for violations of the safety appliance acts. Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174); Act April 1, 1896, c. 87, 29 Stat. 85; Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1909, p. 1143). Seven separate causes of action are pleaded, three on account of defective couplings, three on account of missing grab irons, and one on account of defective driver wheel brakes. By demurrer the defendant challenges the sufficiency of the complaint as a whole, and of each cause of action considered separately.

The only question fairly raised by the demurrer is whether it is incumbent upon the plaintiff to plead that defendant acted knowingly and negligently in the premises; and this, I think, must be answered in the negative. In each count or cause of action the alleged dereliction of the defendant is set forth in the language of the statute itself,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and in addition thereto the time and place, the car, and the particular part of the car where the defect existed, as well as the nature of the defect, are all specifically alleged. More is not required.

True it is that this is a penal action, but a penal action is not necessarily a criminal prosecution. Penalties are often recoverable in civil actions. 16 Enc. Pl. & Pr. 229; *Stockwell v. U. S.*, 80 U. S. 531, 20 L. Ed. 491; *Johnson v. So. Pac. R. R. Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363. But, even if we apply the stricter rules of criminal pleading, the complaint must be held to meet the requirements. "It is sufficient to pursue the very words of the state, if by doing so the act, in the doing of which the offense consists, is fully, directly, and expressly alleged, without any uncertainty or ambiguity. In many cases no allegation of anything more than the words of the statute, *ex vi terminorum*, import is necessary, in order to show that the defendant has committed the offense, and to charge the offense with certainty. Here it is always sufficient to charge the offense in the words of the statute." Clark, *Criminal Procedure*, p. 269.

At the argument it was suggested upon behalf of both the government and the defendant that, even if such a rule of pleading be recognized, sooner or later in the progress of the case it would probably become necessary to construe the act, and generally to define the extent of defendant's duty to keep the appliances in repair, and that in view of the prevailing uncertainty as to the meaning of the act a construction at this time would be desirable; and accordingly the discussion was extended to the question whether or not a railroad company, having equipped its cars and engines with the requisite appliances, is absolutely bound at all times and under all circumstances and contingencies, at its peril, to keep the appliances in proper order, or whether its duty in that respect is fully performed by the exercise of ordinary care.

Neither alternative is free from difficulty, especially in the application of the law to hypothetical conditions, and the decided cases disclose a great variety of views, shading from one extreme to the other. *U. S. v. So. Ry. Co.* (D. C., Ill.) 135 Fed. 122, *U. S. v. St. Louis R. Co.* (D. C., Tenn.) 154 Fed. 516, *U. S. v. Chicago & N. R. Co.* (D. C., Neb.) 157 Fed. 616, *U. S. v. Wabash R. Co.*, *Index-Digest of Decisions under the Federal Safety Appliance Acts*, 243, and *U. S. v. El Paso Ry. Co.*, *Id.* 239, are authority for the construction contended for by counsel for the government. Upon the other hand, *U. S. v. I. C. R. Co.* (D. C., Ky.) 156 Fed. 182, *U. S. v. Santa Fé R. Co.* (D. C., Colo.) 150 Fed. 442, *Mo. Pac. R. Co. v. Brinkmeier*, 77 Kan. 14, 93 Pac. 621, and *Elmore v. Seaboard Air Line Co.*, 130 N. C. 506, 41 S. E. 786, are clearly in support of the position maintained by counsel for defendant, as is also *St. Louis R. Co. v. Delk*, 158 Fed. 931, 86 C. C. A. 95, decided by the Circuit Court of Appeals of the Sixth Circuit since the argument. Other cases, especially when considered in the light of the facts involved, are not so decisive of the general question of construction: *U. S. v. G. N. R. Co.* (D. C., Wash.) 150 Fed. 229; *Voelker v. Railroad Co.* (C. C., Iowa) 116 Fed. 867; *Railroad Co. v. Voelker*, 129 Fed. 522, 65 C. C. A. 226; *U. S.*

v. Atl. Coast Line (D. C., N. C.) 153 Fed. 918; U. S. v. Southern Pacific Co. (D. C., Or.) 154 Fed. 897; U. S. v. C., B. & Q. R. Co. (D. C., Neb.) 156 Fed. 180; U. S. v. Indiana Harbor R. Co. (D. C.) 157 Fed. 565; U. S. v. Lehigh Valley R. Co., Index-Digest of Decisions under the Federal Safety Appliance Acts, 245; U. S. v. Phila. & Reading R. Co., Id. 247.

In view of the number and variety of these decisions, it is manifest that any further discussion can be of little, if any, general interest or value, and, regarding only the procedure and orderly trial of this case, I am clearly of the opinion that no good is likely to come from an attempt to anticipate possible issues. If the defendant has any defenses, it may present them, and to what extent, if at all, they should avail, may be determined upon inquiry as to the sufficiency of the answer or the materiality of the proof. The demurrer will be overruled. Defendant is given 30 days to answer.

Since preparing and before filing the foregoing, I have received a copy of the Supreme Court opinion in *St. Louis, I. M. & So. Ry. Co. v. Taylor* (rendered May 18, 1908) 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061. While in point upon the general question of construction, it presents no reason for modifying the conclusion reached relative to the demurrer.

UNITED STATES v. SCANLON.

(District Court, N. D. Ohio, E. D. November 27, 1908.)

No. 3,284.

FOOD (§ 14*)—MISBRANDING—"MAPLE SYRUP"—"BLENDED."

Defendant manufactured syrup from cane sugar, flavored to represent maple syrup by the introduction of an extract from maple wood after it had been chopped down. The syrup was put up in bottles labeled "Western Reserve Ohio Blended Maple Syrup," the words "Ohio" and "Maple Syrup" being in red, and between them the word "Blended," and then below that, in smaller type, the statement, "This syrup is made from the sugar maple tree and cane sugar." *Held* that the label was misleading, in that purchasers would ordinarily understand that the article contained in part maple syrup made from the boiled-down sap drawn from live maple trees, and that defendant was therefore guilty of misbranding.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 14.*]

H. Y. Scanlon was informed against and convicted of violating Pure Food and Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187), in blending and selling blended maple syrup. Defendant waived a jury, consented to be tried by the court, and was found guilty.

William L. Day, for the United States.

Talmar J. Ross, for defendant.

TAYLER, District Judge (orally). A cursory examination of this label—that is the only examination that the ordinary customer makes, and that is the examination which is controlling in a case of this

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

kind—presents the suggestion, if it does not carry with it the absolute statement, that this bottle contains Ohio maple syrup; but a careful scrutiny discloses, between the red words "Ohio" above and "Maple Syrup" below, a blue word "Blended," and then, below that, in smaller type, the statement that "this syrup is made from the sugar maple tree and cane sugar."

I think it was intended to convey the impression that there was a mixture, in the popular meaning of a mixture, of maple syrup and of a syrup which is made from cane sugar or New Orleans molasses or something of that kind, that people prefer to use rather than the heavier or thicker kinds of syrup; a kind of appropriate union of syrups that are used for a common purpose. At all events, the information conveyed by this label as one looks at it is that it is primarily a maple syrup, and then, upon a little closer inspection, that it is not exactly all maple syrup, but that it has some syrup in it made from cane sugar. The label was evidently designed to go as far as it could in advertising the fact that maple syrup was there and still to comply with the pure food act.

Now, it would be very interesting to enter into this discussion, not exactly sophistical, but still drawing rather sharp lines of distinction between various conceptions of the meaning of the law and the chemical aspects of these various products of the maple tree; but I do not think it is necessary for me to go into it. It is not so much a question of chemistry as of popular comprehension. We would not have any pure food laws if we were all chemists, because then we would be able to find out for ourselves what the thing was we were buying; and, of course, the opportunity and suggestion of temptation to deception would be very much reduced if a man who sold knew that he was dealing with a person who could find out easily just what he was buying. It is not a question of chemistry in this case, any more than it is with butter. It is a question of what is the popularly recognized definition of maple syrup; and that undoubtedly is, and we do not need the chemists to testify to it, that it is the syrup produced from boiling down the sap that flows in the spring of the year from the live maple tree. It has a certain consistency, and, of course, a certain specific gravity, which a chemist can tell us about; but those persons who have used it know in a general way when it has a proper consistency and a proper specific gravity, as they certainly do whether it has the proper flavor.

So that, if this syrup is made, as Mr. Scanlon says it is made, by some treatment of the chopped-down maple tree, whereby he gets an enormously larger amount of what may be called maple saccharine than is obtained from the free flowing of sap from the live tree, that is not maple syrup which he gets from it. If his statement is true—and I have no right to question its truth, except that I can hardly believe him when he says he obtains so much—that he gets his maple syrup and maple sugar that way, that is not maple sugar which he makes, and, therefore, he is not permitted to make use of that word

under the pure food act. It seems to me that is all there is in this matter for me to consider now.

It is an interesting question whether this is not a "blend." But I do not pass upon that. I pass upon the broad question, and lay down the broad proposition that this label is misleading and is a violation of the law; that the contents of the bottle are not what the label manifestly and suggestively declares those contents to be; and, primarily, I think the fundamental fact is that it is not maple syrup. The people who buy maple syrup would be in a very different frame of mind if they knew that the so-called maple syrup that made this so-called maple blend was derived from a treatment of the wood of the maple tree after it was chopped down from that in which they are when they buy what they understand to be maple syrup made from the boiled-down sap drawn from the live tree.

So I will have to find the defendant guilty.

HOVDEN v. SEATTLE ELECTRIC CO.

(Circuit Court, W. D. Washington, N. D. July 20, 1910.)

No. 1,838.

1. STREET RAILROADS (§ 117*)—INJURIES TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE.

Plaintiff attempted to cross a street in the middle of a block, and, after waiting for a car to pass her, stepped in front of a car moving on the further track in the opposite direction and was struck and injured. She had lived in the vicinity of the accident for several months and was familiar with the tracks and the running of cars thereon. She had also seen the car by which she was injured approaching and had noticed that it was moving rapidly. *Held* that, if plaintiff had been a person of ordinary understanding and intelligence, she would have been guilty of contributory negligence as a matter of law precluding her recovery, but where there was evidence that she was of low intelligence the question was for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 248-250; Dec. Dig. § 117.*]

2. NEGLIGENCE (§ 68*)—"CONTRIBUTORY NEGLIGENCE"—WHEN A BAR TO RECOVERY.

The plea of contributory negligence as a bar to recovery of damages in an action against a party primarily liable for an injury resulting from his negligence is available on proof that the accident could not have occurred if plaintiff had not failed to exercise care to avoid danger commensurate with his mental and physical capacities.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 92; Dec. Dig. § 68.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1540-1547; vol. 8, p. 7617.]

At Law. Action by Lena Hovden against the Seattle Electric Company to recover damages for personal injuries in a collision with

a street car. A verdict was rendered for plaintiff, and defendant moves for a judgment non obstante veredicto. Denied.

Martin J. Lund, for plaintiff.

E. M. Carr, James B. Howe, and Hugh A. Tait, for defendant.

HANFORD, District Judge. By the plaintiff's own statement and all the testimony introduced upon the trial it was clearly established that her own negligence was a contributing cause of the accident if negligence can be imputed to a person of her degree of intelligence. She is a Scandinavian past the age of youth, having had experience in travel from her native land to Seattle, where she had lived several months in the vicinity of the accident, so that she was familiar with the tracks and the running of cars thereon. She was struck and knocked over upon the fender on the front end of the car while attempting to cross the street, not at a regular crossing, but near the middle of a block. Before getting in the way, she had seen the car coming in her direction and noted that it was moving rapidly. A car going in the direction opposite to the one which inflicted the injury and on the side of the street nearest to the plaintiff had stopped, so that she had to pass around the rear end of it and then take but a step or two before coming in contact with the car which injured her.

In view of these facts, there could be no honest divergence of opinion with respect to the plaintiff's contributory negligence, assuming her to be a person having intelligence and capacity to care for herself equal to that of an adult person of ordinary understanding and intelligence. In the testimony of one of the doctors who examined the plaintiff, it was stated that she was stupid, and there was some apparent difficulty in eliciting testimony from her as a witness on the trial.

The court denied a motion for a nonsuit and put the defendant upon its defense and after the introduction of all the evidence on both sides denied a motion for a peremptory instruction to the jury to render a verdict for the defendant and by its instructions submitted the question, as to the plaintiff's contributory negligence, to be decided by the verdict of the jury, and explained that it would have to be determined by the jury in the light of the facts as they should find the same from consideration of the evidence; the general purport and meaning of the instructions on this point being that the jury should ascertain all the facts and decide the question as to whether the plaintiff's intelligence and capacity to care for herself at the time of the accident was equal to that of an adult person of average intelligence and capability, and then decide the dependent question whether, in view of her comparative intelligence and capability, negligence should be imputed to her.

It is the opinion of the court that there is no legal ground for the present motion, unless it was error for the court to submit the questions above indicated to the jury. On the authority of the decision of the Supreme Court in the case of *Baltimore & Potomac R. R. v. Cumberland*, 176 U. S. 232, 20 Sup. Ct. 380, 44 L. Ed. 447, this court

deems the questions submitted to be properly within the province of the jury to decide. In that case the court said:

"There is no hard and fast rule applicable to every one under like circumstances. To an adult, in full possession of his mental and physical powers, one standard may be applied; to a boy, particularly if he be of limited intelligence, another standard; and to an infant not *sui juris* and totally ignorant of danger, still another."

The rule deducible from the decision is that the plea of contributory negligence, as a bar to a recovery of damages in an action against a party primarily liable for an accidental injury resulting from his negligence, can only be made available by proving that the accident could not have occurred, if the plaintiff had not failed to exercise care to avoid danger commensurate with his mental and physical capacities.

This court would be justified in denying the motion on the authority of the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of the *United States v. Gardner*, 133 Fed. 285, 66 C. C. A. 663. But the learned counsel for the defendant has made a forcible argument based on the law of procedure in this state, in opposition to that decision as a controlling authority applicable to this case, and, to avoid the unnecessary labor of covering that ground in this opinion, the court denies the motion on the authority of the Supreme Court decision above cited.

The order to be entered will be without prejudice to a petition for a new trial on any grounds not within the scope of this opinion.

THE GENERAL KNOX.

(District Court, D. Rhode Island. July 14, 1910.)

No. 1,217.

1. SHIPPING (§ 84*)—INJURY TO STEVEDORE—CONTRIBUTORY NEGLIGENCE.

A stevedore employed by a railroad company in discharging a coal barge was not guilty of contributory negligence in grasping spikes in the inside edge of the hatch coaming, to aid him in leaving the hold, where, on account of removal of a rope by one of the deck hands 20 minutes before, the spikes were his only means of exit, where such use of the spikes was customary, and where he tested the one, the loosening of which caused his injury, before using it.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 342; Dec. Dig. § 84.*]

2. SHIPPING (§ 84*)—INJURY TO STEVEDORE—NEGLIGENCE.

As affecting liability of a coal barge for injury to a stevedore caused by loosening of a spike in the inside edge of the hatch coaming, placed there by employes long before the accident, while he was using it as a means of leaving the hold, those in charge of the barge were negligent in failing to remove the spike or to see that it was suitable to sustain one's weight.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 350; Dec. Dig. § 84.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Admiralty. Libel by Harry Moore against Barge General Knox. Judgment for libellant.

Frank Healy, for libellant.

Vincent, Boss & Barnefield, for claimant.

BROWN, District Judge. The libellant, Moore, was employed as a stevedore by the New York, New Haven & Hartford Railroad Company, at its East Providence wharf, formerly known as the "Wilkesbarre Pier." The railroad company was in full control of the discharge of the coal barge General Knox.

Moore had been working as a coal shoveler in the after hatch, and about 6 p. m. September 26, 1908, was in the act of leaving the hold. In the hold was a midship stanchion, about 10x12 inches, running from the keelson to the deck beam, with iron rungs going through the beam and projecting on each side. These rungs were from 3½ to 4 inches back from and underneath the face of the hatch coaming. The distance from the top rung to the top of the inside edge of the hatch coaming was 4 feet 5 inches. In the forward side of the hatch coaming were driven two spikes—ordinary railroad spikes. Moore grasped the lower spike with his left hand, then the upper spike with his right hand, and while reaching with his left hand for the top of the hatch coaming the spike in his right hand pulled out, causing him to fall backward into the hold.

The libellant contends that the barge is responsible because the spikes formed a part of the permanent means of exit from the hold provided by the ship.

The claimant contends that the spike was not a part of the permanent structure of the ship, but says that no handholds of any description had been placed in the hatch coaming by authority of its owners or officers; that from time to time during a period of years the stevedores had driven railroad spikes into the face of this hatch coaming to make easier access to and egress from the hold; that this was not done by the authority of the owners or officers of the barge, and that the captain, when opportunity offered from time to time, was in the habit of removing the spikes, either by pulling them out or by driving them in to the head.

It is evident that the men needed some means additional to the rungs in the stanchion in order to get out of the hold. The claimant contends that a rope was a proper and sufficient means and was the means supplied by the ship for this purpose. There is evidence that during the day a rope hung in the hold and that one of the men had ascended by the use of this rope and of the spikes as a foothold. About 20 minutes before the accident, however, this rope had been removed by one of the deck hands of the barge, so that when Moore, after finishing his day's work, came up the stanchion ladder, the only means to assist him from the stanchion ladder to the top of the hatch coaming was the two spikes.

Mr. Henry F. Anthony, the superintendent of this pier for many years, testified that he had known the General Knox for over 10 years, and that during that period she had been unloaded 29 times,

and that he had observed similar spikes in her hatch coaming from time to time since he had known her, and had seen the men using these spikes without the assistance of a rope. He testified that the method of getting out of the hold of a barge by stanchion rods and spikes in the hatch coaming is a very common method, and in reference to the use of railroad spikes particularly said:

"In the older vessels, they are about all of them that way, some of these spikes driven in."

This testimony is corroborated by a number of witnesses, and the libellant has in my opinion established the fact that in the General Knox, as well as in many other wooden barges, including several other wooden barges belonging to the claimant, spikes of this character are commonly present in the hatch coamings, and are in common use by the stevedores either with or without a rope as an aid to their feet or hands in leaving the hold. Even if not a part of the original equipment, according to the testimony they became by adoption a part of the ship's permanent structure, which owners and masters well knew would probably be used by the stevedores.

In view of this testimony, which is from reputable witnesses and of a convincing character, it is evident that the present case is not one of the use of some single temporary device supplied not by the master, but by a fellow workman for a mere temporary purpose.

Conceding that these spikes were driven in during a period of years by the stevedores for their own convenience, yet it must have been obvious in view of this long-continued practice that these spikes if left in the hatch coamings would be likely to be used in connection with the stanchion rungs as a means of exit from the hold. Under such circumstances it does not seem reasonable to place a duty of inspection upon the coal shovelers, or to cast upon them the risk of injury by a defective condition of spikes in ordinary use. Reasonable care and foresight should point out the danger from permitting an appliance of this kind to be placed in the hold by one set of inexperienced laborers and continued permanently attached to the vessel for the use of other inexperienced laborers until it should give way, to the serious risk that the man using it might be precipitated into the hold.

It is not going beyond the ordinary requirement of a reasonable foresight to hold that an accident like that to Moore should have been anticipated and guarded against, either by seeing that the spikes were removed so that their presence might not invite their use, or else by seeing that they were in sound condition and suitable to sustain a man's weight when he is in a place of danger.

There is evidence that after the accident the spike was found and delivered to the superintendent of the wharf, Mr. Anthony, who produced it in court. It was a common railroad spike, much rusted and somewhat bent, and adherent to the end was wood which was practically of the color of rusty iron. The exhibit indicated by its appearance that it had been in the face of the hatch coaming for a very long time; so long that it seems hardly possible that there was

not a full opportunity for the officers of the ship to have determined its condition.

Following the accident an examination of the hatch coaming of the after hatch was made, and there was found one spike and a hole between two planks, indicating a place where a spike had been. At this hole the wood appeared unsound and rusty and particles of it were picked out by some of the men.

It is stated that one of the reasons why no handholds were provided was because of the danger that the digger would break any permanent handhold. There is a suggestion by the claimant that the spike may have been struck by the digger, but there is positive testimony to the contrary, and this suggestion is rather a matter of inference—and not of necessary inference—than of proof.

Reference is made, also, to the bent condition of the spike; but at what period during the long time this spike must have remained in the wood, or before it was put into the wood, the spike became bent, is altogether uncertain.

Although there may have been no appearance of unsoundness of the wood or of imperfect securing of the spike upon a casual inspection, yet something more than a casual inspection was reasonably required of spikes known not to be driven in in the course of a regular construction or repair of the barge but by unskilled laborers only concerned with a single discharge of the vessel.

Under the circumstances, and particularly having in mind the evidence as to the customary use of spikes of this character by the stevedores in leaving the hold, I am unable to find that Moore was guilty of contributory negligence. His standard of care was probably that of a man of his kind. He testifies that when he reached up he pulled down on the spike and that it seemed strong. A man leaving the dark hold of a vessel after a day's work is not in a favorable position for making a close inspection of the condition of the wood-work up which he is climbing.

I am of the opinion that the allegations of the libel are sustained, and that the injuries to Moore were occasioned by negligence of those in charge of the barge.

The question of liability is determined in favor of the libellant, and the case may stand for further hearing upon the question of the amount of damages.

THE IMOGENE.

(District Court, E. D. New York. August 1, 1910.)

SEAMEN (§ 16*)—EMPLOYMENT OF ENGINEER—BREACH OF CONTRACT—DAMAGES.

Where, after part performance of an engineer's contract to operate a yacht, the engineer refused to continue unless he was furnished a fireman, which the owner refused, but there was no meeting of minds at that time with reference to a rescission of the engineer's contract for the season, and on the owner procuring a new engineer libellant left the boat without expressing any desire to continue the contract, merely intimating that he would stand on his rights, the original contract not having in-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cluded services of a fireman unless subsequently agreed to. libelant was only entitled to recover for services up to the time he quit work.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 56-65; Dec. Dig. § 16.*]

In Admiralty. Libel by Henry R. Carter against the steam yacht Imogene. Decree for libelant.

John O'Leary, for libelant.

Battle & Marshall, for claimant.

CHATFIELD, District Judge. The sole question in this case is whether upon the demand by the libelant, Carter (who had been hired as engineer), that he be given a fireman, an agreement was reached between him and the owner of the yacht Imogene that he would relinquish his employment upon some one's arriving to take his place. It appears that the yacht in question had previously been run by one Cerow as engineer, without a fireman, that Cerow was still in the employment of the owner of the yacht and was sent for and again put in charge of the engine room, upon the owner's understanding that the libelant desired to terminate his employment if the owner did not see fit to obtain a fireman for his assistance.

The testimony shows that at the original hiring the question of fireman was taken up, but, upon certain representations by the agents of the owner that a fireman would not be necessary for the work required of the boat, the libelant agreed to hire for the season, and to leave the question of the fireman until it was seen how much one's services were needed. A fireman had actually been procured by the agent, but upon the telegram of the owner was not employed. The libelant, after the owner's arrival, spoke to him several times, saying that a fireman was necessary, to which the owner did not assent, but entered into no discussion of the question, and understood that the engineer did not desire to remain if he had to work alone.

It is evident that, from the standpoint of the owner, the occasions upon which a fireman would be necessary were few. It is evident, from the standpoint of the engineer, that if the use of the boat continued, with comparatively steady runs, a fireman might be needed. There is no doubt that the original contract of hiring was of such a nature that, in the absence of an agreement, the libelant had a right to insist on remaining through the season, and, if he were discharged without cause, to be paid his wages for that time. The 1st of October is shown by the testimony to be the reasonable limit of the season, and the claimant has not contested the fact that, as his boat was in commission, he would have required an engineer's services up to that date.

Upon the issues presented by the answer (which admits that the libelant was ordered to leave the yacht at the time set forth in the libel, but alleges that the libelant's term of service was to be dependent upon his services being satisfactory, and that his wages, amounting to \$125 for the month of July, were tendered to him upon his services proving unsatisfactory, and denies that the hiring was for the season), the claimant could not have successfully met the case made out by the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

libelant. As the testimony stands, the hiring was for an entire season, at the rate of \$125 a month, together with maintenance and clothing, and the libelant received his board and maintenance up to the 1st of August. He is entitled, in any event, to receive wages for the month of July, and would recover for the months of August and September, together with the value of the clothing which he left upon the boat (which is admitted to be \$20), unless a new defense presented by the claimant upon the trial had been interposed. An amendment to the answer was allowed in order to conform the pleadings to the testimony, and to make argument unnecessary over the sufficiency of the general denial already pleaded.

As has been already stated, the issue, therefore, is whether the libelant and the claimant agreed to terminate the contract as soon as a new engineer was obtained. The libelant left the boat upon the 1st day of August at the claimant's direction. He testifies that he stated at the time his intention to collect his wages according to the contract, and Mr. Stewart's letter shows that the libelant's services had been entirely satisfactory. The claimant testifies that the libelant did not state to him that he had any claim beyond his wages for the month which had elapsed, and it is evident that the claimant (Stewart) supposed that the libelant had agreed to give up the position of engineer, on the arrival of the new engineer and upon Mr. Stewart's statement that no fireman would be furnished. The libelant, on the other hand, acted upon the assumption that, if Mr. Stewart succeeded in finding a new engineer, he (Carter) would then have an opportunity to determine whether he desired to stay upon the boat without a fireman, or desired to terminate the contract. Mr. Stewart's understanding of the matter is plainly shown by the letter he sent with the new engineer and his conduct at the time Carter left the boat. Carter's understanding is just as plainly evidenced, and there would seem to have been, up to the 1st of August, no meeting of minds, and hence no rescission of the contract in question, even if Mr. Stewart were justified in sending for a new engineer, upon whose arrival the libelant might decide to stick to his work, but might also be responsible for any damage to the claimant for a failure to keep good his offer to rescind the original contract. It would be one thing to agree that the libelant's services should terminate as soon as a new engineer arrived, and a different thing to agree that, if anybody could be found to take the libelant's place, he would then make up his mind whether he would work without a fireman or would leave at once.

But as things stood, it would seem that the libelant should have realized that Mr. Stewart would get some one to do the work, if the libelant said he did not wish to stay. He did not dissent when Stewart told him he would get a new engineer, and upon the arrival of the new engineer left the boat without expressing any desire to continue the contract, but merely intimated that he would stand upon his rights. He could not thereafter hold himself in readiness to perform the original contract and be entitled to recover therefor. He should have realized that the original contract did not include the services of a fireman unless that item were subsequently agreed to, and he should also have realized that the claimant could not be compelled to let the

matter drift along after the libelant had once definitely stated that he would have a fireman or terminate the contract.

The libelant may have a decree for his wages for the month of July, with costs, but without interest, as the amount was in effect tendered to him.

KOHN et al. v. INTERNATIONAL MERCANTILE MARINE CO.

(District Court, E. D. Pennsylvania. June 27, 1910.)

No. 38.

SHIPPING (§ 166*)—INJURIES TO PASSENGERS—CHILDREN—NEGLIGENCE.

Plaintiff, a child nine years of age, a passenger on defendants' steamship, was standing in charge of his mother near the rail as the vessel approached her dock. In the confusion attending the landing of the vessel, plaintiff placed his left hand in a hawse hole through which a heavy cable had been passed, extending to a tug, and, as the cable moved or tightened, three of plaintiff's fingers were crushed or ground off by the rope's friction against the rim of the hole. *Held*, that the shipowners were not negligent in failing to construct a permanent guard about the hawse hole, nor in failing to keep the passengers away from it; the contingency of injury in the manner plaintiff was injured being too remote to impose a duty of guarding against it.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 538-552; Dec. Dig. § 166.*]

In Admiralty. Libel by Ichil Kohn and others against the International Mercantile Marine Company. Judgment for defendant.

George W. Watt, for libelants.

Howard H. Yocum, for respondent.

J. B. McPHERSON, District Judge. This is an action in personam to recover damages for personal injuries suffered by Ichil Kohn, a passenger nine years of age, on the steamship Noordland. The injury was inflicted on December 25, 1907, as the vessel was approaching her dock in the port of Philadelphia. A number of immigrants were on board, and as the ship slowly neared the land they crowded to the rail, some of them drawn by a natural curiosity, and some in order to look for friends and relatives among the people on the wharf. The boy was in charge of his mother, who was carrying a younger child; but in the press and confusion he was separated from her for a short time, and during this absence, in some way not definitely explained, placed his left hand in a hawse hole through which a heavy cable had been passed. The cable reached from the ship to a tug, and as it moved or tightened three of the boy's fingers were crushed or ground off by the rope's friction against the rim of the hole. The weight of the testimony perhaps points to the conclusion that the boy was pushed by other passengers into the position where he was hurt; but he may have reached that point in the effort to see his father, who was expected to be upon the wharf.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The first, and as I think the only, question is whether his injury was due to any negligence on the part of the respondent. The fault relied upon is thus stated:

"The said hawser rope was passed out by employes of the defendant company at a place where passengers had been allowed to gather, without any warning to them of their dangerous position, and no warning was given by any one to the said Ichil Kohn or to his mother that the said Ichil Kohn was then and there in a position of danger, nor was any warning given by any one to the said Ichil Kohn or to his mother that the said hawse hole was a place of danger."

The evidence shows that one of the crew had been at the hole assisting with the cable, and that while he was thus engaged he directed the passengers to stand back a short distance so as to give him room; but when the accident happened he had apparently gone away, and the passengers had crowded again against the rail, pushing the boy with them. It seems clear that the only ground upon which negligence can be charged against the respondent is the failure to keep the passengers away from the hawse hole. The respondent was not obliged to have a permanent guard about the hole, any more than the *Burgundia* ([D. C.] 29 Fed. 464) was obliged to protect a rudder chain which was carried in an open trough across the main deck. Cables must have room to play and to be moved about, and it is evident I think that a permanent protection could not be properly required. It is therefore clear, in my opinion, that if any duty rested upon the ship it was to do one of two things: Either to station a man at the hawse hole to be continually on guard, or else to rope off that part of the deck altogether. There is no evidence that the hawser was improperly put into service, or that any negligence caused it to slip or to jerk. So far as appears, the work of getting the ship to the dock was being carefully carried on, and it is certain that the mere tightening of the cable was not in itself a negligent act. Unless, therefore, there was negligence in failing to anticipate that small children, incapable of observing and understanding the danger presented by the rope and the hole in combination, might be in the neighborhood without a caretaker—for ordinarily there was no peril in the situation, and adults might properly be expected to look out for themselves and for those in their immediate charge—and in failing to take precautions against such contingency, there is no liability on the part of the respondent. Upon this question I am of opinion that the contingency was too remote to impose the duty of guarding against it, and therefore that the respondent's negligence has not been established. Before this accident could happen, it was necessary that a number of circumstances should combine—some of them most unlikely to occur—and even the high degree of care that is properly required from a carrier of passengers would be overtaxed, I think, if the carrier should be charged with the duty of foreseeing them all. The injury is deplorable; but, unless the respondent was in fault, there is no liability.

A decree may be entered, dismissing the libel, but without costs.

In re ROEBUCK WEATHER STRIP & WIRE SCREEN CO.

(District Court, S. D. New York. February 16, 1910.)

No. 12,138.

BANKRUPTCY (§ 348*)—CLAIMS—PREFERRED CLAIMS—"WAGES"—"SALESMAN."

Complainant contracted to solicit orders for the bankrupt for weather strips, and, when obtained, to superintend the placing thereof by workmen acting under his direction. The bankrupt paid the wages of the workmen and furnished the material, and out of the price retained the cost of the labor and material and 15 per cent. of the price additional, paying claimant whatever was left from the amount collected for his compensation. *Held*, that plaintiff was a "salesman," notwithstanding his duty of supervising the installation of the strips, and his compensation was "wages," within Bankr. Act July 1, 1898, c. 541, § 64b, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), entitling wages of workmen, salesmen, etc., to priority.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 536; Dec. Dig. § 348.*

For other definitions, see Words and Phrases, vol. 8, p. 7793; vol. 8, pp. 7369-7373, 7831.]

In the matter of the Roebuck Weather Strip & Wire Screen Company, bankrupt. Petition to review an order of the referee disallowing the claim of Jesse D. Alger as a preferred labor claim. Order reversed, and petition allowed.

William H. Janes, for claimant.

Leonard Bronner and S. Marshall Kronheimer, for trustee.

HOLT, District Judge. This is a petition to review an order of a referee disallowing a claim of Jesse D. Alger as a preferred claim.

The bankrupt was engaged in the business, among other things, of manufacturing weather strips. It entered into a contract with the claimant by which it was agreed, in substance, that the claimant should solicit orders for weather strips; that, when obtained, he should superintend the placing in position of the strips by workmen acting under his direction, and whom he selected, subject to the approval of the bankrupt; that the bankrupt should pay their wages, should furnish the material, and out of the price should retain the cost of labor and material and an additional amount of 15 per cent. on the price, and whatever was left from the amount collected was to be paid to the claimant for his compensation. He rendered such services to the bankrupt, for which there is due \$431.61, and he claimed priority for \$300, under section 64b of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]), which provides that "wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before the date of the commencement of proceedings, not to exceed \$300 to each claimant," have priority. The referee denied the claim to priority, holding that the claimant was not a wage-earner, that he was a principal and shared in the profits with the bankrupt, and therefore was not entitled to priority.

In my opinion, the claimant was not a principal with the bankrupt

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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in its business. The bankrupt furnished the materials and paid for the labor. It passed upon the credit of the purchaser, and could refuse orders obtained by the claimant if it saw fit. Although the arrangement between them for the claimant's compensation was unusual, I think it amounted to a case of wages paid to a salesman. The term "wages," as used in this section, has received a very liberal construction. It includes commissions or other methods of payment. In re New England Thread Company, 20 Am. Bankr. Rep. 47, 158 Fed. 788, 89 C. C. A. 285. If the agreement had been that the claimant was to receive 15 per cent. and the bankrupt the remaining profits, no one, I take it, would claim that this was not a case of wages due to a salesman. In my opinion, the fact that the bankrupt received the 15 per cent. and the salesman the difference does not substantially change the nature of the arrangement. The fact that the claimant, in addition to procuring orders for the bankrupt's goods, supervised their being placed in position, does not, in my opinion, take him out of the category of salesman. His principal business was that of procuring orders. The weather strips probably could not be properly put in position by an ordinary purchaser or an inexperienced person. The claimant, therefore, supervised that work. But I think that that was an incident to his main business, which was that of a salesman of the bankrupt's goods.

My conclusion is that the claim filed should be allowed priority to the extent of \$300, and that the claimant should stand as a general creditor for the balance only.

In re HANYAN.

(District Court, S. D. New York. March 4, 1910.)

No. 13,123.

1. BANKRUPTCY (§ 76*)—INVOLUNTARY PETITION—CREDITORS—QUALIFICATIONS.

Bankr. Act July 1, 1898, c. 541, § 59b, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3445), provides that three or more creditors who having provable claims against any person amounting in the aggregate to \$500 or more, or, if all the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount, may file a petition to have him adjudged bankrupt. *Held*, that it is not essential to the qualification of a creditor to sign an involuntary petition that he was a creditor at the time the alleged act of bankruptcy was committed; it being sufficient that he has a provable claim when the petition is filed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 50, 99, 100; Dec. Dig. § 76.*]

2. BANKRUPTCY (§ 166*)—ACTS OF BANKRUPT—PETITION—PREFERENCE.

Where an involuntary bankruptcy petition alleged that a chattel mortgage created a preference, it was not objectionable that there was no proof that it was made with an intent to hinder, delay, or defraud creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-258; Dec. Dig. § 166.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the matter of David I. Hanyan, bankrupt. On motion to confirm the report of a special master on issues raised by the involuntary petition and answer. Master's report, advising dismissal of the petition, disallowed.

Graham Witschief, for petitioning creditors.
James Jenkins, for alleged bankrupt.

HOLT, District Judge. This is a motion to confirm a report of a special master, to whom it was referred to take proofs on the issues raised by the involuntary petition and answer. The petition was filed by three persons, claiming to be creditors of the alleged bankrupt. It appeared on the face of the petition that one of the petitioning creditors became a creditor after the alleged act of bankruptcy was committed, and upon that ground the master reported in favor of the dismissal of the petition. This decision was based on the following statement in Collier on Bankruptcy (7th Ed.) p. 630:

"A creditor, who was not such at the time of the commission of an alleged act of bankruptcy, cannot petition his debtor into bankruptcy. This appears to be, not only the conclusion of the courts upon well-considered cases, but a reasonable construction. It is unquestionably based upon the well-established principle that creditors cannot complain of a conveyance by the debtor made prior to the time they became creditors, unless such conveyance was made with the direct purpose of defeating their claim."

Three cases arising under the present act are cited by the editor of Collier in support of this statement: *In re Callison* (D. C.) 130 Fed. 987, affirmed sub nom. *Brake v. Callison*, 129 Fed. 201, 63 C. C. A. 359; *In re Brinckmann* (D. C.) 103 Fed. 65; *Beers v. Hanlin* (D. C.) 99 Fed. 695. In each of these cases it appears that there was but one creditor at the time the alleged fraudulent conveyance or preference took place. Under such circumstances, of course, there could be no fraudulent intent or intent to prefer, and the cases might all have been properly decided on that ground. The opinions undoubtedly, however, contain assertions tending to support the statement in Collier, above quoted; and the master, therefore, naturally followed such authority in his conclusion.

Section 59b of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3445]), which authorizes the filing of an involuntary petition, is as follows:

"Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over, or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt."

There is nothing in this section, or in any other provision of the bankrupt act, requiring that a petitioning creditor should have been one at the time of the act of bankruptcy. All that the act requires is that he have a provable claim against the alleged bankrupt when the petition is filed. With entire respect for those who have intimated a different opinion, I am not able to see upon what ground courts have the right to impose additional conditions, not stated in the bankrupt

act, upon the right of any creditor having a provable claim to join in an involuntary petition. This is the view of Judge Ray (*In re Hornstein* [D. C.] 122 Fed. 266), although in that case the alleged qualification which it was claimed was implied in the section was different. See, also, *In re Bevins*, 165 Fed. 434, 91 C. C. A. 302. Property or money, transferred either fraudulently or as a preference, if recovered by the trustee, would be distributable in dividends among all the creditors, and not solely among those existing at the time of the transfer. The principles governing suits by judgment creditors to set aside fraudulent conveyances do not necessarily apply in all particulars to similar proceedings in bankruptcy.

The master, in his opinion, also states, in substance, that, in his opinion, the evidence does not establish that the chattel mortgage was made with intent to hinder, delay, or defraud creditors. But there is no allegation in the petition that the chattel mortgage was made with fraudulent intent. The allegation is that it was made with intent to create a preference. I think the proof shows clearly that it did create a preference, and that the mortgagor intended that it should create a preference. The proof of insolvency is also sufficient, in my opinion.

Upon the whole case, my conclusion is that on the evidence given there should be an adjudication in bankruptcy.

UNITED STATES *ex rel.* PAZOS *v.* REDFERN, U. S. Com'r of Immigration.

(Circuit Court, E. D. Louisiana. June 25, 1910.)

No. 13,811.

1. ALIENS (§ 54*) — EXCLUSION — INQUIRY BOARD — INSPECTORS — QUALIFICATION.

Immigration Act Feb. 20, 1907, c. 1134, § 24, 34 Stat. 906 (U. S. Comp. St. Supp. 1909, p. 461), provides for the examination of an alien by an immigration inspector touching his right to land, and declares that if the inspector is dissatisfied, or the alien's right to enter is challenged by any other immigration officer, he must be held for further examination by a board of inquiry; and section 25 declares that such board shall consist of three immigration officials, except that, at ports where there are fewer than three immigration inspectors, other United States officials may be designated to serve. *Held* that, where there were only three immigration inspectors at a port where an alien attempted to land, the inspector who had examined her and had denied her right to enter was not competent to sit on a board of special inquiry, and a board consisting of three inspectors, of which such inspector was one, was illegal and without jurisdiction.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 54.*]

2. ALIENS (§ 49*)—RIGHT TO ENTER—MARRIED WOMEN.

Where relator was married to her husband in Cuba, and he had already entered the United States and was employed, earning daily wages sufficient to prevent himself and wife becoming public charges, and both were strong, healthy, and intelligent, relator was also entitled to enter.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 107; Dec. Dig. § 49.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Habeas corpus by the United States, on relation of Mrs. Enriquita Pazos, to obtain her discharge from the custody of S. E. Redfern, United States Immigration Commissioner. Writ allowed, and petitioner discharged.

Jos. A. Morales and Henry J. Rhodes, for relator.
Charlton R. Beattie, U. S. Atty.

FOSTER, District Judge. In this case the petitioner prays for a writ of habeas corpus to discharge her from the custody of the commissioner of immigration at the port of New Orleans. The undisputed facts are as follows:

The petitioner arrived at the port of New Orleans from Cuba, and was duly examined by an immigrant inspector touching her right to land. He, not being satisfied she was entitled to enter the country, ordered her held for the action of a board of special inquiry. In due time the board met and denied her admission, on the ground that she was liable to become a public charge. Thereafter, on appeal to the Secretary of Commerce and Labor, the decision of the board was affirmed. This board was composed of three immigrant inspectors, one of whom was the identical inspector who had denied her admission. In all other respects her examination and detention appears to have been in conformity with law, and if the board was properly constituted I would have no jurisdiction to inquire into the case.

Congress has seen fit to vest the final decision as to the right of aliens to enter the country in the Department of Commerce and Labor, but that department is governed by certain rules and regulations which must be strictly construed in conformity with the eternal principles of justice and right. Immigration Act Feb. 20, 1907, c. 1134, § 24, 34 Stat. 906 (U. S. Comp. St. Supp. 1909, p. 461), provides that an alien coming to the United States shall be examined by an immigration inspector touching his right to land. As a matter of fact his admission is largely in the discretion of this officer. But if the examining inspector is dissatisfied, or the alien's right to enter is challenged by any other immigration officer, he must be held for further examination by a board of special inquiry. Section 25 provides that boards of special inquiry shall consist of three immigration officials, except that, at ports where there are fewer than three immigration inspectors, other United States officials may be designated to serve on such board.

It is urged by the respondent that there are but three immigrant inspectors at this port, and therefore it is necessary that they all serve upon every board of special inquiry, and, there being not less than three, no other United States officer can be designated to serve on such board. I do not agree with this contention. The law should be construed to mean that, in all cases where there are not three immigration officers eligible to serve, then other United States officers may be designated.

It is fundamental in American jurisprudence that every person is entitled to a fair trial by an impartial tribunal, and a board of special inquiry constituted as in this case is at least open to suspicion. I do

not believe the law contemplates that the inspector who makes the preliminary examination shall serve on the board of special inquiry, and I must hold in this case that the board which denied to petitioner the right to land was illegal and without power.

On the merits of the case the facts are with the relator. Her husband is already in the country. She has proven to my satisfaction, by witnesses whose veracity I have no reason to doubt, that she was legally married to him in Cuba. They both appear to be strong, healthy, and intelligent. The husband is employed and earning daily wages, small, it is true, but sufficient to prevent the couple becoming public charges.

The writ will be made absolute, and the relator will be discharged from custody.

UNITED STATES v. GARBISH.

(Circuit Court, E. D. Louisiana. June 27, 1910.)

No. 2,648.

MASTER AND SERVANT (§ 13*)—EIGHT-HOUR LAW—EMERGENCIES.

The building of levees on the banks of the Mississippi river in the Eastern district of Louisiana presents at all times an extraordinary emergency, exempted from operation of Eight-Hour Law Aug. 1, 1892, c. 352, 27 Stat. 340 (U. S. Comp. St. 1901, p. 2521).

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 13.*]

Herman Garbish, having been indicted for violating the eight-hour law of August 1, 1892, demurs to the indictment. Demurrer sustained.

Charlton R. Beattie, U. S. Atty.

Saunders, Dufour & Dufour, for defendant.

FOSTER, District Judge. In this case the defendant was indicted for an alleged violation of Act Aug. 1, 1892, c. 352, 27 Stat. 340 (U. S. Comp. St. 1901, p. 2521), known as the "Eight-Hour Law," and has interposed a general demurrer to the indictment, on the ground that it does not set forth an offense against the laws of the United States. The demurrer, of course, admits all the facts properly pleaded, but does not admit the correctness of either the inferences drawn from them by the pleader, or his conclusions of law.

Stripped of surplusage, the indictment charges that on August 17, 1908, the defendant, a contractor, was engaged in building certain public levees on the banks of the Mississippi river in the parish of St. James, La., and required and permitted the laborers employed by him, and engaged in the said work, to work more than eight hours in one calendar day. The indictment further sets up that during the months of August, September, October, November, and December the waters of the Mississippi river annually fall below the level of the surrounding land and are retained within its banks without the necessity of artificial levees; that the work was being done in the ordinary and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

usual course of levee building by the government of the United States, in preparation for the high waters that annually come down the river; that the existing levee was not of sufficient size and strength and did not comply with the government standard, and was being destroyed and replaced by the new, higher, and stronger levee; that nothing unusual or out of the ordinary had required the destruction of the old levee, or the building of the new levee; and that the contractor had the usual time to complete the levee, so as to allow it to settle and pack and become ready to withstand the next annual rise of the river.

The defendant rests his case on the proposition that the building of levees on the Mississippi river, in the Eastern district of Louisiana, at all times presents an extraordinary emergency; and hence that particular work is exempted from the operation of the law. This is denied by the government, and the indictment contains the general averment that no extraordinary emergency existed. The question thus squarely presented is decisive of the case, if defendant's contention be sustained.

The building of levees in Louisiana has at all times presented many problems. It is absolutely necessary, not only for the preservation of property and to permit the cultivation of the land, but to safeguard the very lives of the inhabitants as well, that levees should be built on the banks of the Mississippi river in this locality. Therefore it has always been usual that levee work proceed with the greatest dispatch, and the labor of the day has never been restricted to eight hours. In the nature of things, it is impossible to employ an unlimited number of men or teams in the building of levees, as, no matter how great a force the contractor may assemble, the work will not permit of crowding. It is necessary that levees be built in as short a time as possible, in order that they may settle as much as they can, and that the grass may become well rooted upon them, before they are called upon to bear the strain of a high river.

It is true that the months of August, September, October, November, and December are the most favorable for levee building, but there is no certainty that during any part of these months the river will maintain a low stage. When the river is bank full, necessarily no levees can be built. Statistics of the river's height, at New Orleans, show that during the past 25 years the river has been bank full on nearly every day of the year, and these statistics may well apply to the locality where the defendant was working. An unprecedented rain, or an early freeze followed by a thaw, anywhere in the valley of the Mississippi river or its tributaries, might unexpectedly cause the river to rise at New Orleans. No one can foresee or anticipate the acts of nature, and who can say that a few days' more time, in which it might have become solidified, would not have so materially added to the levee's strength as to enable it to withstand the pressure, and without which it might signally fail.

All of these facts are within the common knowledge of the people of this district, and, in connection with the specific allegations of fact in the indictment, overcome the mere conclusion of the pleader that no extraordinary emergency existed. The case presented here is not

that of a contractor trying to complete his job on schedule time, nor is it a question of expediency or the saving of expense. In my opinion, the building of levees on the banks of the Mississippi river in the Eastern district of Louisiana presents at all times an extraordinary emergency, within the meaning of the statute.

It may be that the indictment is otherwise demurrable, but I prefer to base my decision on the broad ground above set forth.

The demurrer will be sustained, and the defendant discharged.

PENSACOLA STATE BANK v. MERCHANTS' & FARMERS' BANK.

(Circuit Court E. D. Louisiana. June 28, 1910.)

No. 1,757 (13,757).

1. TRIAL (§ 177*)—QUESTIONS OF LAW OR FACT—PEREMPTORY INSTRUCTIONS.

Where both sides ask for a peremptory instruction, without more, both thereby affirm that there is no disputed question of fact, and the judgment is conclusive, if there is any evidence at all to support the finding.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 400; Dec. Dig. § 177.*]

Operation and effect of motions by both plaintiff and defendant for direction of verdict, see note to Love v. Scatterd, 77 C. C. A. 8.]

2. TRIAL (§ 177*)—QUESTIONS OF LAW OR FACT—REQUEST FOR PEREMPTORY INSTRUCTION—SPECIAL INSTRUCTIONS.

Where a party requests a peremptory instruction, and also asks for special instructions to the jury, and there are disputed questions of fact, the court, on overruling the motion to direct, should submit the case to the jury, notwithstanding the other party may have also asked for a peremptory instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 400; Dec. Dig. § 177.*]

3. TRIAL (§ 177*)—QUESTIONS OF LAW OR FACT—REQUEST FOR PEREMPTORY INSTRUCTION.

Where a party wishes to avail himself of a directed verdict on part of the record, and, if it is overruled, to go to the jury on the whole record, he must specifically point out the facts on which he relies as undisputed, and if he does not do so, but moves for a verdict on all the evidence, and his adversary also moves for a directed verdict, both thereby affirm that there is no disputed question of fact before the court, and are concluded by the judgment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 400; Dec. Dig. § 177.*]

At Law. Action by the Pensacola State Bank against the Merchants' & Farmers' Bank. Verdict for defendant, and plaintiff moves for a new trial. Denied.

Merrick & Lewis, P. L. Gensler, Jr., and R. J. Schwarz, for plaintiff.
Jones & Tyler and A. C. & J. W. McNair, for defendant.

FOSTER, District Judge. In this matter, at the close of all the evidence, both the plaintiff and the defendant moved the direction of a verdict. The motion of defendant was granted, and necessarily that of plaintiff was denied. At the time of presenting its request for a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep.'s Indexes

peremptory instruction, or immediately after it was overruled, plaintiff also presented 17 special instructions to be given the jury on the law and the facts in the case. Plaintiff now moves for a new trial, mainly upon the ground that, upon the overruling of the motion to direct a verdict, the case should have been submitted to the jury on the special instructions requested.

The discussions of the appellate courts upon the question have been largely academic. The decisions lay down no specific rules of practice, and offer slight aid to the trial judge in determining his course of action in the situation here presented. It may be considered settled that where both sides ask for a peremptory instruction, and do nothing else, both affirm there is no disputed question of fact, and the judgment is conclusive, if there is any evidence at all to support the finding. *Beutell v. Magone*, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654. It also appears to be settled as an abstract proposition that where a party requests a peremptory instruction, and also asks for special instructions to the jury, and there are disputed questions of fact, on the overruling of the motion to direct, the case ought to be submitted to the jury, notwithstanding the other party may have also asked for a peremptory instruction. *McCormick v. National City Bank*, 142 Fed. 133, 23 C. C. A. 350; *Empire State Cattle Co. v. Atchison R. R.*, 210 U. S. 1, 28 Sup. Ct. 607, 52 L. Ed. 931.

But it is certain that the mere fact that a party requests the direction of a verdict, and supplements the motion by requests for special charges, does not of itself require the court to submit the case to the jury, as in both the cases above cited the judgment was affirmed. As was said by Judge Shelby, concurring in the *McCormick Case*:

"A party may believe that a certain fact, which is proved without conflict or dispute, entitles him to a verdict. But there may be evidence of other, but controverted, facts which, if proved to the satisfaction of the jury, entitle him to a verdict, regardless of the evidence on which he relies in the first place."

No one can doubt that, where a state of facts exists as contemplated by Judge Shelby, it would be error not to submit the case to the jury, if it is properly requested. But if a party moves the court to direct a verdict in his favor on all the evidence, how can he more clearly state that there is no conflict or dispute as to all the evidence. If he desires to bring himself within the purview of the cases above cited, and believes that some fact is undisputed which entitles him to a verdict, while other facts are disputed which would also entitle him to a verdict, if the conflict resolves itself in his favor, it seems to me he should specifically call the court's attention to the fact upon which he relies in support of his motion to direct. I do not believe that a simple, general motion, requesting the direction of a verdict, although coupled with requests for special charges of a general nature, is sufficient for this purpose. In most cases it is proper that the jury find the facts. There is a growing tendency, however, to attempt to subvert this function by moving the court to direct a verdict, not with any hope it will be granted, but merely thereby to foist upon the appellate court the burden of reviewing the facts.

It is incumbent upon a party, objecting to the admission of evidence, to state adequate grounds to support his objections. It is also necessary that counsel, in reserving exceptions to the court's charge, do so with clearness and certainty, and point out the exact portion to which he objects. It seems logical, by analogy, that if a party wishes to avail himself of the chance of having a verdict directed in his favor on part of the record, but, if overruled, to go to the jury on the whole record, it is but fair to the court and his adversary that he specifically show the facts he relies upon as undisputed. If he moves for a verdict on all of the evidence, as was done in this case, he undoubtedly affirms that there is no disputed question of fact before the court, and, if his adversary agrees with him, both should be concluded.

While I believe that a new trial should be refused for the reasons above stated, still, in justice to the defendant, I feel bound to say that I think, in any event, the undisputed facts in the record entitle it to a verdict.

The motion for a new trial will be overruled.

UNITED STATES *ex rel.* CALAMIA *v.* REDFERN. Immigration Com'r.

(Circuit Court, E. D. Louisiana. May 26, 1910.)

No. 13,789.

1. ALIENS (§ 54*)—DEPORTATION—LIMITATION.

Act Cong. March 3, 1903, c. 1012, § 21, 32 Stat. 1218, fixing three years as the period within which an alien unlawfully in the country might be deported, governs deportation of an alien who landed March 3, 1907.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 54.*]

2. ALIENS (§ 54*)—DEPORTATION—WARRANT—SUFFICIENCY.

A warrant for the deportation of an alien charged to be unlawfully in the country in violation of Act March 3, 1903, c. 1012, 32 Stat. 1213, and Act Feb. 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1909, p. 447), is not insufficient because signed by the Assistant Secretary of Commerce and Labor instead of the Secretary.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 54.*]

3. ALIENS (§ 54*)—DEPORTATION—LIMITATION.

Under Acts Cong. March 3, 1903, c. 1012, 32 Stat. 1213, and Feb. 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1909, p. 447), providing for the deportation of aliens unlawfully in the country within three years after landing, deportation need not be completed within that time, the government having the whole of the last day of the three years in which to make the arrest, and prescription being interrupted by the arrest, the government is entitled to a reasonable time in which to carry out the sentence of deportation.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 54.*]

4. ALIENS (§ 53*)—"PASSPORT"—EFFECT.

A passport from a foreign government to its citizen is merely written permission from the government to travel, and does not affect his status in the United States, in the absence of treaty provision, and hence is no defense to proceedings to deport him.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 53.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Application by the United States, on the relation of Guiseppe Calamia, against Samuel E. Redfern, Commissioner of Immigration, for a writ of habeas corpus. The writ having been discharged, relator moves for a new trial. Motion denied.

Patorno & Denechaud, and Geo. Sladovich, for relator.
Charlton R. Beattie, U. S. Atty.

FOSTER, District Judge. In this case relator sued out a writ of habeas corpus alleging that he was unlawfully restrained of his liberty by the respondent, and that he was about to be illegally deported from the United States. He alleges that he arrived at the port of New York on March 3, 1907, and was duly admitted to the United States; that on February 26, 1910, he was arrested in New Orleans by an immigrant inspector upon a warrant from the Secretary of Commerce and Labor; that he was given a hearing immediately after his arrest, and was thereafter released on bond; that on March 2, 1910, his bondsmen were called upon for his surrender and he was taken into custody by respondent. He alleges certain irregularities as to the method of his examination immediately after his arrest, and urges particularly that it will be physically impossible to deport him from the United States within three years after his landing, and that, therefore, the immigration officers are without power in the matter. To this petition respondent made due return, denied any illegality in the arrest or examination of relator, and set up that prior to his entry into this country he had committed certain felonies in Italy involving moral turpitude, and had been convicted and sentenced to 20 years' imprisonment at hard labor. On the trial of the case the return to the writ was not traversed in any way, but on the contrary the facts set out therein were admitted to be true, so there is no doubt that relator belongs to one of the classes of aliens excluded from admission to the United States, both under the act of Feb. 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1909, p. 447), and the act of March 3, 1903, c. 1012, 32 Stat. 1213. Upon this hearing of the case the writ of habeas corpus was discharged and relator remanded to the custody of respondent. The matter is now before me on an application for a new trial.

In addition to the matters set out in the original petition it is urged that relator was admitted into the United States under the act of March 3, 1903, and that said act fixes the limitation for deportation at two years, instead of three years as provided by the act of Feb. 20, 1907; that the warrant of deportation was not signed by the Secretary of Commerce and Labor, but was signed by one of his assistants, and is therefore void; that in the course of ordinary events the Secretary could not have examined the facts before issuing the warrant; that relator was in possession of a passport issued by the Italian government, and therefore is entitled to remain in the United States until such time as he may desire to return to Italy, and in the meantime should be considered under the special protection of the treaty, and not subject to deportation. It seems to me to be immaterial whether or not the limitation as to deportation is to be governed by

the act of March 3, 1903, or the act of Feb. 20, 1907. The act of 1907 is unambiguous, and fixes a period of three years after landing in which an alien, unlawfully in the country, may be deported. Section 20 of the act of 1903 fixes a period of two years, while section 21 of the same act fixes a period of three years. In this case I consider section 21 would govern.

The warrant under which relator is held sets up that he is unlawfully in the country in violation of both the acts of 1903 and of 1907, and I consider it sufficient in form. Nor is it a defect that it is signed by the Assistant Secretary of Commerce and Labor. See *Rev. St. § 177* (U. S. Comp. St. 1901, p. 90); *Marsh v. Nichols, Shepard & Co.*, 128 U. S. 615, 9 Sup. Ct. 168, 32 L. Ed. 538; *United States v. Peralta*, 19 How. 347, 15 L. Ed. 678.

It is urged with great earnestness by counsel for relator that as it was physically impossible to deport him from the United States within three years from the time he entered, when he was surrendered by his bondsmen, that he cannot be deported at all, as the law should be held to be that an alien must be both arrested and deported within three years. I cannot agree with this view. I consider the government should have the whole of the last day of the three years in which to make the arrest, and, prescription being interrupted by the arrest, the government is entitled to a reasonable time in which to carry out the sentence of deportation.

Relator's contention in regard to the privileges accorded him by virtue of his passport is entirely without merit. The passport is, at most, a written permission from his government to travel, and, in the absence of express treaty provisions, has no effect upon his status at all. As no pertinent provision of the existing treaties has been pointed out, I assume there is none. The other contentions of relator are equally without merit.

The motion for a new trial will be denied.

In re HOXIE et al.

(District Court, D. Maine. July 2, 1910.)

BANKRUPTCY (§ 384*)—COMPOSITION.

Under Bankr. Act July 1, 1898, c. 541, § 12d, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), the approval of the majority of creditors of an offer of composition is evidence, *prima facie*, that the composition is for the best interests of the creditors; and the burden is upon those who attack the composition.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 384.*]

Proceedings in bankruptcy in the matter of Charles E. Hoxie and another, individually and as partners. Confirmation of an offer of composition denied.

Williamson & Burleigh, for objecting creditors.

Albert S. Woodman and Norman L. Bassett, for bankrupts.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HALE, District Judge. The bankrupts were duly adjudicated on the 15th day of March, 1910, upon an involuntary petition filed February 26, 1910. At the first meeting of creditors, claims of 44 creditors, amounting to \$9,146.59, were filed. Claims of certain other creditors, duly scheduled, have not yet been presented for allowance. Appraisers have been appointed, and have filed their report, showing the value of the assets of the bankrupts to be: Real estate, \$5,300, which is under mortgage for more than that amount; personal property, \$1,481.95. The appraisers report that the basis of their valuation is partly at cost price and partly at possible selling value. After the bankrupts filed their schedule and were examined they offered a composition at the rate of 15 per cent. A majority in number of all the creditors whose claims have been allowed, namely, 29 creditors, representing \$5,362.06, have accepted in writing the offer of composition. The referee reports the above facts. He recommends that the composition will be for the best interests of the creditors; that it is made in good faith, and not procured by any means, promises, or acts prohibited by the bankrupt law; and that the bankrupts have not been guilty of any act, or of any failure in duty, which would be a bar to their discharge. He also assigns certain reasons which have influenced him in coming to his conclusion.

It is provided by section 12d of the bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]) that the judge shall confirm a composition if satisfied (1) that it is for the best interests of the creditors. There being no question of the bankrupts having been guilty of any act or of any failure in duty which would be a bar to their discharge, and the offer and acceptance having been in good faith, the single question before the court is whether or not the confirmation of the composition is for the best interests of all the creditors.

The English rule appears to be that the approval of the majority of the creditors to the offer is final. Under our statute such approval is evidence, *prima facie*, that the composition is for the best interests of the creditors; and the burden is upon those who attack the composition. The same rule prevailed under the bankruptcy act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517). In *Ex parte Jewett*, 2 Low. 393, Fed. Cas. No. 7,303, Judge Lowell said:

"In the absence of fraud and concealment, the question for the court seems to be, not whether the debtor might have offered more, but whether his estate would pay more in bankruptcy."

Substantially the same issue is before the court under the present act. *Adler v. Jones*, 109 Fed. 967, 48 C. C. A. 761; *Adler v. Hammond*, 104 Fed. 862, 44 C. C. A. 229; *In re Waynesboro Drug Co.* (D. C.) 157 Fed. 101.

Certain creditors object to the confirmation of the composition, and file specifications of objections. The examination of the bankrupts, and all papers relating to the estate, are before me. It is for the court to determine whether the nonassenting creditors have met the burden of showing that the offer of composition is inadequate, and that a substantially larger sum may reasonably be expected to result

from the administration of the assets under the regular course of bankruptcy proceedings. A sum less than \$1,500 is required to carry out the offer of composition. The appraisal shows assets amounting to about \$4,500. The learned counsel for the bankrupts urge that the evidence shows the appraisal to be largely in excess of the available value of the property. It is not necessary to discuss in detail the different views taken by counsel touching this matter, or the testimony relating to it. It is in evidence that since the adjudication the business of the bankrupt firm continues to be carried on, and that many of the creditors who have accepted the offer continue to supply the bankrupts with goods, and to do business with them. It is urged that they are willing to accept the offer for the reason that their profits in future from the conduct of the business will fully repay them for their losses in bankruptcy. I do not esteem it to be my duty to discuss the evidence in detail, or to decide what induced the assenting creditors to assent. The bankruptcy law does not make their decision conclusive, but only *prima facie*. Their assent does not relieve the court from passing on the question whether the composition is for the best interests of all the creditors. This question is addressed to the judicial discretion of the court, and from its conclusion either party may appeal. *Adler v. Hammond*, *supra*.

Upon a careful review of the examination of the bankrupts, the schedules, and all the evidence before me, I cannot avoid the conclusion that the nonassenting creditors have met the burden of showing that the acceptance of the composition will not be for the best interests of all the creditors. The whole testimony leads me to the conclusion that the assets should produce nearly double the offer of 15 per cent. It is with hesitation that I come to a conclusion opposed to that of the painstaking and competent referee, who assigns some very good reasons for coming to his conclusion. Some of the reasons which he assigns, however, are not tenable, and would enlarge the inquiry beyond its legitimate scope.

The offer of composition is not confirmed.

JUNG v. AMERICAN CREDIT INDEMNITY CO.

(Circuit Court, E. D. Louisiana. April 22, 1910.)

No. 13,733.

INSURANCE (§ 432*)—CREDIT INDEMNITY POLICIES—LOSSES COVERED.

A credit indemnity policy insured against a loss not exceeding \$4,000 on accounts of persons rated by a mercantile agency, above an initial loss to be borne by insured equaling 2½ per cent. of his gross sales, not less than \$180,000. A rider provided that losses on unrated debtors should be covered as follows: The gross amount covered on any one debtor should be 75 per cent. of \$500 gross indebtedness. The aggregate losses recoverable on a policy under the rider should be 75 per cent. of \$4,000. The amount of the initial loss should be calculated on the net losses under the rider and the policy. *Held*, that the contract insured against loss on unrated accounts up to \$3,000, after deducting the initial loss to be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

borne by insured; the rider not being subject to construction, as not insuring unrated accounts, and as merely permitting consideration of losses on them in estimating the net initial loss.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 432.*]

Credit insurance, see notes to American Credit Indemnity Co. v. Wood, 19 C. C. A. 271; Same v. Athens Woolen Mills, 34 C. C. A. 165.]

At Law. Action by L. E. Jung against the American Credit Indemnity Company. Verdict directed for plaintiff.

Chas. J. Theard and Sol. Wolff, for plaintiff.

Farrar, Jonas, Goldsborough & Goldberg, for defendant.

FOSTER, District Judge. I may as well state my reasons for directing a verdict in this case. This is a suit, gentlemen, on a policy of credit indemnity insurance. The policy is for \$4,000, and it is admitted that the total loss of the plaintiff has been \$18,451.46. It also appears that he has two kinds of accounts, one termed "rated accounts," which are accounts of debtors falling within the ratings of R. G. Dun as set out in paragraph 2 of the conditions of the policy, and the other called "unrated accounts," consisting of all other accounts. The policy reads, in part, as follows:

"The American Credit Indemnity Company, in consideration of the representations and warranties made in the application for this bond or any prior bond of indemnity issued to the indemnified by this company, and upon payment of three hundred dollars premium, hereby guarantees L. E. Jung, of New Orleans, La., engaged in the business of wholesale liquors, etc., to an amount not exceeding four thousand dollars, against actual loss, in excess of the initial loss of not less than forty-five hundred dollars to be borne by the indemnified as hereinafter provided, which may be sustained by the indemnified through the insolvency of debtors as hereinafter defined, occurring during the term of this bond, and be covered under and proven in accordance with the provisions hereof, on the indemnified sales of merchandise shipped and delivered during the term of this bond, in the usual course of said business to individuals, firms, or copartnerships or corporations, in the United States of America or in the Dominion of Canada. The term of this bond shall be from the 1st day of October, 1907, to the 30th day of September, 1908, both days inclusive. The said initial loss, to be borne by the indemnified, shall be two and one-half per cent. of the total amount of the gross sales by the indemnified of merchandise shipped and delivered, during the term of this bond, in said United States and Dominion of Canada, but said percentage shall be calculated on sales of not less than \$180,000, and said initial loss shall be deducted, as hereinafter provided, from the aggregate amount of the net covered, proved losses ascertained in the adjustment."

Paragraph 2 of the provisions refers to the rating of the debtor and reads as follows:

"No loss is covered by this bond, unless the debtor to whom the goods were shipped and delivered shall have in the latest published book of the Dun & Company Mercantile Agency at the date of the shipment one of the ratings of the said Agency, both as to capital and credit, as tabulated below. The gross amount to be covered on any one insolvent debtor shall be limited to 30 per cent. of the lowest amount of his capital rating where the first credit rating follows, but shall be limited to \$2,000 gross, and shall be limited to 30 per cent. of the lowest amount of his capital rating where the second credit rating follows, but shall also be limited to \$2,000 gross."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Then there are some further provisions and a schedule of ratings it is not necessary to read. To this policy is attached the following rider:

"By this rider, attached to and made part of bond No. 51612—C issued by the American Credit Indemnity Co., of New York, to L. E. Jung, of New Orleans, La., it is agreed that the following provisions shall be added to and made part of section No. 2 of this bond: If the governing rating of the debtor is a rating not covered under the body of said section No. 2, or if it is blank as to capital or credit, or both (blank blank), a loss on such debtor, if otherwise coming within the provisions of this bond, shall be covered to the following extent: The gross amount covered on any one such insolvent debtor shall be 75% of the indebtedness at the time of his insolvency but shall be limited to 75% of \$500 gross: Provided, that the aggregate of the net losses to be included in the adjustment under this bond on all debtors coming within the provisions of this rider be limited to 75% of \$4,000. The net amounts of proven losses covered under this rider shall enter with the net amounts of all other losses covered and proven under this bond in calculating under section No. 6 the amount from which the initial loss, to be borne by the indemnified, shall be deducted, and this rider shall in all respects have the same effect as if its provisions had been incorporated in the body of said section No. 2."

And section 6 refers to certain amounts that shall be deducted in estimating the initial loss, such as the amount collected, the value of securities given, the amount of goods returned, or recovered by legal proceedings.

It is admitted that the plaintiff lost \$954.73 on what might be termed the rated accounts, and \$17,496.73 on the nonrated accounts. He sues for \$3,000 on his nonrated accounts, and for \$954.73 on his rated accounts. The company, however, contends that it is not liable for anything as the provisions in the rider and the last paragraph mean that there is no insurance whatever on unrated accounts, but that, in estimating the net initial loss, \$3,000 of unrated accounts may be considered, and, as there was only \$954.73 loss on rated accounts, that, taken together with the \$3,000 allowed under their construction, would not make up the initial loss of \$5,000 that the plaintiff would be required to lose before he could recover anything.

It may be that the language of the policy and the rider are susceptible of this construction. But I must confess that my mind is not subtle enough to grasp it. It seems to me that the plain common-sense interpretation of the entire policy is that this plaintiff was insured against loss on his unrated accounts up to \$3,000, provided he had first made his initial loss of \$5,000. Therefore, in that view of the case, I must direct a verdict for the plaintiff for \$3,954.73. It would have been very easy for the company to have put their construction in a simple sentence of a few words. They have not seen fit to do so, and it seems clear to me that any business man or layman, not an adjuster or actuary, in construing this policy, would adopt the interpretation that I have given it.

Of course, if I am wrong on that, the appellate court will very speedily correct me.

EATON v. CARGO OF LUMBER.

(District Court, E. D. New York. May 6, 1910.)

1. SHIPPING (§ 171*)—DEMURRAGE—CONSTRUCTION OF CHARTER—DELAY IN REACHING DOCK.

A provision of a charter party requiring the charterer to pay towing charges from the mouth of a creek to the dock of the charterer thereon for discharge does not require the charterer to provide the tug to do such towing nor render it liable for delay in obtaining such tug.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 171.*]

Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

2. SHIPPING (§ 181*)—DEMURRAGE—LAY DAYS—NOTICE—ARRIVAL OF VESSEL.

A provision of a charter party that lay days for discharging shall commence "from the time the captain reports his vessel ready to discharge cargo in New York harbor," where other provisions show that she was to discharge at the charterer's dock some distance up a creek, did not entitle the vessel to compute her time from notice of readiness while lying in the harbor before proceeding to the dock, when the delay was caused by the captain and exceeded the time lost.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 589-591; Dec. Dig. § 181.*]

In Admiralty. Suit by Frederic R. Eaton against cargo of lumber, lately on board schooner *Edward T. Stotesbury*. Decree for respondent.

Henry W. Goodrich, for libellant.

Solomon C. Whitbeck, for claimant.

CHATFIELD, District Judge. The libellant chartered to certain parties a schooner, the *Edward T. Stotesbury*, for a trip from Mobile, Ala., to New York. The charter party provided that the vessel should be discharged at a rate "not less than 60,000 feet per running day, Sundays and legal holidays excepted, commencing from the time the captain reports his vessel ready to discharge cargo, in New York harbor. Time consumed in shifting vessel to count as lay days." The charter party further provided:

"Charterers to pay towing mouth of Newtown creek to Cross, Austin & Ireland Lumber Co. and return."

The vessel arrived in the harbor of New York within the time provided for in other parts of the charter party, but was delayed after reporting her arrival in getting the necessary tugboats and in proceeding up Newtown creek to the dock of the charterer, Cross, Austin & Ireland Lumber Company. The unloading was begun away from the face of the dock, owing to certain delays in securing a berth, but the actual rate of unloading and the amount of time consumed in moving the vessel from that dock to a different location near the Gowanus creek and finishing the unloading there was at a more rapid rate than the minimum provided by the charter party; some of the lost time thus being saved.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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Without going into details, but taking the dates testified by the captain, who seems to have erroneously copied the mate's memoranda for the log, and thus credited two days which he might have included, the actual situation is that from January 19th, the day the boat arrived in the harbor and proceeded to an anchorage, until the 6th day of February at 1 p. m., amounts to 16 days exclusive of lay days, which the discharge of cargo at the rate specified would consume. From Saturday, February 6th, until February 11th, $5\frac{1}{8}$ days were lost, for which this action is brought.

The libellant contends that the provision in the charter compelling the charterer to pay the towing from the mouth of Newtown creek to the dock frees the boat and its captain and owners from any responsibility for the time lost in accomplishing that towing, and also that the language "ready to discharge cargo, in New York harbor," means from the time the vessel reported in the harbor rather than the time when docked ready to discharge.

It would seem that, if the expenses of towing were to be repaid by the charterer, the vessel could not thereby be relieved from proceeding under the charter to the place of unloading. At the most a demand upon the charterer to furnish the tow would have been necessary before responsibility for failing to provide a tugboat could be thrown upon those who were responsible for the cost. In addition, the arrival in the harbor ready to discharge cargo was, under ordinary circumstances, an ambiguous provision, and, in view of the other provisions showing that the cargo was to be unloaded some distance up Newtown creek, it is impossible to consider that the parties to the charter intended to have the boat report its readiness when lying in the harbor.

Allowing the usual time of 24 hours to report and to be taken to a dock, it would seem that the balance of the time $4\frac{1}{8}$ days, should not be counted against the vessel, as some 8 days elapsed before she was in her berth, and none of this seems to be the fault of the charterer, but was rather because of the insistence of the captain in maintaining his construction of an ambiguous charter.

The libel will be dismissed, but without costs.

PENNSYLVANIA STEEL CO. v. NEW YORK CITY RY. CO. et al.

(Circuit Court, S. D. New York. July 8, 1910.)

RECEIVERS (§ 88*)—CLAIMS—COMPROMISE.

Where the receiver of a street railway company had claims against a securities company amounting to \$8,615,555.24, including interest, but, to recover such sum, it would be necessary for him to prevail on substantially every one of the questions in controversy between himself and the various defendants, involving in one case a doubtful appeal to the Supreme Court of the United States, and the amount of interest on such claim alone was \$1,200,000, he would be directed to accept a cash com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

promise offer to pay him \$5,500,000. especially where it was approved by substantially all the interests affected.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 162; Dec. Dig. § 88.*]

In Equity. Suit by the Pennsylvania Steel Company against the New York City Railway Company and the Metropolitan Street Railway Company. Petition by receiver of the New York City Railway Company for instructions concerning an offer of compromise of judgment against the Metropolitan Securities Company and suit against the same company and others. Acceptance of compromise directed.

Byrne & Cutcheon, for complainant.

James L. Quackenbush, for defendant.

Dexter, Osborn & Fleming, for receiver of New York City Ry. Co.

J. Parker Kirlin, for Metropolitan St. Ry. Co.

Masten & Nichols, for receivers of Metropolitan St. Ry. Co.

LACOMBE, Circuit Judge. Notice of hearing has been given and representatives of various interests have appeared. The facts are fully set forth in the petition and its several schedules which were filed June 29, 1910. The situation of the judgment and the suit is specifically treated of in the opinion of counsel filed therewith. Irrespective of the other considerations referred to, the cash offer of \$5,500,000 is a large one. The total amount of receiver's claims, including interest, is \$8,615,555.24, but to recover that sum it would be necessary for him to prevail on substantially every one of the questions in controversy between himself and the various defendants. Defeat on two or three points only might result in producing after some years a smaller sum of money than is now offered. What these controversies are may be seen by reference to the opinion of counsel. In the one case it is apparent that the question raised would have to be taken to the Supreme Court in view of its decision in *Old Dominion Copper Co. v. Lewisohn*, 210 U. S. 206, 28 Sup. Ct. 634, 52 L. Ed. 1025. Whether that court would take the broad view contended for by the receiver and which is essential to his success no one can foretell. Irrespective of the other serious questions referred to in the papers presented, it is to be remembered that the suit against the Metropolitan Securities Company impleaded with certain directors of the New York City Railway Company is one for a diversion of capital of the last-named company to the treasury of the former. Whether or not under these circumstances interest could be recovered against any one other than the corporation defendant which received the diverted capital is problematical. That corporation is already bankrupt. The item of interest on this claim alone amounts to \$1,200,000. In the other suit, called the stockholder's suit, the various defenses are set forth in the opinion of counsel, and it is manifest that there are difficulties in the way of recovery which indicate a protracted litigation with no certainty as to the ultimate result. Moreover, if such litigation were entirely successful in all respects, the result would be a large judgment against another corporation concerned with traction in this city, and as the experience of this receivership has indicated, it sometimes happens that when a particularly large judgment is obtained against such a corporation it turns out to be insolvent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In view of all these circumstances, it seems wise for the receiver to accept the offer, and he is instructed to do so. Even if the court entertained any doubt as to the wisdom of such a course, the same instructions would be given in view of the substantially unanimous expression of approval by the representatives of the creditors and of all other interests, who have appeared. The receivers and their counsel are to be congratulated on the great success which has attended their untiring efforts to secure something out of the chases in action which the initiation of the receivership placed in their hands.

**COMPANIA AZUCARERA CUBANA v. INGRAHAM, MAXWELL
& BEALS.**

(Circuit Court, D. Connecticut. July 14, 1910.)

No. 737.

1. COURTS (§ 350*)—FEDERAL COURTS—COMMON-LAW ACTIONS—MODE OF PROOF—DEPOSITIONS.

Under the express terms of Rev. St. § 861 (U. S. Comp. St. 1901, p. 661), in common-law actions in the United States courts, the witnesses must appear in open court, unless the case falls within one of the statutory exceptions.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 923; Dec. Dig. § 350.*]

Conformity of practice in common-law actions to that of state court, see notes to *O'Connell v. Reed*, 5 C. C. A. 594, *Nederland Life Ins. Co. v. Hall*, 27 C. C. A. 392.]

2. COURTS (§ 350*)—FEDERAL COURTS—DEPOSITIONS DE BENE ESSE—FOREIGN WITNESSES.

Testimony of foreign witnesses cannot be taken under Rev. St. § 863 (U. S. Comp. St. 1901, p. 661), authorizing depositions de bene esse.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 923; Dec. Dig. § 350.*]

3. COURTS (§ 350*)—FEDERAL PRACTICE—FOREIGN WITNESSES.

Under Act Cong. March 9, 1892, c. 14, 27 Stat. 7 (U. S. Comp. St. 1901, p. 664), authorizing depositions to be taken in causes in the federal courts in the mode prescribed by the state laws, and under the Connecticut law, permitting the taking of depositions of nonresidents and providing for their oral examination, direct and cross, the Circuit Court for the District of Connecticut can grant a *dedimus potestatem* to take depositions in Cuba, where otherwise there will be a failure or delay of justice.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 923; Dec. Dig. § 350.*]

4. COURTS (§ 334*)—FEDERAL PRACTICE—JUDICIAL POWER.

Federal courts cannot go beyond federal authority, and adopt special privileges or restrictions enforced by states, in their courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 899; Dec. Dig. § 334.*]

At Law. Action by the Compania Azucarera Cubana against Ingraham, Maxwell & Beals. Plaintiffs apply for *dedimus potestatem*. Application granted.

John K. Beach and Wollman & Wollman, for plaintiffs.

J. L. Barbour and R. A. Knight, for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PLATT, District Judge. The plaintiffs have filed an affidavit in support of their application for a *dedimus potestatem* to take depositions in Cuba, which seems to show clearly that, unless some form of order shall be granted, there will be a failure or delay of justice. It is clear that by section 861, Rev. St. (U. S. Comp. St. 1901, p. 661), the Congress has taken charge of the mode of proof in the trial of actions at common law. The witnesses must appear in open court, unless a situation arises which is governed by one of the subsequent exceptions.

Plaintiffs find no aid in section 863, because the testimony of foreign witnesses cannot be taken *de bene esse*. The *Alexandra* (D. C.) 104 Fed. 907. They are driven to section 866, providing for the taking of depositions according to common usage.

Federal courts cannot exercise their discretion to go beyond federal authority and adopt special privileges or restrictions enforced by states in their courts. *Nat. Cash Reg. Co. v. Leland*, 94 Fed. 502, 37 C. C. A. 372; *Hanks Dental Ass'n v. Tooth Crown Co.*, 194 U. S. 309, 24 Sup. Ct. 700, 48 L. Ed. 989.

When the judiciary act (Act Sept. 24, 1789, c. 20, § 30, 1 Stat. 88) was passed in 1789, and when amended in 1872 (Act May 9, 1872, c. 146, 17 Stat. 89), out of which section 866 emerges, it is clear that the "common usage" was to take depositions upon written interrogatories; but in 1892 Congress passed an act (Act March 9, 1892, c. 14, 27 Stat. 7 [U. S. Comp. St. 1901, p. 664]) providing for an additional mode of taking depositions, authorizing them to be taken "in the mode prescribed by the laws of the state in which the courts are held."

The state of Connecticut permits its courts to take depositions of nonresidents, and expressly provides for the oral examination, direct and cross, of the witnesses. The power of this court to make the order asked for is, therefore, positive and clear. *U. S. v. Fifty Boxes*, etc. (D. C.) 92 Fed. 607.

A draft form of order was at one time submitted to the court, but is not now in hand. Counsel can hardly expect me, with the multitude of different matters which burden me daily, to keep in mind the details of the order. I can say in a general way, however, that, if the defendants remain constant in their objections to the form, I am not inclined to grant it as presented. It must be more specific, in the first place, as to the names and addresses of the witnesses to be examined. But, in addition to that, the defendants should not be compelled to incur the expense of attendance at the hearings in Cuba, and yet no satisfactory way of getting the facts which Cuban witnesses may testify to properly before our jury occurs to me, unless such witnesses are subjected to cross-examination at the time they give their direct.

I will settle the form of the order on July 26th, at 11 a. m., at Hartford, and shall expect counsel on both sides to confer as to the details, so as to be as nearly in harmony as possible before we come together.

UNITED STATES v. 420 SACKS OF FLOUR.

(District Court, E. D. Louisiana. March 29, 1910.)

No. 14,173.

1. COMMERCE (§ 55*)—PURE FOOD AND DRUG ACT—CONSTITUTIONALITY.

Pure Food and Drug Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187), prohibiting the transportation of adulterated and misbranded food in interstate commerce, is not unconstitutional as an attempted exercise by Congress of police power belonging to the states.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 91; Dec. Dig. § 55.*]

2. STATUTES (§ 47*)—PURE FOOD AND DRUG ACT—CERTAINTY.

Pure Food and Drug Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187), is not void for uncertainty and indefiniteness, in that no standard of grade, quality, or purity is prescribed, but that the determination of the standard is left to the courts, as such objection may be obviated by requiring specific and properly drawn pleadings.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 47; Dec. Dig. § 47.*]

Libel by the United States against 420 Sacks of Flour, claimed by the Ætna Mill & Elevator Company. On exception to the libel. Dismissed.

Charlton R. Beattie, for the United States.

A. E. Helm, for claimant.

FOSTER, District Judge. In this case a libel was filed by the United States against 420 sacks of flour alleged to have been brought into Louisiana by interstate shipment from Kansas, in violation of the pure food and drugs act (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187]). The Ætna Mill & Elevator Company has claimed the flour and filed exceptions to the libel on the following grounds:

"First. That Food and Drugs Act June 30, 1906, under the authority of which the libellant herein instituted these proceedings, is wholly invalid, unconstitutional, and void, in that said act in terms and by intentment is in violation of article 1, section 8, paragraph 3, of the Constitution of the United States, and is in further violation of so much of article 5 of the amendments to the Constitution of the United States as prescribes that no person shall be deprived of life, liberty or property without due process of law; and is further in violation of article 10 of the amendments to the Constitution of the United States.

"Second. That the said act, known as the Food and Drugs Act of June 30, 1906, is wholly illegal and void by reason of the fact that it is uncertain and indefinite, and that said uncertainty and indefiniteness apply to the whole of said law, and particularly in this: That the law itself does not define any standard of grade, quality, or purity, and in this regard delegates legislative functions to the court clothed with jurisdiction of cases of a civil or criminal nature brought under this law."

It is urged by claimant that Congress intended to enact, and in fact has enacted, a police regulation, and that, having such intention, the power vested in Congress to regulate interstate commerce is insuffi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cient to validate the act. I cannot agree with this contention. To my mind it is immaterial what the intention of Congress was, if it had the power to enact the legislation. That it did so have, I consider well settled. In the Lottery Case, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492, the Supreme Court upheld the validity of the law prohibiting the sending of lottery tickets from one state to another, and, reasoning by analogy, it seems perfectly clear that Congress can prohibit the shipment in interstate commerce of food that has been adulterated, or labeled so as to defraud or mislead the public.

The second contention I consider equally without merit. While the act is necessarily broad in its terms, the courts can well protect the rights of parties in each particular case by requiring specific and properly drawn pleadings.

The exceptions must therefore be overruled.

In re T. H. BUNCH CO.

(District Court, E. D. Arkansas, W. D. June 23, 1910.)

No. 1,167.

1. CONTRACTS (§ 138*)—ILLEGAL TRANSACTION—RELIEF.

If plaintiff does not require the aid of an illegal transaction to establish his claim, he may recover if defendant has possession of a thing of value belonging to plaintiff, though an illegal transaction was involved therein.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681-700; Dec. Dig. § 133.*]

2. BANKRUPTCY (§ 314*)—CLAIMS PROVABLE.

Kirby's Dig. Ark. § 530, provides that no property transported by a carrier shall be delivered except on surrender and cancellation of the bills of lading. A carrier delivered grain without requiring surrender of such bills of lading, and the consignee deposited some of the bills as collateral security for loans, and some of them were held by the original vendors when the consignee became bankrupt. The carrier took assignments of the drafts secured by the bills of lading, and open accounts, and bills of lading owned by the original vendors, and procured the bills of lading. *Held* that, though the carrier had violated the statute, it could recover against the bankrupt's trustee on the assignments.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 314.*]

3. CONTRACTS (§ 136*)—VALIDITY—ACTS "MALUM IN SE" AND "MALA PROHIBITUM."

A distinction is made between acts "malum in se," which are generally regarded as absolutely void in the sense that no right or claim can be derived from them, and acts which are "mala prohibitum," which are void or voidable, according to the nature of the thing prohibited.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681-700; Dec. Dig. § 136.*]

For other definitions, see Words and Phrases, vol. 5, p. 4296; vol. 5, p. 4315.]

4. STATUTES (§ 241*)—CONSTRUCTION—VALIDITY OF CONTRACT.

When a statute imposes specific penalties for its violation, where the act is not malum in se, and the purpose of the statute can be accomplished without declaring contracts in violation thereof illegal, the inference is

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that it was not the legislative intent to render such contracts illegal and unenforceable, and the court must examine the entire statute to discover whether the Legislature intended to prevent courts from enforcing contracts based on the act prohibited, and, unless it does so appear, only the penalties imposed by the statute can be enforced.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.*]

5. CARRIERS (§ 20*)—CARRIAGE OF GOODS—DELIVERY WITHOUT SURRENDER OF BILL OF LADING—PENALTY—STATUTORY PROVISIONS.

Kirby's Dig. Ark. § 530, provides that no property deposited for which bills of lading have been issued shall be delivered up by a carrier, except on surrender and cancellation of such bills of lading. Section 531 provides that any person violating the provisions of the act shall be deemed guilty of a crime, and upon conviction fined, not exceeding \$5,000, or imprisoned in the penitentiary not exceeding five years, or both, and also provides a liability in a civil action for all damages sustained by the owner of the bill of lading. *Held*, that it was not the legislative intent to impose upon a carrier delivering goods to a consignee without surrender or cancellation of the bill of lading, in addition to the fine and civil liability, the further penalty of being prohibited from collecting the value of the goods illegally delivered and converted to the consignee's own use.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

In the matter of the T. H. Bunch Company, bankrupt. On petition for review of allowance by the referee of a claim of the Chicago, Rock Island & Pacific Railway Company. Action of referee approved.

As some of the claims are not questioned, it is only necessary to state the facts bearing upon the disputed claims, amounting to \$205,767.53. The claim as originally presented stated that the railway company is a common carrier engaged in the transportation of freight in and through the state of Arkansas and other states; that the bankrupt, which was engaged in the city of Little Rock in the grain and produce business, procured from said railway company the delivery of a large number of cars of corn, oats, hay, and other grain and merchandise which had been consigned by the shippers thereof to shippers' order, and which were surrendered and delivered by the railway company to the bankrupt without surrender of the bills of lading, whereby the railway company had been compelled to pay to the holders and owners of bills of lading the sums of money now claimed; that the said bills of lading had been hypothecated by the bankrupt as collateral security to certain notes and accepted drafts, and upon payment by the railway company to the holders of the bills of lading these notes and accepted drafts were assigned to it. About \$35,000 of this amount was paid to the original vendors, who had not parted with the bills of lading, and they assigned these bills of lading to the railway company. The various notes, accepted drafts, and accounts are fully set out in the proof of claim, and it is unnecessary to set them out in this statement of facts. The assignments made by the holders of the notes and accepted drafts were in the following form:

After reciting the facts as above stated and describing the bills of lading and acknowledging the receipt of the payment, they proceed as follows:

"In consideration of this payment the Chicago, Rock Island & Pacific Railway Company is hereby released from all liability on account of said bills of lading and all the interest of this bank in the aforesaid notes to the amount of \$—— (naming the amount paid to it) is hereby transferred and assigned to the said Chicago, Rock Island & Pacific Railway Company, and the said railway company is hereby authorized to collect the same from the said T. H. Bunch Company or its receivers, successors or assigns, and to use the name of this bank in filing suit or taking legal steps to make the said collection, it being understood, however, that all such proceedings are to be at the sole cost and expense of said railway company."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The form of the assignments made by the vendors who had not parted with the bills of lading which were made to shippers' order was as follows:

"Received of the Chicago, Rock Island & Pacific Railway Company the sum of \$—— (naming the amount due that vendor) in full settlement of claims against said company for failure to deliver car (describing the car) in accordance with shippers' order bill of lading issued therefor. In consideration of this settlement the said bill of lading is hereby assigned to the said Chicago, Rock Island & Pacific Railway Company."

To these claims the trustee and the W. B. Worthen Company, a creditor of the bankrupt, filed objections. The objections, briefly stated, are that the statements set out by the railway company in its proof of claim and the accompanying exhibits in reference to said payments do not entitle it to be subrogated to the debt or demand originally owing by said bankrupt to the banks or shippers; that they do not constitute a just, valid, and provable debt, claim, or demand owing from said bankrupt to the railway company for the reason that said sums of money were paid to said banks by the railway company to obtain its release from a liability it had incurred to them by its own unlawful act in wrongfully delivering to said bankrupt shipments for which it had issued negotiable bills of lading which had thereafter been hypothecated by the bankrupt to the holders thereof as collateral security to certain notes and accepted drafts; that by said payments the railway company obtained a release from such liability; that these payments were made by the railway company to obtain its release from a liability it had incurred by violation of the criminal laws of the state of Arkansas, and were in full settlement of the claims against said railway company held by the holders of the bills of lading.

After these objections were filed, the railway company, by leave of the referee, filed a new and amended proof of claim, in which it claims as assignee and owner of the notes and accepted drafts of the bankrupt by assignments made to it by the owners thereof. These assignments are in the following form, so far as the notes and accepted bills are affected:

After reciting the receipt of the money from the railway company and describing the bills of lading, it proceeds:

"In consideration of this payment the Chicago, Rock Island & Pacific Railway Company is hereby released from all liability on account of said bills of lading, and all the interest of this bank in the aforesaid notes (which are described) is hereby transferred and assigned to the said Chicago, Rock Island & Pacific Railway Company, and the said Chicago, Rock Island & Pacific Railway Company is hereby authorized to collect the same from the said T. H. Bunch Company, its receivers, successors or assigns, and to use the name of this bank in filing suit or taking legal steps to make the said collection, it being understood, however, that all such proceedings are to be at the sole cost and expense of the railway company."

The open accounts and bills of lading still owned by the original vendors were assigned as follows:

After acknowledging the receipt of the money, it proceeds: "In consideration of this payment all of our interest in the said above-named car and in bill of lading covering said car, and in the account above mentioned, is hereby sold and assigned and transferred to the said Chicago, Rock Island & Pacific Railway Company, its successors and assigns"—and then authorizes the railway company to collect the same in the same manner as in the other assignments.

This amended proof was filed on May 19, 1910. The same objections were filed by the trustee and the creditor as were filed to the original, and the further objection made that the original assignment as set out in the original proof of claim was only a release of the liability of the railway company to the holders of the bills of lading, and not an assignment of the indebtedness secured by said bills of lading, and that the assignments mentioned in the amended complaint were not made until after objections had been filed to the allowance of the original claim, and that the assignments were dated back to the date when the payments were made for the purpose of avoiding the defense set up in the objection to the allowance of the claim.

The statutes alleged to have been violated were enacted in 1887 and are

digested as chapter 15 of Kirby's Digest. So far as applicable to the issues involved herein, they are as follows:

"Sec. 528. No master, owner or agent of any boat or vessel of any description, forwarder or officer or agent of any railroad, transfer or transportation company, or other person shall sign or give away any bill of lading, receipt or other voucher or document for any merchandise or property by which it shall appear that such merchandise or property has been shipped on board of any boat, vessel, railroad car or other vehicle, unless the same shall have been actually shipped and put on board, and shall be at the time actually on board or delivered to such boat, vessel, car or other vehicle, or to the owner or owners thereof, or his or their agent or agents, to be carried and conveyed as expressed in such bill of lading, receipt or other voucher or document.

"Sec. 529. All receipts issued or given by any warehouseman, wharfinger or other person or firm, and all bills of lading, transportation receipts and contracts of affreightment issued or given by any person, boat, railroad, transportation or transfer company for goods, wares, merchandise, cotton, grain, flour or other produce or commodity, shall be and are hereby made negotiable by written indorsement thereon, and delivery in the same manner as bills of exchange and promissory notes; and no printed or written conditions, clauses or provisions inserted in or attached to any such receipts, bills of lading or contracts shall in any way limit the negotiability, or affect any negotiation thereof, nor in any manner impair the right and duties of the parties thereto, or persons interested therein; and every such condition, clause or provision purporting to limit or affect the rights, duties or liabilities created or declared in this act shall be void and of no force or effect.

"Sec. 530. Warehouse receipts given by any warehouseman, wharfinger or other person or firm for any goods, wares, merchandise, cotton, grain, flour or other produce or commodity, stored or deposited, and all bills of lading and transportation receipts of every kind given by any carrier, boat, vessel, railroad, transportation or transfer company, may be transferred by indorsement in writing thereon, and the delivery thereof so indorsed, and any and all persons to whom the same may be transferred shall be deemed and held to be the owner of such goods, wares, merchandise, cotton, grain, flour or other produce or commodity, so far as to give validity to any pledge, lien or transfer given, made or created thereby, as on the faith thereof, and no property so stored or deposited, as specified in such bills of lading or receipts, shall be delivered except on surrender and cancellation of such receipts and bills of lading; provided, that all such receipts and bills of lading which shall have the words, 'Not negotiable,' plainly written or stamped on the face thereof, shall be exempt from the provisions of this act.

"Sec. 531. Any warehouseman, wharfinger, forwarder or other person who shall violate any of the provisions of this act shall be deemed guilty of a criminal offense, and upon indictment and conviction shall be fined in any sum not exceeding five thousand dollars, or imprisoned in the penitentiary of this state not exceeding five years, or both; and all and every person or persons aggrieved by the violation of any of the provisions of this act may have and maintain an action at law against the person or persons, corporation or corporations violating any of the provisions of this act, to recover all damages which he or they may have sustained by reason of any such violation as aforesaid, before any court of competent jurisdiction, whether such person or persons shall have been convicted of fraud as aforesaid under this act or not.

"Sec. 532. All the provisions of this act shall apply to bills of lading, and to all persons or corporations, their agents or servants, that shall or may issue bills of lading of any kind or description, the same as if the words 'forwarder' and 'bills of lading' were mentioned in every section of said act."

By an act approved May 23, 1907, this statute was amended as follows:

"Section 1. That it shall be lawful for a shipper or consignee of goods to make, execute and deliver to, and the carrier to take and receive a good, sufficient and valid bond in a sum double the value of the goods, conditioned that, the shipper or consignee shall within a reasonable time thereafter, deliver to the carrier the original receipts and bills of lading issued for said

goods or shall pay the value of said goods to the carrier upon demand; and upon the execution and delivery of said good, sufficient and valid bond as aforesaid, it shall be lawful for the carrier to deliver up the said goods to the shipper or consignee, without requiring the immediate surrender of said original bills of lading and receipts and for so doing the carrier shall not incur the penalty of the law as set forth in chapter 15 of Kirby's Digest." Sess. Acts Ark. 1907, p. 861.

The facts are practically undisputed, and the court finds them as follows:

That the railway company is a common carrier, as alleged in the proof of claim, and that the bankrupt was engaged in the grain and produce business in the city of Little Rock; that said bankrupt made its purchases in large lots in Kansas, Nebraska, Missouri, and other western states. These purchases of grain would be shipped over the railway's line to Little Rock, and bills of lading issued by it to the vendor consigned to the shipper's order. The shipper, who was also the vendor, would then draw on the bankrupt for the purchase price of the shipment, attaching the draft to the bill of lading, which was indorsed by the shipper, with directions to deliver to the bankrupt upon payment of the draft. Most of these drafts were sold by the shippers to various banks who sent them to banks at Little Rock for collection. The bankrupt would either pay these drafts with loans obtained from local banks executing its notes and leaving the bills of lading as collateral security, or accept the drafts in order that the local banks could remit for them and carry them as loans to the bankrupt with the bill of lading as security. Shipments to the value of \$35,000 were made in the same manner, but the drafts were not negotiated by the vendors; they retaining the same. The business of the railway company with the bankrupt being very extensive, and the shipments frequently reaching Little Rock before the arrival of the drafts with the bills of lading attached, the bankrupt and railway company agreed that, if the bankrupt would execute to the railway company a bond in the sum of \$25,000 to secure it for shipments delivered without surrender of the bills of lading, shipments to the value of that sum would be delivered to it without the surrender of the bills of lading, which were to be surrendered as soon as they arrived and were taken up by the bankrupt. The local agent of the railway company, who had positive instructions not to make deliveries of shipments without the surrender of the bills of lading exceeding in value the amount of the bond, made them largely in excess of the bond, relying upon the bankrupt's assurance that the bills of lading were in its possession and would be delivered to him at later dates; the excuse being that the grain was needed at once for reshipment, and that the bills of lading, although in possession of the bankrupt, would have to be entered on its books and checked off, which caused a delay.

At one time, the agent testified, when he called for bills of lading, the president of the bankrupt corporation showed him a large number of the bills of lading then in its safe, but which had not been checked off, and for that reason not delivered to him. When the grain company became insolvent, it was found that bills of lading for shipments delivered to the bankrupt in excess of the bond were held by banks as collateral or loans as above set forth, and some were held by the original vendors, amounting to the sum now in dispute. The railway company paid these claims off in October, 1909, shortly after the insolvency proceedings had been begun, taking the assignments as set out in the original proof of claim. After the objections had been made by the trustee and creditor, they procured the assignments set out in the amended proof of claim, antedating them so as to correspond with the dates the payments were made by it. The amounts claimed by it are justly owing by the bankrupt on its notes and accepted bills and open accounts of the vendors.

Thos. S. Buzbee, for railway company.

Rose, Hemingway, Cantrell & Loughborough, for trustee.

W. L. & D. D. Terry, for W. B. Worthen Co.

TRIEBER, District Judge (after stating the facts as above). The conclusions reached by the court upon the main issue involved here—

in make it unnecessary to determine whether the act of May 23, 1907, authorizes the carrier to deliver goods to the consignee without the surrender of the bills of lading, without taking a bond in double the value of the shipment as provided by that amendatory act, but solely on the credit of the consignee; the carrier assuming the risk of collecting from him the value of the shipment if obliged to pay therefor to one to whom the bill of lading had been assigned for value. We will, therefore, dispose of the case as if the act of 1887 had not been amended, but is still in full force as originally enacted, except as it may become necessary to refer to it for the purpose of ascertaining the intent of the Legislature in enacting these statutes.

On behalf of the trustee, it is claimed that as this statute forbids a carrier to deliver goods without a surrender or cancellation of the bill of lading, and makes a violation of this provision of the statute a crime, public policy requires that the claim of the railway company should be disallowed, as it is for the value of grain shipped over its line and delivered to the bankrupt without surrender of the bill of lading; the assignments of the notes and bills and open accounts secured by the bills of lading being made solely for the purpose of enabling it to make this claim.

As the amended petition takes the place of the original, it is unnecessary to refer to the original except for the purpose of ascertaining the good faith of the railway company in making this claim. The claim of the railway company as set out in its amended proof of claim is not to recover in its own right the value of the grain wrongfully delivered to the bankrupt and by it converted; but it seeks to recover as assignee and owner of the notes and accepted bills of the bankrupt and of the accounts of the original vendors. It is not denied that its assignors could successfully maintain an action against the bankrupt on these claims; but it is earnestly urged that, the railway company having violated the statute, it is therefore outlawed, and cannot recover, although the banks or any other assignee or holder of them could have done so.

In *National Bank & Loan Co. v. Petrie*, 189 U. S. 423, 425, 23 Sup. Ct. 512, 47 L. Ed. 879, a similar contention was made, but the court refused to sustain it, saying:

"A person does not become an outlaw and lose all rights by doing an illegal act."

The law is well settled that, if the plaintiff does not require the aid of an illegal transaction to establish his claim, he may recover if the defendant has possession of a thing of value belonging to plaintiff. As stated in *Dent v. Ferguson*, 132 U. S. 50, 10 Sup. Ct. 13, 33 L. Ed. 342:

"A new contract founded on a new and independent consideration, if fair and lawful, although in relation to property respecting which there had been unlawful or fraudulent transactions between the parties, will be determined by the courts on its own merits; and if the new consideration be valid and adequate it will be enforced."

To the same effect are *Planters' Bank v. Union Bank*, 16 Wall. 483, 500, 21 L. Ed. 473; *Armstrong v. American Exchange Bank*, 133

U. S. 433, 469, 10 Sup. Ct. 450, 33 L. Ed. 747. And this is the rule established by the Supreme Court of this state in a number of cases. In *Martin v. Hodge*, 47 Ark. 378, 384, 1 S. W. 694, 696, 58 Am. Rep. 763, it was said:

"The test of illegality to determine whether plaintiff is entitled to recover is his ability to establish his cause of action without aid from an illegal transaction."

To the same effect is *Burks v. Harris*, 91 Ark. 205, 208, 120 S. W. 979, 23 L. R. A. (N. S.) 626.

Under the Constitution and laws of this state a usurious contract is wholly void, the penalty imposed being a forfeiture of the principal as well as the interest; but it has been uniformly held by the Supreme Court that a surrender of a valid security not tainted by usury for a security invalid for usury is not a satisfaction and will not bar a recovery on the original valid debt or security. *Humphrey v. McCauley*, 55 Ark. 143, 17 S. W. 713; *Tillman v. Thatcher*, 56 Ark. 334, 19 S. W. 968; *Johnson v. Hull*, 57 Ark. 550, 22 S. W. 176.

In the last-cited case the original agreement was not usurious, but by a subsequent agreement a usurious rate of interest was agreed upon. In an action on the original agreement the second usurious agreement was pleaded. The court, in overruling it, said:

"Plaintiff is under no necessity of relying upon either the note or mortgage in which the excessive interest is stipulated for, and his claim is founded upon a contract clearly separable from both of these writings."

It is also insisted that the railway company and the bankrupt are joint tort-feasors, and that, as one joint tort-feasor cannot recover from another, the assignment of the claims to the railway company is but an indirect method to enable one joint tort-feasor to collect from the other. The statement of law is correct, but the premises are not. The liability of the railway company to the owners of the bills of lading may well be based on its contract to carry and deliver the goods to the holder of the bill of lading, and its failure to do so is a breach of that contract. It may be that an action of trover might also lie and the act of the railway company treated as a conversion; but, looking at the facts in this case, it is clear that there was no conversion of the goods by the railway company, but merely a breach of contract.

Upon the undisputed facts in this case no one will question the fact that these claims could have been enforced by the banks or their assigns against the bankrupt as the maker and acceptor of the notes and bills without any aid from the bills of lading, for there is no claim that they were executed without a valid and good consideration. The railway company, as assignee and owner of them, can establish its cause of action without aid from any illegal transaction. Assuming that it could not recover in an action based upon an implied promise to pay for the grain delivered in violation of the statute and then converted by the bankrupt, the law does not prevent a recovery on such claims which, if presented by the original creditor or any other assignee than the railway company, would be allowed as valid without question, because in a transaction wholly independent of these evidences of indebtedness, and which was not a part of the consideration

moving the bankrupt to execute them, it had been guilty of a violation of a criminal statute.

A similar question arose under the statutes of New York, which are very much like the Arkansas statute, and upon facts but slightly different from those established in the case at bar. *Burnham v. Cape Vincent Seed Co.*, 142 N. Y. 169, 172, 36 N. E. 889. There the warehouseman had permitted the consignee, after he had accepted a draft to which the bill of lading was attached, to remove the goods without surrender of the bill of lading. Thereupon the bank, the holder of the draft and bill of lading, demanded the goods, and the warehouseman, being unable to deliver them, paid the draft, taking an assignment thereof and a surrender of the bill of lading. In an action against the seed company, who had wrongfully obtained possession of the goods, the plea was interposed that the warehouseman had parted with the goods in violation of section 633 of the Penal Code of that state, which is almost identical with section 531, Kirby's Dig.; but the plea was overruled, the court saying:

"The defense based on plaintiff's alleged violation of section 633 of the Penal Code has no foundation in fact or in law. The section referred to is designed to protect bona fide holders of negotiable warehouse receipts, by inflicting a severe penalty on warehousemen who wrongfully deliver to third parties articles covered by the receipt. In the case at bar the plaintiff held the cargo of peas as security from the Ontario bank, and if, before the bank's debt was paid, he had wrongfully delivered it to the defendant, he would have been criminally liable under section 633 of the Penal Code, and the bank could have proceeded against him in a civil action for damages. The facts in this case show that the section quoted has no application. The plaintiff, before this action was commenced, had paid the claim of the Ontario bank and was subrogated to all its rights as against the defendant; his cause of action was on the draft, although inartificially pleaded; the defendant, by the verdict of the jury, is found to have received the cargo which was covered by the warehouse receipt held by the bank, and there is no reason in morals or in law why it should not pay the draft accepted in payment of property it has reduced to possession."

These statutes of Arkansas, although never construed by the Supreme Court of the state on the particular point now involved, have received construction as to its intent in two well-considered cases. *Martin v. Railway Co.*, 55 Ark. 510, 524, 19 S. W. 314; *Nebraska Meal Mills v. Railway Co.*, 64 Ark. 169, 173, 41 S. W. 810, 38 L. R. A. 358, 62 Am. St. Rep. 183.

In the first-cited case the court said:

"The act was passed to protect bona fide holders of the receipts of warehousemen and bills of lading of carriers. * * * The main object of the act is to fix the liability of warehousemen, common carriers, and other persons named in the act, to the holders of their receipts or bills of lading. To do this it prohibits them from issuing the same, except for property in their actual possession, and from selling or incumbering, shipping or transferring, or permitting to be shipped, transferred, or removed beyond their control, the property for which a receipt or bill of lading has been given without the written assent of the person or persons holding such receipt or bill of lading. Their liability for a violation of the act is limited to the persons aggrieved, who are the persons interested in the property described in the receipt or bill of lading. It does not undertake to define the duties and liabilities of the warehousemen, carriers, and other persons named therein, to third persons, and does not change their rights, relations, duties, or liabilities to such persons, but leaves them as they were before its enactment."

In the last-cited case, the railway company had delivered some goods to the consignee without surrender of the bill of lading which the seller had retained and intended not to be delivered until the purchase money for which a draft had been drawn on the consignees, and which was attached to the bill of lading, had been paid. As the bill of lading was directed to the consignee and not to shipper's order, the railroad company delivered the goods to him without surrender of the bill of lading. Thereupon the consignor, the holder of the bill of lading, sued the carrier for the value of the goods, the consignee, being insolvent, insisting that the surrender of the goods in violation of this statute made it liable, but the court refused to sustain this contention, and held that:

"The purpose of the statute was to protect persons not parties to the bill of lading originally, but who for a valuable consideration acquired an interest in the property represented by it through the transfer of the bill of lading to them."

2. Does this statute prevent a recovery by the carrier of the value of property delivered in violation thereof and by the receiver converted to his own use? While there is some conflict among the decisions of the state courts as to the effect of an act not *malum in se* but only *malum prohibitum*, the decisions of the national courts are practically unanimous that there is an important distinction. *United States v. Bradley*, 10 Pet. 343, 360, 9 L. Ed. 448; *Spring Company v. Knowlton*, 103 U. S. 49, 26 L. Ed. 347; *Ewell v. Daggs*, 108 U. S. 143, 150, 2 Sup. Ct. 408, 27 L. Ed. 682; *Dunlop v. Mercer*, 156 Fed. 545, 555, 86 C. C. A. 435.

In *Ewell v. Daggs* the court said:

"A distinction is made between acts which are *mala in se*, which are generally regarded as absolutely void in the sense that no right or claim can be derived from them, and acts which are *mala prohibitum*, which are void or voidable according to the nature of the thing prohibited."

There is another equally well settled rule of law so far as the national courts are concerned. When a statute imposes specific penalties for its violation, where the act is not *malum in se*, and the purpose of the statute can be accomplished without declaring contracts in violation thereof illegal, the inference is that it was not the intention of the lawmakers to render such contracts illegal and unenforceable. *Harris v. Runnels*, 12 How. 79, 13 L. Ed. 901; *Farmers', etc., Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196; *National Bank v. Matthews*, 98 U. S. 621, 629, 25 L. Ed. 188; *Barnet v. National Bank*, 98 U. S. 555, 25 L. Ed. 212; *Louisiana v. Wood*, 102 U. S. 294, 298, 26 L. Ed. 153; *Fritts v. Palmer*, 132 U. S. 282, 289, 293, 10 Sup. Ct. 93, 33 L. Ed. 317; *Central Transportation Co. v. Pullman Co.*, 139 U. S. 24, 60, 11 Sup. Ct. 478, 35 L. Ed. 55; *Logan County Bank v. Townsend*, 139 U. S. 67, 11 Sup. Ct. 496, 35 L. Ed. 107; *Merchants' Cotton Press Co. v. Insurance Co.*, 151 U. S. 368, 388, 14 Sup. Ct. 367, 38 L. Ed. 195; *Pullman Co. v. Central Transportation Co.*, 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 545, 22 Sup. Ct. 431, 46 L. Ed. 679; *Yates v. Jones*, *National Bank*, 206 U. S. 158, 179, 27 Sup. Ct. 638, 51 L. Ed. 1002;

Hanover National Bank v. First National Bank, 109 Fed. 421, 426, 48 C. C. A. 482, 487; Dunlop v. Mercer, *supra*; Boatman's Bank v. Fritzen (C. C.) 175 Fed. 183.

The rule to be deduced from these authorities is that, when such a plea of illegality is set up, the court must examine the entire statute in order to discover whether or not the Legislature intended to prevent courts of justice from enforcing contracts based on the act prohibited, and unless it does so appear only the penalties imposed by that statute can be enforced. A reference to a few of the leading cases on that subject will show how well settled this rule is in the courts of the United States.

In *Harris v. Runnels* the plea in bar to an action on a note was that "the consideration was the purchase of a slave imported into the state of Mississippi, which the statute prohibited." The only penalty provided in the statute was a fine on the seller and purchaser, and it was held that, the context of the statute showing no other penalty was intended, the plea was bad.

The national banking act prohibits these banks from making loans secured by real estate. In *National Bank v. Matthews* it was sought to foreclose a mortgage taken by a national bank in violation of the statute, and this statutory prohibition was pleaded as a defense. The Supreme Court of Missouri sustained the plea. On error the Supreme Court of the United States reversed that decision and held that from an examination of the entire statute it did not appear that Congress intended to declare a contract made in violation of the statute void, and the bank was entitled to a foreclosure of the mortgage.

In *Barnet v. National Bank* a like construction was given to that part of the national banking act prohibiting usurious contracts, and this has been uniformly followed by all courts ever since.

In *Fritts v. Palmer* a conveyance of land made to a foreign corporation prohibited under a penalty from doing business in the state of Colorado was sought to be set aside by the vendor; but the court held the deed passed a valid title to the corporation, basing its decision upon the ground that, as the statute imposed a penalty and did not declare that contracts and deeds in violation thereof were void, it indicated that the Legislature did not intend to make them so.

In *Marsh v. Fulton County*, 10 Wall. 676, 684, 19 L. Ed. 1040, it was said:

"The obligation to do justice rests upon all persons, natural and artificial, and, if a county obtains the property or money of others without authority, the law, independent of any statute, will compel a restitution or compensation."

In *Central Transportation Co. v. Pullman Company*, the court said:

"A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to

do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract."

In *Connoly v. Union Sewer Pipe Co.* this question is again fully discussed, and the broad rule laid down:

"Assuming, as defendants contend, that the alleged combination was illegal if tested by the principles of the common law, still it would not follow that they could, at common law, refuse to pay for pipe bought by them under special contracts with the plaintiff. The illegality of such combination did not prevent the plaintiff corporation from selling pipe that it obtained from its constituent companies or either of them. It could pass a title by a sale to any one desiring to buy, and the buyer could not justify a refusal to pay for what he bought and received by proving that the seller had previously, in the prosecution of its business, entered into an illegal combination with others in reference generally to the sale of Akron pipe."

In *Merchants' Cotton Press Co. v. Insurance Company* the validity of bills of lading was attacked upon the ground that rebates and drawbacks had been granted to the shipper; but Mr. Justice Jackson, speaking for the court, quotes with approval the following excerpt from the decision of the Supreme Court of Tennessee in that case:

"This fact of special rate and rebate is denied, and it is a matter of controversy and conflict of evidence. * * * We are of opinion, however, and rest our decision upon the ground, that if it were assumed that the law was applicable, and the fact of agreement for rebate and special rate proven, it would not prevent liability on the part of the carrier for the freight received and covered by insurance in the hands of the carrier's agent. The law makes such agreements as to rebate, etc., void, but does not make the contract of affreightment otherwise void, and we think there is nothing in the law or the policy of it which requires a construction that would excuse a carrier from all liability when it made such a contract in connection with that for receipt and transportation of freight. Such a construction would encourage rather than discourage such unlawful agreements for rebates. The carrier might prefer them to liability for the freight. Such a contract for rebate would be void, and could not be enforced; but we think the shipper could nevertheless recover for loss of his freight through the carrier's and insurer's negligence. No different construction has yet been put upon the interstate commerce law so far as we are advised, and we decline to give it any other."

In *Yates v. Jones National Bank* it was held that:

"The civil liability of national bank directors, then, in respect to the making and publishing of the official reports of the condition of the bank, a duty solely enjoined by the statute, being governed by the national banking act, it is self-evident that the rule expressed by the statute is exclusive, because of the elementary principle that, where a statute creates a duty and prescribes a penalty for nonperformance, the rule prescribed by the statute is the exclusive test of liability."

The latest decisions of the Supreme Court on that subject are *Citizens' Central National Bank v. Appleton*, 216 U. S. 196, 30 Sup. Ct. 364, 54 L. Ed. —, and *Earling v. Eneigh* (opinion filed May 31, 1910, and not yet officially reported) 30 Sup. Ct. 672, 54 L. Ed. —.

In the *Appleton* Case it was sought to recover money loaned by the Cooper Exchange Bank, of which Appleton became receiver, to a debtor of the Citizens' Bank, to be used for the purpose of paying that debt, and the money was so applied; the Citizens' Bank guaranteeing to the Cooper Exchange Bank the payment of the loan. The plea of illegality and ultra vires was set up in bar to this action; but the

court held that, although the guaranty was ultra vires, and therefore illegal, as the bank had received the money, it was liable on the implied contract which made it its duty to account to the Cooper Exchange Bank for the money advanced by the latter in execution of the agreement made by the former with the borrower. The court, speaking by Mr. Justice Harlan, said:

"Whatever may be said as to the validity of the written guaranty now alleged to be illegal, the judgment can be supported based wholly on the implied contract which made it the duty of the Central National Bank, under the facts disclosed, to account to the Cooper Exchange Bank for the money obtained from the latter in execution of the agreement made by the former with the borrower."

In the Earling Case the stock of a corporation engaged in the business of a creamery and making butter was turned over to the cashier of a national bank, but in trust for the bank, to whom the corporation was indebted. The business was carried on in the name of the original corporation, but for the benefit of the bank, and under its control. The corporation becoming insolvent, creditors of the creamery, while under management for the benefit of the bank, sued the receiver and the bank. The plea was that the national banking act prohibited it from doing other than a banking business, and for that reason there was no liability; but the court held that it was liable for these debts, saying:

"Although restitution of property obtained under a contract which was illegal cannot be adjudged by force of the illegal contract, yet, as the obligation to do justice rests upon all persons, natural and artificial, if defendant obtained the money or property of others without authority, the law, independent of express contract, will compel restitution or compensation."

In Pangborn v. Westlake, 36 Iowa, 546, 549, the rule is thus tersely stated:

"We are, therefore, brought to the true test, which is that while, as a general rule, a penalty implies a prohibition, yet the courts will always look to the language of the statute, the subject-matter, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and, if from all these it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the courts will so hold and construe the statute accordingly."

Was it the intention of the General Assembly of the state of Arkansas, as expressed in the statute, to impose upon a carrier delivering goods to the consignee without surrender or cancellation of the bill of lading, in addition to the large fine imposed by the statute if convicted in a criminal proceeding, and a civil liability for all damages sustained by the owner of the bill of lading, the further penalty of being prohibited from collecting the value of the goods thus illegally delivered? At common law a bill of lading, as stated in Pollard v. Vinton, 105 U. S. 7, 26 L. Ed. 998:

"While a symbol of ownership designed to pass from hand to hand with or without indorsement, and is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into hands of persons who have innocently

paid value for it. The doctrine of bona fide purchasers only applies to it in a limited sense. It is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver."

To the same effect are *The Lady Franklin*, 8 Wall. 325, 19 L. Ed. 455; *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. Ed. 892; *Iron Mountain Railway Co. v. Knight*, 122 U. S. 79, 7 Sup. Ct. 1132, 30 L. Ed. 1077; *Friedlander v. Texas & Pacific R. R. Co.*, 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991; *Missouri Pacific Ry. Co. v. McFadden*, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. Ed. 944.

The rapid growth of the commerce of the nation, shipments of products amounting in value to millions daily, necessitated a change of the common law. As appears from the foregoing cases, and numerous others to be found in the state as well as national reports, gross frauds were frequently practiced on vendees and banks by reason of bills of lading being issued by dishonest agents of the carriers when no goods had been delivered for shipment, and these bills were used for the fraudulent purpose of obtaining payment of the value of goods never shipped and for which there was no redress against the carrier, the only responsible party. To remedy that evil the Legislatures of most of the states, including this state, enacted statutes making them negotiable "in the same manner as bills of exchange and promissory notes," and, to prevent the fraudulent practice then prevailing, prohibited the issuance of bills of lading unless the goods were actually received by the carrier. To further protect the purchasers of these bills thus made negotiable, these statutes prohibit the delivery of the goods except upon surrender of the bill of lading. To prevent evasions of this statute, the act of this state prescribes certain penalties. Upon conviction in a criminal proceeding there is to be a fine not exceeding \$5,000 and imprisonment in the penitentiary not exceeding five years, or both, and in addition thereto a liability in a civil action for all damages sustained by the owner of the bill of lading. It was no doubt supposed that these heavy penalties would deter carriers and their agents from violating the statute, and the liability of the carrier for the loss sustained by purchasers of the bills or warehouse receipts would protect them, and thus remedy the mischief then prevailing. To impose the additional liability on the carrier of depriving him of the right to maintain an action for the goods obtained without surrender of the bill of lading or the value if converted was evidently not deemed necessary, for it would award a premium to one of the wrongdoers and add to the severe punishment of the carrier provided by the statute. Courts should place no such construction on the act unless this intention is clearly expressed in the act. *Bowditch v. N. E. Life Ins. Co.*, 141 Mass. 292, 296, 4 N. E. 798, 55 Am. Rep. 474; *De Lucca v. North Little Rock (C. C.)* 142 Fed. 597, 605; *Nebraska Meal Mills v. Railway Co.*, 64 Ark. 169, 173, 41 S. W. 810, 811, 38 L. R. A. 358, 62 Am. St. Rep. 183, where the court said:

"To justify the court in arriving at such a conclusion, the language of the act to that effect should be so plain and direct that it would be unreasonable to give it a different meaning."

The rule would of course be different if the goods were delivered in pursuance of an illegal agreement or conspiracy between the carrier and the consignee for the purpose of defrauding the rightful owners. This would be a tort for which all parties aiding in its commission would be liable at common law even in the absence of any statute, and all parties engaged in it would be joint tort-feasors, or if it were sought to enforce specific performance of such an agreement.

That great inconvenience often resulted from a strict compliance with the provisions of section 530 of Kirby's Digest was recognized by the General Assembly of the state, and to prevent injuries arising therefrom it enacted the act of May 23, 1907. This is clearly shown by the preamble to that act, which is as follows:

"Whereas, section 530 of Kirby's Digest, Arkansas Statutes, provides that: No property stored or deposited for which receipts and bills of lading have been issued, shall be delivered up by the carrier, warehouseman, wharfinger or other person or firm except on surrender and cancellation of such receipts and bills of lading; and, whereas, It often happens that the shipper or consignee fails to receive said bill of lading or original receipt and the goods called for therein cannot be delivered on account of the absence of the original receipts and bills of lading, thus causing delay and injury to the goods. Therefore, be it enacted," etc.

Upon the facts in this case the court is of the opinion that the action of the referee in allowing the claim was right, and for this reason it is approved.

MOODY v. EASTERN OREGON LAND CO.

(Circuit Court, D. Oregon. July 5, 1910.)

No. 3,118.

1. SPECIFIC PERFORMANCE (§ 94*)—PERFORMANCE BY PLAINTIFF.

One suing to specifically perform a contract to convey must show substantial compliance with his obligations or waiver thereof by vendor.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 249-256; Dec. Dig. § 94.*]

2. SPECIFIC PERFORMANCE (§ 117*)—DEFENSE—PLEADING.

On suit to specifically perform a contract to convey, a vendor cannot complain of purchaser's failure to show payment of taxes as required by the agreement, where no issue on that point is made by the pleadings.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 117.*]

3. VENDOR AND PURCHASER (§ 335*)—CONTRACT TO CONVEY—FORFEITURE.

Where a contract to convey does not provide for forfeiture on purchaser's failure to make stipulated payments when due, no forfeiture results ipso facto from such default; it being necessary for the vendor to signify to the purchaser a purpose to insist on surrender.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 981; Dec. Dig. § 335.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. VENDOR AND PURCHASER (§ 269*)—CONTRACT TO CONVEY—PLAINTIFF'S DEFAULT—VENDOR'S REMEDIES.

Where a contract to convey does not provide for forfeiture on the purchaser's failure to make stipulated payments when due, on such default the vendor may elect to retake possession and sue in ejectment; or sue to foreclose contract and recover the balance due on the purchase price or sue to cancel the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 269.*]

5. VENDOR AND PURCHASER (§ 187*)—CONTRACT TO CONVEY—PURCHASER'S DEFAULT—WAIVER.

The purchaser's default in making stipulated payments under a contract to convey may be expressly waived by agreement or impliedly by the vendor's acts relied on by the purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 374, 375; Dec. Dig. § 187.*]

6. VENDOR AND PURCHASER (§ 187*)—CONTRACT TO CONVEY—PURCHASER'S DEFAULT—WAIVER—ACCEPTANCE OF PAYMENT.

Purchaser's default in making stipulated payments under a contract to convey is waived by the vendor afterwards accepting payment.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 374, 375; Dec. Dig. § 187.*]

7. VENDOR AND PURCHASER (§ 299*)—CONTRACT TO CONVEY—PURCHASER'S DEFAULT—WAIVER.

Demand for possession by a vendor under a contract to convey on the purchaser's default in making stipulated payments being waived by subsequent acceptance of a payment, another demand was necessary before the vendor could rescind the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 338; Dec. Dig. § 299.*]

8. PRINCIPAL AND AGENT (§ 123*)—AGENT'S AUTHORITY—EVIDENCE—SUFFICIENCY.

Evidence held to show that the agent of vendor, under a contract to convey, did not exceed his authority in accepting a payment after the purchaser's default.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 420-429; Dec. Dig. § 123.*]

9. PRINCIPAL AND AGENT (§ 171*)—AGENT'S ACTS—RATIFICATION.

If an agent of the vendor under a contract to convey exceeded his authority in accepting a payment after the purchaser's default, the act was ratified by the vendor's retention of the payment.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 644-655; Dec. Dig. § 171.*]

10. SPECIFIC PERFORMANCE (§ 97*)—RIGHT TO RELIEF.

One who demanded a deed under a contract to convey tendering the required payment after waiver by the vendor of default in earlier payments was entitled to specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 286-298; Dec. Dig. § 97.*]

Persons entitled to enforce specific performance, see note to *Lawyer v. Post*, 47 C. C. A. 493.]

11. SPECIFIC PERFORMANCE (§ 16*)—REQUISITES—EQUITY.

One seeking specific performance must show, not only a legal right thereto, but also that it will be just.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 35, 36; Dec. Dig. § 16.*]

In Equity. Suit by Z. F. Moody against the Eastern Oregon Land Company. Decree for complainant.

Martin L. Pipes, for complainant.

Williams, Wood & Linthicum and Huntington & Wilson, for defendant.

WOLVERTON, District Judge. This is a suit upon the part of the purchaser, under an executory contract, to compel the specific performance thereof by a conveyance by the vendor of the real property involved. The contract was entered into January 2, 1902, by the terms of which the defendant covenants and agrees, upon the payment of certain money consideration by the complainant, to convey to complainant, by warranty deed, certain lands situated in Wasco and Sherman counties, Or., particularly described, consisting of 2,547.25 acres. The complainant, on the other hand, promises and agrees to pay for said lands the full sum of \$8,457.75, in installments, as follows: \$1,457.75 upon the execution of the contract, and \$1,750 annually thereafter, on the 1st day of January, 1903, 1904, 1905, and 1906, with interest at the rate of 8 per cent. per annum, payable semiannually; and, further, that he will pay all taxes assessed against the property. The parties further mutually stipulate as follows:

"In case the party of the first part shall make default in the payment of any one or more of the sums of money herein agreed to be paid, for a period of six months, the said party of the first part agrees to surrender the possession of the premises herein described to the party of the second part, which is hereby empowered to take possession of the same and terminate this contract.

"The payment of said sums and interest, and the strict performance by the party of the first part of all the covenants and agreements herein contained, to be by said party of the first part kept and performed, are hereby made a condition precedent to the said conveyance, and time is of the essence of this contract."

The bill of complaint, besides setting out this contract, shows a tender of the balance of the consideration due, and some matter designed to establish waiver by the defendant of prompt payment on the part of the complainant. Complainant further avers that he has done and performed all things required by him to be done or performed under such agreement, and brings the money due into court to be paid defendant on the rendition of the decree.

By answer, the defense of failure to perform on the part of the complainant, in that he failed and refused to make the stipulated payments of the purchase price as required, is interposed; and by cross-bill defendant seeks a rescission and cancellation of the contract, and to this end brings the consideration previously paid into court, and tenders it to the complainant, to be paid to him upon the entry of decree as prayed.

There is but little disagreement in the testimony. Payments on the contract were made and received as follows: On February 13, 1902, \$1,457.75 principal; January 24, 1903, \$560 interest to January 2, 1903, and \$14.20 interest on deferred interest payment; June 2, 1903, \$280 interest to July 2, 1903; December 31, 1903, \$280 interest to

January 2, 1904; December 29, 1905, \$1,120 interest to January 2, 1906, and \$67 interest on deferred interest payment; August 13, 1906, \$280 interest to July 2, 1906.

It will be noted that the first payment of principal was not made until 42 days after the contract was signed; that installment being payable in cash. The first payment of interest was for one year, and was not paid semiannually as required, nor until 22 days after the second interest payment and the first installment of principal became due. The second payment of interest was made a month before it was payable; the third two days before due; and the fourth payment was not made until almost two years' interest had accumulated, and the first, second, and third installments of the principal had fallen due, being made December 29, 1905. The payment, however, was of interest to January 2, 1906, when the last installment of the principal became due and payable. The last payment of interest was made 1 month and 11 days after the semiannual interest payment was due, and 7 months and 11 days after all the principal payments had fallen due.

Malcolm A. Moody, the son of complainant, was his authorized agent for the transaction of all business with the defendant corporation in connection with the contract, and George T. Parr was the agent for the defendant. The scope of the latter's authority was not general; but he was authorized to make demand for and collect all payments becoming due upon the contract, and the general negotiations touching the contract, after its execution, were had between these representatives. Much correspondence passed between them relative to payments of principal and interest, some of which may be referred to briefly to show the manner of dealing between the parties. On December 14, 1903, Parr wrote to Moody:

"On January 2nd, 1904, the second and third payments on your contract dated Jan. 2nd, 1902, will fall due. * * * The company has requested us to collect all amounts maturing. * * * By making an effort to comply with this request you will greatly oblige."

To this Moody replied December 18th:

"My father is at present in California. * * * I understand from him that his arrangements with you anticipated that the company would carry along the principal until he could conveniently retire it if the interest was kept paid promptly on its due day. I wish you would let me know whether or not this was your understanding."

On December 21st Parr again wrote:

"Replying to your favor of the 18th inst. * * * beg to state that while there was no definite promise given your father regarding the payments we stated that we would endeavor to carry the account without payment as long as possible. The company having now called upon us for payment, we have no alternative in the premises. We will say this, however, that if you will send us half of the amount due and interest, we will see that it is satisfactory with the company to allow the other payment to continue for one year."

On December 31st Moody paid \$280 by check, saying:

"I expect father up from Salem right after New Year's, and then we will adjust the principal payments with you."

On January 1, 1904, Parr acknowledged receipt of payment, and wrote:

"We note that you will adjust the principal payments in a short time."

On January 28th Moody wrote:

"It isn't entirely convenient for us to make it just now, but I think we can arrange it soon."

On June 17th Parr wrote Moody:

"Please send us your check for \$280.75 to pay interest in full to June 2nd, 1904."

On July 5, 1904, Parr again wrote:

"Interest on your contract dated Jan. 2, 1902, fell due the second instant. Amount payable \$280."

And on August 25th:

"The company wrote us a letter a few days since requesting to be advised regarding the arrangements made with you for extension of time on payments due on contract for the purchase of land. We replied that we had extended the time until it would be more convenient for yourself to meet the obligations. In replying to this letter the company sanctioned our actions in the matter, but stated that they preferred to have the interest paid semiannually as provided for in the agreement. We would therefore thank you to comply with this part of the contract, and we will carry the payments along until such times as the company demands that collections be made."

And again on December 6, 1904:

"On the 2nd of January, 1905, there will be due on your contract of Jan. 2nd, 1902, \$5,250.00, accrued interest \$571.20, making total amount payable at that time \$5,821.20. Of this amount we expect a payment of \$1,750.00 and accrued interest \$571.20; total \$2321.20."

Then on August 11, 1906, Huntington & Wilson, attorneys representing the defendant corporation, made demand upon Moody concerning the contract, as follows:

"We are directed and authorized by the Eastern Oregon Land Company * * * to demand of you the surrender of possession of all the premises described in said contract; you are hereby notified that said Eastern Oregon Land Company terminates this contract by reason of your failure to make the payments which by said contract you agreed to make. You are now in default in the payments, which you by said contract agreed to make, in the sum of seven thousand dollars and interest at the rate of eight per cent. per annum from Jan'y 2nd, 1902, and interest upon each semiannual payment of interest at the legal rate from the date such semiannual interest payment became due. We hereby notify you that unless you surrender possession of all of said premises on or before the 21st of August, 1906, or pay the entire amount now due upon said contract on or before said last named date, we shall commence suit to foreclose your interest in and to said contract and said premises. The Eastern Oregon Land Company is now ready and willing and hereby offers to convey to you by warranty deed all of said tracts of land described in said conveyance upon the payment of the amount due from you upon said contract."

In this demand a mistake was made as to the time to which interest was paid. This was corrected by subsequent letter of date August 17th. On August 13, 1906, Moody transmitted to Parr by exchange \$280, saying:

"We hope by the time the next payment of interest is due to retire a part if not all the principal."

On August 21st Moody again wrote to Parr:

"Confirming our conversation by telephone to-day, we will be ready to pay the balance due on the contract with your company made January 2nd, 1902, as soon as you can execute and deliver the deeds for the land according to the terms of the contract. Please make the deeds to E. E. Ferguson and notify me by return mail whether you prefer to receive the money and deliver the deeds here at The Dalles or at Moro."

Later, on September 11th, Moody made further inquiry touching the execution of the deeds as requested. On September 17th Parr wrote relative to the deed:

"Will say that we have heard nothing from the city relative to same since writing."

On October 8th Moody again wrote inquiring about the deed, saying:

"Please hurry its execution."

In reply to this, Herbert S. Ward, representing the land company, wrote October 9th:

"Mr. Parr is at the present time accompanying the Messrs. Martin on a trip across the grant. Upon his return, however, he will be pleased to give your letter consideration."

On October 17th Moody again wrote Parr:

"Your secretary reported a few days ago that on your return to Moro, the execution of our deed would have your immediate attention. Please attend to it promptly."

On October 22d Moody wrote to Huntington & Wilson making a tender in writing of the balance due upon the contract, and demanding a deed of conveyance. By letter of the same date Huntington & Wilson acknowledged the tender, and admitted that the demand for deed had been made under the contract, saying further:

"We are not in a position to deliver such deed."

On the 23d of October Moody made upon Parr a like demand as made upon Huntington & Wilson for a deed to the lands.

On August 17th, after receiving the letter from Huntington & Wilson, Moody relates that he saw Parr and expressed surprise that the company desired to rescind the contract, to which Parr replied, in effect, that he was unable to explain it, as he himself was surprised, and further said that he was satisfied that the company would be willing to accept a portion of the balance of the principal. To this Moody answered that, since the matter had been placed in the hands of attorneys, he was afraid to make partial payments, and thought that it would be better to pay it all, and that he would let Parr know on the following day whether he would pay a portion only or all the principal then due. Moody saw Parr on the next day and told him that he (Moody) had concluded to pay the whole amount, and Parr answered that would be satisfactory, and that he would send for the deed. Later, on August 21st, Moody called Parr up on the telephone, and told him how he wanted the deed made, namely, to E. E.

Ferguson, and asked him to notify the attorney, which he consented to do, and said he would forward the deed for execution. Other conversations were had from time to time, during the running of the contract, touching the payments of both principal and interest, and the matter was allowed to run along, seemingly to the satisfaction of both parties. Prior to the day of the tender to Huntington & Wilson, Moody arranged with Ferguson for obtaining \$7,000, with which to make the requisite payment upon the contract to entitle him to a deed.

Mr. Parr testifies, beyond what Mr. Moody has disclosed, that in December, 1903, he had a conversation with Moody wherein he suggested that Moody write a letter to the company at San Francisco, requesting an extension of time for payment of the principal then due and to become due up to January 2, 1904, which was done, and that the matter was accordingly submitted to the directors of the company; that in pursuance thereof an extension was granted, with the understanding that the interest should be kept up promptly, which action was communicated to Moody; that when the payment of \$1,187 was made on December 29, 1905, he (Parr) insisted that Moody pay the entire sum then due, both principal and interest; that after considerable conversation he agreed to accept the interest in full to January 2, 1906; and that Moody stated that he would pay the principal within a few months. At this time Moody was shown a letter from the company, whereby Parr was instructed, if necessary, to recover possession of the land involved by the contract and damages on account of loss sustained by withholding it; and, if Moody refused to pay in full, that the matter be then referred to Messrs. Huntington & Wilson, with instructions to begin proceedings to collect the amount. This communication was accompanied with a specific statement of the full amount due to January 1, 1906, both principal and interest. On January 1, 1906, Parr wrote the company that Moody had paid \$1,187 in full of the amount of interest due January 2, 1906, and reported as follows:

"We promised him to present the matter and if satisfactory to the company would allow the account to continue until he could make some arrangement."

On January 9, 1906, the company, through Walter S. Martin, president, wrote Parr acknowledging receipt of the payment, and said:

"I must ask you to immediately take this matter up and get a settlement from Gov. Moody of the principal."

After receiving this letter, Parr had other negotiations with Moody with reference to a settlement, saying to him:

"If you can pay or send us \$1,000.00 it is possible that I can get the company to accept that and continue the other for a longer period."

To which Moody replied that he would make the payment by sending a check for that amount. Moody did not send the check as promised. On January 16, 1906, Parr wrote the company that Moody promised to give the matter of payment of the principal "his early consideration and endeavor to negotiate a loan at a lower rate of interest."

On March 22d the company again wrote Parr, as follows:

"As before stated, we do not think the conditions warrant us in giving the Governor any more time, as we feel that we have been very lenient with him, and as the principal as well as the interest is now long in arrears, we desire to have this matter immediately taken up and a settlement made."

Parr further testifies that, after receiving this letter, he suggested again to Moody that he do something, and if he could not pay \$1,000 to pay \$500, which Moody promised to do in a few days, but failed to do; and that neither at the time of the payment in December, 1905, nor at any other time, did he agree with Moody that the time of payment of the overdue installments of principal should be extended. Parr received the payment of \$280 of August 13, 1906, and forwarded it to the company at San Francisco, which sum it has since retained. Parr further testifies that, during the time the interest was not paid, he does not remember making any demand upon Moody for the principal, but that after December, 1905, he informed Moody on several occasions that the company was insisting upon the payment of the principal, and urged him to at least make partial payments to show his good intentions. Parr forwarded the deed to San Francisco for execution, as requested by Moody, naming E. E. Ferguson as grantee; but the company did nothing about it. On August 20, 1906, the company telegraphed Parr:

"Consult Huntington & Wilson before accepting principal or interest from Moody."

Coming now to the legal phases of the controversy, it must be premised that, the complainant seeking a specific performance of the contract, it is essential that he show a substantial compliance upon his part with all his covenants and agreements, or, if there be any that he has not complied with, that such performance has been waived by the land company. There can be no controversy as to this.

Contention is made that the complainant has not shown that he has paid all the taxes levied against the land as they became due, under his agreement, and therefore the suit must fail. This may be disposed of at the outset. The answer is that no issue is made concerning this in the pleadings. True, complainant, by a blanket allegation, avers that he has performed all the terms of the contract on his part agreed to be performed—a clause usual to all complaints in suits of the kind. But the specific issues are made by the answer and the cross-bill, and in these papers no complaint is made whatever that complainant has not paid the taxes as stipulated on his part. Consequently no evidence was offered at the trial to prove or disprove the fact, whatever it was, and none was necessary in the absence of an issue thus tendered. The objection is therefore without merit.

The defenses regularly interposed are: First, that the complainant has not made his payments promptly, as required by the terms of the contract of purchase; and, second, which is affirmative in its nature, that defendant is entitled to a rescission and cancellation.

It is strongly urged that complainant has, by his failure to pay on time, forfeited all prior payments made, both of principal and interest, and that by reason thereof the defendant is entitled to re-enter

upon the lands, and thus to close the contractual relations between the parties. This depends upon the proper construction of the contract. The agreement of the purchaser is that, in case he should make default in payment of any one or more of the sums of money agreed to be paid as consideration for said land for a period of six months, he will then surrender possession of the premises to the vendor, and in consonance therewith he empowered the vendor to resume possession, and thereby to terminate the contract. By a subsequent clause, time is made of the essence of the contract, and strict performance a condition precedent to conveyance under the vendor's covenant. There is no forfeiture stipulated for or agreed to, and a fortiori none can take place ipso facto on failure in payment at the exact time when due and the lapse of six months thereafter. The agreement on the part of the purchaser in such event is to surrender possession. This agreement is for the benefit of the vendor, and it was optional with it alone whether to insist upon it or not. The vendor, being empowered to re-enter into possession, could thereby terminate the contract. It would not be terminated by the simple default of the purchaser, although he agreed in such case to surrender; but it remains for the vendor to signify its purpose to insist upon the surrender. If insisted upon, and the re-entry made, the contract would be terminated. What would be the right of the purchaser to recover back the purchase money paid if the contract was terminated in that way, I need not now decide. The termination of the contract being optional with the vendor, it was incumbent upon it to signify its election to that purpose in some way, and of this it should have seasonably advised the purchaser. Thereupon it would have had the right of action to recover possession, and not until then. *O'Connor v. Hughes*, 35 Minn. 446, 29 N. W. 152. There is here, therefore, neither forfeiture of previous payments, nor a termination of the contract under the terms thereof. In this respect the present is unlike the case of *Maffet v. Or. & Cal. R. Co.*, 46 Or. 443, 80 Pac. 489.

There were open to the defendant, if the complainant was in default in payment, three remedies: One, to declare its election to repossess itself of the premises in an appropriate way, and then to bring its action in ejectment. *O'Connor v. Hughes*, supra; *Reddish v. Smith*, 10 Wash. 178, 38 Pac. 1003, 45 Am. St. Rep. 781. Another, to sue for a foreclosure of the contract, and thus to recover the balance remaining of the purchase price by sale of the land and application of the proceeds to the payment thereof. *Burkhart v. Howard*, 14 Or. 39, 12 Pac. 79. And, still another, for cancellation and rescission. The defendant has chosen to adopt the latter remedy.

Much controversy has arisen relative to the particular purpose of the demand made upon the complainant by Messrs. Huntington & Wilson August 11, 1906, whether it was made with a view to obtaining possession of the land for default in payment of consideration, or to putting the company in a position to rescind. The notification is that, unless possession be surrendered on or before August 21, 1906, or the entire amount due be paid, suit to foreclose the purchaser's interest in and to the contract and premises will be instituted.

In the same connection, an offer to convey was made. It cannot be, from the wording of this demand, that a forfeiture of the consideration paid and a repossession of the land by the land company was intended. True, surrender of possession is demanded; but the remedy specified excludes an action therefor. The thing that is intended is usually interpreted by what is done. In this case, what has been done is in exact accord with the idea of a rescission, and this is what is asked for in the cross-bill, which is tantamount to a suit instituted for that purpose.

As an essential to the remedy, it is recognized by the pleader that the purchase money paid should be returned to the vendee so as to reinstate statu quo conditions. This is deducible from the fact that it is so tendered in the cross-bill. Thus we are brought to the question whether the defendant, upon the cross-bill, is entitled to a rescission. This may be considered in connection with the question presented upon the bill of complaint whether the complainant is entitled to a specific performance, for, if complainant is not entitled to such relief, the defendant ought to have a rescission.

That Moody did not make the stipulated payments at the times designated is a fact conceded, and the crucial question is resolved into whether the land company has, by its conduct, waived strict performance in this respect. A waiver may be accomplished by express agreement, or it may result through implication arising from the acts and dealings of the party against whom it is claimed, if they have been acted upon by the party with whom he is in contractual relations. Without question, the acceptance of the cash payment after default of the vendee in paying on the day and date of the contract was a waiver of that default. So the acceptance of any interest payment after the day it became due and payable would likewise be a waiver of default as to every such interest payment so accepted. There can be no cavil as to that. Furthermore, the acceptance of an interest payment upon a defaulted payment of principal would be a waiver of such default, because tantamount to the acceptance of a consideration for a continuance of such payment after due. This proposition seems equally clear with the preceding. The land company is certainly estopped, by taking interest on an overdue payment, from claiming that Moody was in default upon the principal during the time for which it has received interest from him while so overdue. If the company did not desire to waive such a default, it ought to have refrained from taking interest upon any overdue payment of the principal.

Thus it will appear, under the testimony, that the land company waived strict performance as to all payments of principal except the last, because the interest on all prior overdue payments was paid in full to January 2, 1906, by the payment of \$1,187, made December 29, 1905, which included also interest on overdue interest payments. There was, therefore, by the acceptance of that particular interest payment, a waiver on the part of the land company of all prior defaults in payment on the part of Moody, whether of principal or interest. The purchaser was, from that date, allowed to continue with-

out payment of any part of the principal, although he continually promised to pay some part of it, until August 11, 1906, when the demand for possession was made in default of payment of the whole amount due within 10 days. There was due then \$7,000 of principal and the accrued interest from January 2, 1906. On the second day following the posting of the letter containing the demand, M. A. Moody made a payment to Parr of \$280, being the interest for six months on the amount of the principal then due. This was accepted by Parr, and forwarded to the company at San Francisco. The letter to complainant was probably received by him prior to the date when M. A. Moody, his son, made the payment of \$280; but the latter had no knowledge of it at the time. This circumstance relieves Moody of the charge of any endeavor to circumvent the effect of the demand. Now, an acceptance of the \$280 interest on these overdue payments was a waiver of the default for which demand for possession was made, because it was an acceptance of a consideration for the use of the money represented by such payments in the meantime, and, being a waiver for this purpose, it rendered nugatory the effect of the demand. The default being waived, another demand would be necessary, with a reasonable time fixed within which to make final payment, before there could be a final determination of the contract.

But it is urged that Parr exceeded his authority in accepting the \$280 payment, and therefore that the land company was not bound by his act in this respect. This proposition is manifestly not sustainable. Parr's explicit authority was to collect both interest and principal, and to forward the same to the company at San Francisco. He acted in that capacity with reference to this contract, collecting interest and forwarding it to his principal, which was always received without question, although collected upon principal payments overdue; and thus by the acts of the company his acts were ratified, even if beyond the scope of his authority. Moody was all along cognizant of these dealings, and was warranted in supposing that Parr had full authority for that purpose. Parr was therefore held out to be something more than a mere agent to make collections. His authority extended even to the binding of his principal to a waiver of a default in payment, where he accepted interest on overdue payments or parts of such payments. The land company recognized this, for it telegraphed Parr on August 20th not to receive any more payments, either of principal or interest, from Moody. The purpose of such telegram was to revoke all previous authority in Parr, as it respected collections, so that the company would not be further bound by his acts. The payment of August 13th had, however, been previously made to Parr. This payment was received by the land company on August 24th, and, although so received, the company retained it, making no effort to return it or to notify Moody that it was held to his credit. By these acts, even if Parr was without any authority in the first instance, the company ratified and affirmed what he did in the premises, and is accordingly bound thereby. I hold, therefore, that by accepting this payment the land company waived all prior default of Moody in strict performance in payment of the purchase price,

and Moody was free to make full payment of what remained due on the contract so as to entitle him to a deed.

Payment by the terms of the contract is made a condition precedent to the delivery of the deed. This required Moody to make the payment before he could demand a deed at the hands of the land company. The tender of payment was duly made to the land company, through Huntington & Wilson, its attorneys, who answered that they were not in a position to deliver the deed. By such tender Moody became entitled to the deed conveying the premises, and hence is entitled to a decree for specific performance. It follows as a corollary that defendant is not entitled to a rescission of the contract. In so concluding, the court is clearly within the equity rule that a party demanding specific performance must show, not only a legal right to the relief sought, but also that such decree would be just and meet with equity. The complainant's legal right arises, not upon the fact that he made his payments strictly as stipulated, but that the defendant, by its conduct, waived his default in that particular, which put complainant in a position, after tender of the balance due of the purchase price, to demand his deed.

The equities are with the complainant. The defendant has received its interest upon all deferred payments, and the entire balance due was tendered, so that it is losing nothing by its bargain. It is only just that the complainant should get the land.

Let a decree be entered for complainant as prayed.

PROCTOR-GAMBLE CO. v. WARREN COTTON OIL CO. et al.

(Circuit Court, E. D. Arkansas, W. D. May 13, 1910.)

No. 5,500.

1. COURTS (§ 366*)—FEDERAL COURTS—DECISION OF STATE COURTS—CONCLUSIVENESS.

The decision of the Arkansas Supreme Court that Kirby's Dig. §§ 848, 859, imposing a personal liability for corporate debts on the president and secretary of a corporation for failure to file annual reports of the corporation's condition, etc., was remedial and not penal, was conclusive on all federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954-968; Dec. Dig. § 366.*

State laws as rules of decisions in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

2. CORPORATIONS (§ 340*)—"DEBTS"—LIABILITY OF OFFICERS—STATUTES.

Kirby's Dig. Ark. § 848, requires the president and secretary of every corporation to file annual reports, and section 859 provides that, if the president or secretary of any such corporation neglects or refuses to do so, they shall be liable for all debts of the corporation contracted during the period of such negligence or refusal. *Held*, that since the word "debt" means an obligation resting on one person to pay or perform something that is due to another, the state or condition of being indebted to another, and includes all that is due by one person to another in any form of obligation or promise, the term as used in such section was not limited to obligations certain, arising from an express agreement, but included

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

as well corporate obligations consisting of unliquidated damages for breach of contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1473-1478; Dec. Dig. § 340.*

For other definitions, see Words and Phrases, vol. 2, pp. 1864-1886; vol. 8, p. 7628.]

At Law. Action by the Proctor-Gamble Company against the Warren Cotton Oil Company and others. On motion of defendants J. M. Bailey and D. A. Bradham for a new trial, and judgment in their favor. Denied.

Plaintiff, a corporation created under the laws of the state of Ohio, seeks to recover from the defendant the Warren Cotton Oil Company, a corporation created under the laws of the state of Arkansas, and which will hereinafter be referred to as the "oil company," and the other defendants, J. M. Bailey and D. A. Bradham, who were, respectively, the president and secretary of the corporation, damages alleged to have been sustained by it by reason of a breach of a contract entered into between the plaintiff and the oil company for five tanks of cotton seed oil to be delivered at a future day. The testimony, which was undisputed, established the following facts:

On July 28, 1909, the defendant oil company, by its manager, entered into a written contract with the plaintiff, whereby it agreed to sell to the plaintiff, and the plaintiff to buy from it, five tanks of prime cotton seed oil at 31 cents per gallon f. o. b. Warren, Ark., where the oil company's mill was operated. Deliveries were to be made in October and the first part of November, 1909, to be paid for by plaintiff by sight draft drawn on it with bill of lading attached. Three tanks of the oil were duly delivered and paid for in October; but the other two tanks, which were to contain 7,000 gallons each, the oil company refused to deliver, whereupon plaintiff purchased the same in open market at 46 cents per gallon, the then prevailing market price, and instituted this action to recover the difference between the contract price and the price paid after the default.

The other defendants were, respectively, the president and secretary of the corporation at the time the contract was entered into, and have been such officers ever since, and they are sought to be held liable under the statutes of Arkansas digested in Kirby's Digest as sections 848 and 859. These sections are as follows:

"Section 848. The president and secretary of every corporation organized under the provisions of this act shall annually make a certificate showing the condition of the affairs of such corporation, as nearly as the same can be ascertained, on the first day of January or of July next preceding the time of making such certificate, in the following particulars, viz.: The amount of capital actually paid in; the cash value of its real estate; the cash value of its personal estate; the cash value of its credits; the amount of its debts; the name and number of shares of each stockholder; which certificate shall be deposited on or before the fifteenth day of February or of August with the county clerk of the county in which said corporation transacts its business, who shall record the same at length in a book to be kept by him for that purpose."

"Section 859. If the president or secretary of any such corporation shall neglect or refuse to comply with the provisions of section 848 and to perform the duties required of them respectively, the persons so neglecting or refusing shall jointly and severally be liable to an action founded on this statute, for all debts of such corporation contracted during the period of any such neglect or refusal."

No certificates required by section 848 were ever filed by these officers.

At the close of the evidence, plaintiff asked for a peremptory instruction against all the defendants, while on the part of defendants a peremptory instruction was asked in favor of the defendants Bailey and Bradham. The latter request was upon the ground that a liability incurred by reason of a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

breach of a contract by a corporation is not a "debt" within the meaning of section 859. Neither counsel being then prepared to present the question involved by this motion as fully as its importance demanded, the court, not being sufficiently advised how to determine it, directed a verdict against all the defendants, reserving the points involved for final disposition on a motion for a new trial, and judgment in favor of these defendants notwithstanding the verdict of the jury.

J. W. & M. House, for plaintiff.

Davis & Pace and B. L. Herring, for defendants.

TRIEBER, District Judge (after stating the facts as above). The contention of counsel for defendants is that the word "debt" used in this statute must be given a strict construction and limited to "a sum of money due by certain and express agreement," and, as this is an action to recover unliquidated damages for a breach of contract under a statute penal in its nature and in derogation of the common law, it is not a "debt" within the meaning of the statute.

While there is an irreconcilable conflict among the authorities as to whether a statute of this nature is penal or remedial, and consequently whether it should be liberally or strictly construed, the Supreme Court of Arkansas, in *Nebraska National Bank v. Walsh*, 68 Ark. 433, 59 S. W. 952, 82 Am. St. Rep. 301, held this identical statute to be remedial and not penal. Counsel for defendants insist that that decision must be limited to the application of the statute of limitations and nothing else. But the opinion of the court does not sustain this contention. Mr. Justice Wood, who delivered the unanimous opinion of the court, after a very careful review of the many conflicting authorities cited by counsel, said:

"We conclude, from these considerations, that the statute is not penal, but highly remedial, even when construed independent of the statute of limitations."

And in another part of the opinion he said:

"With due deference to all authorities which hold that statutes similar to ours are penal, we are constrained to believe that such views are erroneous, and we fully agree with Mr. Morawetz that 'it is not quite clear what the courts mean to express by saying that statutes of this character are penal, and that they impose upon the directors a penal liability.' 2 Mor. Corp. § 908. The better view, as Judge Thompson says, is that expressed by the Supreme Court of Georgia, in the early case of *Neal v. Moultrie*, 12 Ga. 116. This opinion is unusually clear and strong."

This construction of the statute by the highest court of the state is conclusive, not only on this court, but all national courts, including the Supreme Court. *Chase v. Curtis*, 113 U. S. 452, 5 Sup. Ct. 554, 28 L. Ed. 1038; *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; *Continental National Bank v. Buford*, 114 Fed. 290, 53 C. C. A. 14.

In determining the question involved, it is important to ascertain whether the word "debt" was used by the lawmaking body in that restricted sense as claimed by counsel for defendants, or in the broader sense, to cover all demands arising from contracts express or implied. In *Am. & Eng. Enc. of Law* (2d Ed.) 983, the general definition of the word is stated to be:

"In common parlance the word 'debt' is sometimes used to denote any kind of a just demand, and has been differently defined owing to the subject-matter of the statutes in which it has been used; and while ordinarily it imports a sum of money arising upon a contract express or implied, in its most general sense it means that which one person is bound to pay or perform to another."

The notes cited by the author give the various definitions found in the law dictionaries, and need not be repeated here.

The Standard Dictionary gives as one of the definitions:

"The obligation resting upon one person to pay or perform something that is due to another; the state or condition of being indebted to another."

The courts which have defined the word "debt" have been influenced to a great extent by the context of the statute in which it was used, its objects, and the existing mischief sought to be remedied. A reference to these decisions, the language used in the statute under consideration, and the object sought to be attained by its enactment remove all doubt as to the construction to be placed upon this statute.

In *Fisher v. Consequa*, 2 Wash. C. C. 385, Fed. Cas. No. 4,816, Mr. Justice Washington, in speaking of an action for damages arising from a breach of contract said:

"The uncertainty of the sum does not, in the common understanding of mankind, render it less a debt. A promise, whether express or implied, to pay as much as certain goods or labor are worth, or as much as the same kind of goods may sell for on a certain day on a certain market, or to pay the difference between the value of one kind of goods and another, creates in common parlance a debt."

In *New Jersey Insurance Co. v. Meeker*, 37 N. J. Law, 282, 301, the court, in a very learned opinion delivered by Chief Justice Beasley, defined it as a word "of large import, including not only debts of record and judgment, and debts by specialty, but also obligations arising on an implied contract to a very wide extent, and in its popular sense includes all that is due to a man in any form of obligation or promise."

This definition was followed with approval by the Supreme Court of Massachusetts in *Gray v. Bennett*, 3 Metc. 522, 526.

In *New Haven Steam Sawmill Co. v. Fowler*, 28 Conn. 103, 108, it was held that damages due for a breach of contract was a debt within the attachment statute of that state. The same conclusion was reached in *Stiff v. Fisher*, 2 Tex. Civ. App. 346, 21 S. W. 291.

In *Dunsmoor v. Furstenfeldt*, 88 Cal. 522, 26 Pac. 518, 12 L. R. A. 508, 22 Am. St. Rep. 331, the court held:

"Any kind of obligation of one man to pay money to another is a debt."

And quoted with approval from *Rodman v. Munson*, 13 Barb. (N. Y.) 197:

"A debt signifies what one owes. There is always some obligation that it shall be paid; but the manner in which it is to be paid, or the means of coercing payment do not enter into the definition."

In *Equitable Life Insurance Co. v. Board of Equalization*, 74 Iowa, 178, 181, 37 N. W. 141, it was held that, under a statute au-

thorizing the deduction of "debts" from the credits list for taxes, the profits held for the stockholders are debts which should be deducted. Mr. Justice Beck, who delivered the opinion of the court, said:

"Here is a claim by the stockholders for which the corporation is liable. It is not now matured, but will become payable in the future. The amount which the stockholder will receive may not now be certainly determined. The corporation being bound to pay the stockholders its obligations, any credit creates a debt according to the definition above given."

In *Cheney v. Straube*, 35 Neb. 521, 53 N. W. 479, a liability arising from a breach of a covenant of warranty was held to be a debt within the attachment statute, and in *Dryden v. Kellogg*, 2 Mo. App. 87, it was held that a liability upon a breach of warranty is a debt within the meaning of the statute similar to this providing for the liability of stockholders of corporations.

In *Barber v. City of East Dallas*, 83 Tex. 147, 18 S. W. 438, it was held:

"In common parlance the word 'debt' is sometimes used to denote any kind of just demand, and has been differently defined, owing to the subject-matter of the statute in which it has been used, and while ordinarily it imports a sum of money arising upon a contract express or implied, in the more general sense it means that which one person is bound to pay or perform for another."

In *Green v. Easton*, 74 Hun, 329, 26 N. Y. Supp. 553, officers of a corporation who had failed to comply with the requirements of the statute of that state were held liable for a debt arising from a breach of contract, although in that state it is the settled rule of law that such a statute is penal in its nature and must be strictly construed.

In *Felker v. Standard Yarn Co.*, 148 Mass. 226, 19 N. E. 220, a tax assessed against the corporation was held to be a "debt" within the meaning of a statute making directors liable for the debts of the corporation.

Other cases in which the word "debt" was similarly defined are: *Frazer v. Tunis*, 1 Bin. (Pa.) 254; *Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417; *Brand v. Godwin* (Com. Pl.) 8 N. Y. Supp. 339, 9 N. Y. Supp. 743; *Chalmers v. Sheehy*, 132 Cal. 459, 64 Pac. 709, 84 Am. St. Rep. 62; *In re Lambie's Estate*, 94 Mich. 489, 54 N. W. 173; *Rosenbaum v. U. S. Credit System Co.*, 61 N. J. Law, 543, 40 Atl. 591.

What the intention of the Legislature of Arkansas in the enactment of this section was is easily ascertained by an examination of the act of which these sections are a part. In the original act enacted in 1869 (Laws 1868-69, p. 186, § 21) the liability was only imposed when the officers named "intentionally" neglected to comply with the requirements of the statute. *Gantt's Dig.* § 3356. By the amendatory act of February 14, 1891 (Acts 1891, p. 12) the word "intentionally" was omitted, making the officers liable for neglect or refusal to comply with the provisions of this statute, regardless of the fact whether it was intentional or not. Section 859, *Kirby's Dig.*

It will be noted that in each of the acts the words used are "all debts," thus indicating that the intention of the lawmaking body was to include every liability arising upon contract as distinguished from

those arising from torts. The object of the Legislature, no doubt, was to have publicity of the financial standing of the corporation and the names of its stockholders. The mischief then existing, and which it was sought to remedy, was that insolvent corporations would often hold themselves out to the world as being companies of large capital and means, and thus obtain extensive credits, when, in fact, they were wholly insolvent. By requiring these statements to be filed and recorded, and which by section 858, Kirby's Dig., are required to be made under oath, persons intending to deal with a corporation could examine these statements and decline to extend credit or enter into contracts with insolvent corporations from whom, in case of a breach, they could not recover what should be due them; stockholders of a corporation not being liable for the debts of the corporation under the laws of Arkansas. If no such statement had been filed, the financial responsibility of the president and secretary would determine the advisability of dealing with the corporation, for by their neglect to file this statement they, in effect, made "all debts" of the corporation their own and assumed liability for their payment. The Legislature certainly must have known what is known to every person, that the liabilities of corporations created by contracts to be performed in the future are as important and numerous and create as many liabilities as those created by loans of money or sales of merchandise; and, to remove all doubt on the subject, used the words "all debts" undoubtedly in the popular sense and common understanding of the people. To limit the meaning of the statute to the narrow technical meaning of "monies due by certain and express agreement" would not effect the purposes intended, and for the courts to give it that construction would defeat the evident purpose of the Legislature.

The object of these acts has been very aptly stated by the Supreme Court of the United States in *Chase v. Curtis*, 113 U. S. 452, 5 Sup. Ct. 554, 28 L. Ed. 1038. There it was sought to hold officers of a corporation liable under the statute of the state of New York, which is practically like that of the state of Arkansas, on a judgment rendered against the corporation for a tort committed by its agents; but the court held that such an action could not be maintained for a tort, even after it had been reduced to a judgment and thus liquidated and made certain, it was not within the contemplation of the lawmakers, as was apparent from the act. Mr. Justice Matthews, who delivered the opinion of the court, said on that point:

"Such claims are not within the contemplation of the act. The mischief to be prevented by its requirements has no relation to liabilities of that description. The creditors to be protected are those only who become such by voluntary transactions, in reference to which, for their benefit, the information becomes important as to the debts of the company." 113 U. S. 462, 5 Sup. Ct. 558, 28 L. Ed. 1038.

See, also, *Beekman Lumber Co. v. Ahern*, 75 Ark. 107, 111, 86 S. W. 842.

A party, whether a corporation or an individual entering into a contract to be performed in the future, impliedly promises to pay to the other party to the contract the loss sustained by him in case of a breach, and such a debt is clearly one arising from a contract. There

is an implied obligation to pay in a case of a breach of the contract the difference between the price contracted and the value of the article under contract of sale at the time of the breach, and this is as easily ascertained as the sum claimed in an action for a quantum meruit. As stated by Mr. Justice Washington in *Fisher v. Consequa*, supra:

"The uncertainty of the sum does not, in the common understanding of mankind, render it less a debt."

Whether it becomes a debt for which officers are under this statute liable when the contract is entered into or when there is a breach and the innocent party has either sold or purchased the articles contracted for, and thus made the amount of the debt certain, it is unnecessary to determine in this case, as the undisputed evidence is that these defendants were the officers of the oil company at both times and had failed to comply with the statute requiring the filing of a statement before the contract was entered into as well as when it was breached.

From a careful consideration of the authorities on the subject, the language of the act, the mischief then existing and sought to be remedied by the enactment of the statute, and in view of the construction placed upon this statute by the highest court of the state that it is remedial and must be liberally construed, it is impossible to escape the conclusion that by the use of the words "all debts" the legislative intent was to include liabilities arising from a breach of contract by a corporation as well as those due by certain and express agreement.

The motion for a new trial will be overruled, and judgment entered against all the defendants on the verdict of the jury.

IN re SWOFFORD BROS. DRY GOODS CO.

(District Court, W. D. Missouri, W. D. July 28, 1910.)

1. BANKRUPTCY (§ 11*) — JURISDICTION — RESTRAINT OF INTERFERENCE OF COURTS.

Bankruptcy Act July 1, 1898, c. 541, § 2, subd. 15, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3421), invests courts of bankruptcy with the power to make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for enforcement of the act. *Held*, that the section may be availed of to compel anything which ought to be done, or to prevent anything which ought not to be done against the enforcement of the law, provided the court of bankruptcy otherwise has jurisdiction of the person or subject-matter, and for such purposes the court has the plenary powers of a court of equity, and can exercise them for the ascertainment and enforcement of the rights and equities of the various parties interested in the bankrupt's estate, and where the bankrupt's estate was undergoing administration, and a proposition was made to buy the assets for a certain sum prior to termination of the year, allowed for filing claims, the court could restrain any proceeding which would disturb or change the matter in process of administration.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 11; Dec. Dig. § 11.*]

Jurisdiction of federal courts in suits relating to bankruptcy, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. **BANKRUPTCY (§ 22*)—JURISDICTION—PROTECTION OF JURISDICTION.**

A proceeding in bankruptcy being in equity, and the court having all the inherent powers of a court of equity to enforce and protect its jurisdiction, it may be appealed to by supplemental and ancillary bill to enforce its orders, sustain its jurisdiction, and protect parties before it in the enjoyment of rights secured under it, where jurisdiction is reserved or still retained, or even afterwards where the result of the interference would be a relitigation of the same subject-matter between the same parties.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 11; Dec. Dig. § 22.*]

3. **CORPORATIONS (§ 206*)—ILLEGAL ACTS OF OFFICERS—RIGHT OF ACTION.**

Where an officer of a corporation misappropriates property of the corporation to his own benefit, in respect to a stockholder, a right of action exists in the corporation itself, and the right of a stockholder, if any, is derived from that, as between a stockholder and the corporate management, the stockholder may sue where the company is under such hostile control that its proper officers will not in the nature of things sue in its name.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 791-796; Dec. Dig. § 206.*]

Rights of stockholders to sue or defend on behalf of corporation as dependent on refusal of corporation or officers to act, see note to *Eagle Iron Co. v. Colyar*, 87 C. C. A. 390.]

4. **BANKRUPTCY (§ 145*)—RIGHTS VESTING IN TRUSTEE—RIGHT OF ACTION.**

Rev. St. Mo. 1899, § 1338 (Ann. St. 1906, p. 1075), provides that the circuit court shall have jurisdiction over the officers of corporations organized under the article pertaining to manufacturing and business companies, to compel payment by them to the corporation which they represent and to its creditors, of money and of the value of property which they have acquired to themselves or transferred to others, or lost, or wasted by violation of their duties or abuse of their powers. *Held*, that in a bankruptcy proceeding the right to compel such payment vests in the trustee, becoming assets in his hands, which may be disposed of under the direction of the court under Bankruptcy Act July 1, 1898, c. 541, § 70, subd. 6, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), vesting in the trustee the bankrupt's title, except as to property exempt, in rights of action arising from the unlawful taking, detention, or injury to his property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 205, 230-234; Dec. Dig. § 145.*]

5. **BANKRUPTCY (§ 4*)—PURPOSE OF ACT.**

The policy and purpose of national bankruptcy acts is primarily to secure an equal and speedy distribution of the bankrupt's property among his creditors, and to relieve the honest debtor from legal proceedings for his debts, to enable him to start afresh in business life; but the distribution of the property is the principal object to be attained.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 314; Dec. Dig. § 4.*]

6. **BANKRUPTCY (§ 11*)—JURISDICTION.**

A court of bankruptcy has no concern with an action against a bankrupt company and its president who had previously offered and had had accepted by the bankruptcy court a proposition to buy the assets of the company, for an accounting based on the claim that the president, through his purchase and settlement with the trustee, had secured assets largely exceeding the amount paid by him to the trustee, and had secured a great advantage for which he, in equity, would be required to account to the bankrupt and its stockholders so long as it does not involve the impairment of the orders, decrees, and other proceedings in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 11; Dec. Dig. § 11.*]

In the matter of Swofford Bros. Dry Goods Company, bankrupt. Supplemental bill to enjoin action in state court. Decree for complainant as to certain causes of action, and for defendant as to another.

Edwin A. Krauthoff, for complainant.

Silvers & Silvers, for defendant.

VAN VALKENBURGH, District Judge. On the 9th day of October, 1909, a petition in bankruptcy was filed in this court against the above-named bankrupt, and on the 28th day of October, 1909, an adjudication in bankruptcy was entered. Thereafter a trustee was appointed by the creditors who duly qualified and assumed charge of the assets of the bankrupt estate. This estate was largely involved, and in January, 1910, it developed that the unsecured claims against the bankrupt amounted approximately to \$500,000, and that upon the assets applicable thereto the trustee had been able to realize in money approximately \$125,000, and also had on hand some remnants of the stock of goods, the fixtures located in the store building, some accounts, bills receivable, equities in personal property pledged as collateral security, and some real estate and other claims of doubtful value. Among the latter were claims against one J. J. Swofford, the petitioner herein, who was the president and actively in control of the company up to the time the bankruptcy petition was filed.

On or about the 6th day of January, 1910, the petitioner Swofford filed in the bankruptcy case a proposition to buy all the remaining assets of the company in consideration of a payment to the trustee in bankruptcy of a sum of money sufficient, in addition to the cash then on hand and any cash that might be realized from the assets of the estate in bankruptcy, to pay each general creditor of the estate a dividend of 37½ per cent. upon the face of his claim as it might be provable and allowed. A further consideration moving to the applicant was expressed as follows:

"It being the intent of this application that by a decree of this court, and by such conveyances and receipts as the court may direct the trustee to make, any and all liability claimed to be due and owing the estate in bankruptcy or the trustee in bankruptcy or otherwise by your petitioner be receipted in full, and that the trustee in bankruptcy shall convey to your petitioner all the property of the bankrupt corporation of whatever kind or character or wherever situate."

The court ordered this application referred to the referee for hearing and disposition, with directions to notify each creditor of the bankrupt corporation of the terms of the offer. This was accordingly done, and, there being no objection on the part of the creditors, the court through its referee ordered that the proposition be accepted. The order made, after reciting the details of the payments to be made by Swofford, contained this provision:

"Upon the foregoing being accomplished, the title to all the property of the estate in bankruptcy of whatever kind or character or wherever situate shall be vested in J. J. Swofford, and all liabilities claimed to be due and owing the estate in bankruptcy or the trustee in bankruptcy by J. J. Swofford shall be deemed receipted and canceled in full, and the trustee is directed by such assignments, conveyances, and deliveries as the court shall direct the trustee to

make to convey the absolute title to the assets hereinbefore mentioned to J. J. Swofford and deliver the same to him."

The year within which claims may be presented does not expire until on or about October 28, 1910. The greater part of the assets were accordingly delivered to Swofford, who in turn paid to the trustee an amount of money sufficient to pay 37½ cents on the dollar upon each claim ascertained and allowed; the trustee reserving a substantial part of the assets to secure such future payments as might become due from Swofford on account of possible claims yet to be allowed. It will be observed, therefore, that the bankruptcy proceeding is still open and pending and can in no event be reported for closing until after October of this year.

In this state of the record, one A. Rosier, claiming to be a stockholder of the Swofford Bros. Dry Goods Company, filed in the circuit court of Jackson county, Mo., on the 20th day of May, 1910, his certain petition or bill for an accounting against the bankrupt company and the said J. J. Swofford as its president. This petition contains 23 paragraphs embracing 22 causes of action against Swofford for fraud upon the corporation in the management of its affairs as its president and on account of money and property acquired by him directly or indirectly and lost and wasted by a violation of his duties and an abuse of his powers as such president. Without considering these various causes of action in detail, it will be sufficient to state that the petition states in general that the action is instituted and prosecuted by the plaintiff on behalf of himself and the other stockholders of said corporation and on behalf of said corporation; that the defendant J. J. Swofford, as president of said corporation, had for a long time been wholly in charge thereof, dominating and controlling its business policy and the conduct of its affairs generally; that plaintiff had requested the trustee in bankruptcy to bring proceedings to redress the wrongs therein complained of; but that said trustee had failed and refused to do so; that the estate in bankruptcy had been fully settled. The first 21 causes of action pray damages against the defendant Swofford for having used the property of the company in various ways therein set forth for his own personal advantage and profit at the expense, disadvantage, and loss of said corporation. The twenty-second cause of action embraced in the twenty-third paragraph of the petition will be separately considered.

Thereupon the petitioner J. J. Swofford brings this ancillary or supplemental bill in connection with the bankruptcy proceeding setting up the situation as herein above detailed and praying this court to issue an order restraining the said Rosier from further prosecuting his suit against said Swofford and the bankrupt upon the grounds that the matters therein sought to be litigated have already been settled and adjudicated by the orders and decrees of this court; that the bankruptcy proceeding being still open and unsettled this suit, in effect, impedes the enforcement of the bankruptcy act and interferes with the administration of the estate in bankruptcy; and further that this court owes it to the petitioner herein to protect the title which he as a purchaser acquired at the sale made by this court,

and in general to secure to him whatever rights he acquired by virtue of the acceptance of his proposition and the order made in relation thereto.

At the threshold of this discussion we are met by the contention of the defendant Rosier that the District Court, as a court of bankruptcy, has no power to enjoin or stay proceedings in a state court in a case such as this; that its power to interfere is limited to proceedings which impede the enforcement of the bankruptcy act or interfere with the administration of the estate in bankruptcy. It is contended that such is not the effect of the action in the state court. Subdivision 15 of section 2 of the act (Act July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421]) invests courts of bankruptcy with the power "to make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act." It is said this section may be availed of to compel anything which ought to be done for, or to prevent anything which ought not to be done against the enforcement of the law; provided the court of bankruptcy otherwise has jurisdiction of the person or the subject-matter. For such purposes the court has the plenary powers of a court of equity and can exercise the powers of such a court for the ascertainment and enforcement of the rights and equities of the various parties interested in the estate of the bankrupt company. In *re Siegel-Hillman Dry Goods Co.* (D. C.) 111 Fed. 980-983; *Dodge v. Norlin*, 133 Fed. 363-368, 66 C. C. A. 425; *Bardes v. Hawarden Bank*, 178 U. S. 524-535, 20 Sup. Ct. 1000, 44 L. Ed. 1175.

In *Re Rochford et al.*, 124 Fed. 182-187, 59 C. C. A. 388, 393, the Court of Appeals of this Circuit, speaking through Judge Sanborn, said:

"The administration and distribution of the property of bankrupts is a proceeding in equity, and when authorized by act of Congress it becomes a branch of equity jurisprudence. Property in the custody of a court of equity for administration is always held by it in trust for those to whom it rightfully belongs. The jurisdiction to inquire and determine who the lawful owners of it are, and to that end to call before it all claimants by a reasonable notice or order to present their claims to the court within a reasonable time, or to be barred of any right or interest in the property in its custody, or in its proceeds, is a power inherent in every court of equity, incidental and indispensable to the authority to administer the property in its possession and to distribute its proceeds."

In this case the estate of the bankrupt was and is undergoing administration in this court. The visible assets were manifestly insufficient to pay more than a comparatively small dividend upon the claims allowed. A proposition was made by the petitioner Swofford to buy the remaining assets, which included claims against himself, upon the payment to the trustee of a sum of money sufficient to enable all creditors having provable claims to receive 37½ cents of the face thereof. The court had full power to entertain such a proposition and in its discretion to accept it. This the court did, and the contract raised by that judicial determination has been in large part executed; not wholly executed, however, for the reason that further claims may still be filed and further payments by Swofford may and will become

necessary. The matter is, therefore, still in process of administration by this court, and cannot be disturbed or changed without seriously impeding the enforcement of the act and interfering with the administration of the estate. In such case there can be little doubt of the power of this court to restrain by injunction any proceeding which will have this damaging effect.

The jurisdiction of this court would undoubtedly be sustained upon still broader grounds. We have seen that a proceeding in bankruptcy is a proceeding in equity, and that for the purposes of enforcing and protecting its jurisdiction a court of bankruptcy has all the inherent powers of a court of equity. This being the case, it may be appealed to by supplemental and ancillary bill to enforce its orders, sustain its jurisdiction, and protect parties before it in the enjoyment of rights secured through and under it, and this is always true where jurisdiction is reserved or still retained, and even afterwards where the result would be a relitigation of the same subject-matter between the same parties. A bill addressed to this power of the court is essentially supplemental and ancillary in its nature and inheres in the general equity jurisdiction of the court. *Henrie v. Henderson et al.*, 145 Fed. 316-320, 76 C. C. A. 196; *Root v. Woolworth*, 150 U. S. 401-411, 14 Sup. Ct. 136, 37 L. Ed. 1123; *Pickens v. Dent*, 106 Fed. 653-656, 45 C. C. A. 522; *Riverdale Mills v. Manufacturing Co.*, 198 U. S. 188-195, 25 Sup. Ct. 629, 49 L. Ed. 1008; *Julian v. Central Trust Co.*, 193 U. S. 93, 24 Sup. Ct. 399, 48 L. Ed. 629; *State Trust Co. v. K. C. P. & G. R. R. Co.* (C. C.) 110 Fed. 10-18; *Chicago, R. I. & P. Ry. Co. v. St. J. Union Depot Co.* (C. C.) 92 Fed. 22.

This being so, it remains to be seen whether the bill filed appeals properly to the protecting power of this court, and the answer to this question involves primarily whether the claims sued for by Rosier in the state court were embraced in the sale by the trustee in bankruptcy to Swofford. In other words, whether they were assets of the bankrupt estate, and, as such, passed to Swofford under the terms of this sale, and whether Swofford was released therefrom by the action of this court. As has been already stated, the first 21 causes of action, embracing paragraphs 2 to 22, inclusive, of defendant's petition in the circuit court of Jackson county, pray damages against the defendant Swofford for having fraudulently used the property of the company in various ways therein set forth for his own personal advantage and profit at the expense and to the disadvantage and loss of the corporation.

Section 70 of the bankruptcy act provides that:

"The trustee of the estate of a bankrupt * * * shall * * * be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt in (6) rights of action arising upon contracts or from the unlawful taking or detention of or injury to his property."

Each one of the counts of the petition just referred to involves, either directly or indirectly, the taking and misappropriation of the moneys or property of the corporation; the diversion of the same from their legitimate channel to the use and benefit of its president Swofford, amounting to misappropriation or conversion. Counsel for

defendant in their brief and argument speak of this action as arising from fraud committed against a corporation in the conduct of its business. This arose in each case from the handling and disposition of the property of the company, and it is impossible to consider the acts complained of in any other light than as contributing to the injury and damage of that property. The courts of Missouri have always viewed such acts on the part of managing officers, involving as they do fraud and not merely passive dereliction of duty, as vesting a cause of action in the corporation, and through it in the creditors. In respect to a stockholder the right of action exists in the corporation itself, and the right of a stockholder, if any, is derived from that. *Donham v. Hahn*, 127 Mo. 439-445, 30 S. W. 134.

"The wrong committed by an officer of the corporation which affects the stockholders generally is not a wrong to them as individuals, but to the corporate entity." Cooley on Torts, par. 578.

"The cause of action for the violation of a corporate right accrues to the corporation and not to the stockholders, and generally the remedy must be obtained by, and in the name of, the corporation." *Hannerty v. Standard Theater Co.*, 109 Mo. 297-305, 19 S. W. 82, 84; *Loomis v. Missouri Pacific Ry. Co.*, 165 Mo. 469, 65 S. W. 962.

It is undoubtedly the law that as between stockholders of a corporation and its management the latter may sue in cases where the company is under such hostile control that its proper officers will not in the nature of things sue in its name; but that does not alter the fact that the primary right is in the corporation. *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827. Such causes of action as are here involved differ sharply from those arising out of a personal wrong suffered by the bankrupt, such as injuries to person, reputation, or personal comfort. The distinction is well pointed out by De Haven, District Judge, in *Re Haensell*, 91 Fed. 355.

In *Walker v. Reister*, 102 U. S. 467-471, 26 L. Ed. 220, Mr. Justice Miller said:

"The bill is not framed on that foundation, but distinctly on the ground of a conversion of the funds of the company, which, if true, is to that extent a fraud on the company's creditors."

In *Claffin v. Houseman*, Assignee, 93 U. S. 130-135, 23 L. Ed. 833, Mr. Justice Bradley said:

"The assignee, by the fourteenth section of the bankrupt act, becomes invested with all the bankrupt's rights of action for property, and actions arising from contract, or the unlawful taking or detention of or injury to property, and a right to sue for the same. The actions which lie in such cases are common-law actions, ejectment, trespass, trover, assumpsit, debt, etc., or suits in equity."

In fact this principle has uniformly been recognized by the Supreme Court of the United States in many decided cases. *Porter v. Sabin*, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815; *Erwin v. United States*, 97 U. S. 392, 24 L. Ed. 1065; *Comegys v. Vasse*, 1 Peters, 213, 7 L. Ed. 108. In the latter case Mr. Justice Story said:

"In general, it may be affirmed that mere personal torts, which die with the party, and do not survive to his personal representative, are not capable of passing by assignment; and that vested rights *ad rem* and *in re*, possibili-

ties coupled with an interest, and claims growing out of and adhering to property, may pass by assignment."

An express statute of the state of Missouri, however, would seem to dispose of all argument in the premises. Section 1338, Rev. St. Mo. 1899, vol. 1, p. 434 (Ann. St. 1906, p. 1075), provides that the circuit court shall have jurisdiction over the directors, managers, trustees, and other officers of corporations organized under the article pertaining to manufacturing and business companies, among other things:

"To order, decree and compel payment by them to the corporation which they represent, and to its creditors, of all sums of money and of the value of all property which they have acquired to themselves, or transferred to others, or may have lost or wasted by any violation of their duties or abuse of their powers as such directors, managers, trustees or other officers of such corporation."

This right is given to the corporation and to its creditors. In any aspect of the case, in a bankruptcy proceeding the right would be vested in the trustee. That being so, such rights become assets in his hands and may be dealt with, disposed of, sold, or compromised by him under the direction of the court. As between the corporation or its stockholders and creditors, the rights of the latter would necessarily be paramount. It must be conceded then, I think, that such rights as Rosier seeks to enforce were vested in the trustee of the bankrupt estate. For reasons thus appearing, it is unnecessary to consider whether the trustee could or should go into the state court to protect his interests, or whether the bankrupt or a stockholder could sue.

It must be remembered that the policy and purpose of all national bankruptcy acts is primarily to secure an equal and speedy distribution of the property of the bankrupt among his creditors. A further object is to relieve the honest debtor from legal proceedings for his debts, and to enable him to have a fresh start in business life; but the distribution of the property is the principal object to be attained—the discharge of the debtor is incidental and subordinate. The rights of stockholders, although subsisting as between the corporation and dishonest officers, are and must be inferior to those of creditors in a bankruptcy proceeding. In such proceedings creditors are the favorites of the law, and the object is to secure them not only an equal distribution of the property, but a speedy one. The court and its officers clothed with full authority, upon canvassing the possibilities and probabilities in each individual case, will decide what is best to be done from the standpoint of the creditor, and may, and will, act accordingly. When they have done so, their acts cannot be reviewed and the matter relitigated in another forum and at the suit of the parties or their privies.

In this case the trustee had assets of the bankrupt to dispose of, and among them were claims against the petitioner Swofford. These claims were civil in their nature. They were the subject of sale, compromise, or adjustment for the benefit of the creditors. Swofford made an offer which was accepted. Both he and the court are carry-

ing out the terms of their contract. His release from these claims was as much a consideration moving to him as any piece of tangible property purchased from the trustee. This court is as bound to protect his acquittance as it is to deliver to him the tangible property he bought. To hold otherwise would be to render unstable and futile all the proceedings of like nature in a bankruptcy court through which the property of the bankrupt is administered and money is realized from which distribution may be made to creditors.

A court of bankruptcy, under the existing circumstances, may, and doubtless did, conclude that the interest of the creditors was better subserved by this arrangement, which secured to them a speedy and largely increased dividend, than by resorting to the slower and uncertain process of attempting to realize from the assets by collection and litigation. This option rested with the creditors and their representatives in the court. The release of Swofford was a substantial feature of the agreement. Whatever rights against him may have existed in others beside the creditors had vested in the trustee in bankruptcy, and a release by this court was complete and absolute.

It will not do to say that the court of bankruptcy, through its referee and trustee, may have made a bad bargain, or may have acted unwisely. No court can recognize such a criticism in a collateral proceeding. Moreover, if such considerations are to be urged, it must be in the same court where the matters were litigated by seasonable and appropriate application to that tribunal. There, and not elsewhere, the remedy, if there be one, lies.

The twenty-second cause of action represented by the twenty-third paragraph of the Rosier petition presents a different question. In this count it is claimed, in substance, that the petitioner Swofford by virtue of his purchase from and settlement with the trustee in bankruptcy secured assets which largely exceeded the amount of money paid by him to the trustee; that by reason of the premises he secured to himself a great advantage and benefit for which he should, in equity and good conscience, be required to account to the bankrupt and its stockholders. With such a controversy, so long as it does not involve the impairment of the orders, decrees, and other proceedings in bankruptcy, this court has nothing to do, and the parties must be left to litigate such matters in the forum where the jurisdiction properly lies.

It follows from the conclusions reached that the defendant Rosier must be restrained from prosecuting in the circuit court of Jackson county, Mo., the 21 causes of action embraced in paragraphs 2 to 22, inclusive, of his petition, and that, as to the remaining cause of action embraced in paragraph 23 of that petition, the injunctive relief prayed for must be denied.

It is so ordered.

Ex parte EAGLESFIELD.

(District Court, E. D. Wisconsin. June 3, 1910.)

1. COMMERCE (§ 21*)—INTERSTATE COMMERCE.

The owner of a vessel enrolled under the federal statutes, licensed for foreign and domestic trade, and cleared from the port where the license was issued, who took a cargo of potatoes from a point in Michigan to Milwaukee, where she exposed them for sale on the vessel, was engaged in interstate commerce under a valid coasting license.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 10; Dec. Dig. § 21.*]

2. COMMERCE (§ 40*)—INTERSTATE COMMERCE.

The right to trade in interstate commerce includes the right to sell.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 29; Dec. Dig. § 40.*]

3. COMMERCE (§ 33*)—INTERSTATE COMMERCE.

Potatoes brought from one state to another on a vessel remained an import until sold and delivered on the deck.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 26; Dec. Dig. § 33.*]

4. COMMERCE (§ 64*)—INTERSTATE COMMERCE—LICENSES.

One trading in interstate commerce under a valid coasting license is not subject to a state or municipal license.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 104; Dec. Dig. § 64.*]

5. COMMERCE (§ 64*)—INTERSTATE COMMERCE—TAXATION.

A cargo in interstate commerce is not subject to taxation by a state.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 104; Dec. Dig. § 64.*]

Taxation of interstate commerce by state, see note to Board of Assessors v. Pullman's Palace Car Co., 8 C. C. A. 492.]

6. LICENSES (§ 7*)—ORDINANCE—REASONABLENESS—PROHIBITIVE PROVISIONS.

An ordinance under Laws Wis. 1905, c. 490, relating to the licensing of particular occupations, requiring transient merchants to pay \$20 a day, is unreasonable and void as being prohibitive.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 15; Dec. Dig. § 7.*]

Application by Elizabeth Eaglesfield for a writ of habeas corpus. Petitioner discharged.

This is a habeas corpus proceeding. The petitioner is a resident of Grand Rapids in the district of Michigan. She is the owner of the gas screw steamer "The Golden Girl," which vessel was duly enrolled pursuant to title L of the Revised Statutes of the United States, entitled "Regulation of Vessels in Domestic Commerce." She was licensed at the port of Grand Haven in the district of Michigan to carry on a coasting and foreign trade on the northern, northeastern, and northwestern frontier for one year from the 19th day of August, 1909. After stating certain conditions to be observed at all times by said vessel in such coasting trade, the license concludes as follows: "License is hereby granted for the said gas screw vessel called 'The Golden Girl' to be employed in foreign and domestic trade, for one year from the date hereof, and no longer."

Within the period covered by said license, and on or about the 20th of April, 1910, said vessel cleared from the port of Grand Haven for the South Manitou Islands in the state of Michigan, where she took on board a cargo of potatoes, and, in pursuit of her occupation as a coasting trader,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

arrived at the port of Milwaukee, Wis., on the 9th day of May, 1910. The vessel was moored at a dock in Milwaukee river, which is a navigable stream of the United States, and exposed said potatoes for sale upon the said vessel. The petitioner was thereupon arrested for a breach of a city ordinance of the city of Milwaukee, and was held to bail upon complaint alleging that the petitioner on the 13th day of May, 1910, at Milwaukee, "did then and there engage in and follow the business of a transient merchant in the state of Wisconsin, within the meaning of chapter 490 of the Laws of Wisconsin for 1905, without first having obtained a license therefore." On the 27th of May, 1910, the petitioner was found guilty of said offense by the district court of Milwaukee county, which imposed a fine of \$50 and costs. In default of which the petitioner was committed to the house of correction for 30 days. Thereupon this application was made for a writ of habeas corpus.

The business of a transient merchant is defined in section 5 of chapter 490, as follows:

"A transient merchant within the meaning of this act is defined as one who engages in the vending or sale of merchandise at any place in this state temporarily, and who does not intend to become, and does not become a permanent merchant of such place."

Which definition is adopted by the ordinance of the city of Milwaukee under which the arrest was made. By said state law it is provided that every such transient merchant may be licensed upon paying into the state treasury \$75, and, in addition to such amount, by paying into the treasury of any city or village where he may be conducting his business a sum not exceeding \$25 per day, to be determined by ordinance of such place. The Milwaukee ordinance requires \$20 a day.

This state law is entitled "An act relating to hawkers and peddlers and various other occupations," including circuses, menageries, side shows, vaudeville, Ferris wheel, merry-go-round, shooting galleries, and transient merchants.

No evidence was offered tending to show that the potatoes in question were not wholesome, or that any cause existed whereby the public health was involved.

Daniel W. Hoan, City Atty., for City of Milwaukee.
Bloodgood, Kemper & Bloodgood, for petitioner.

QUARLES, District Judge (after stating the facts as above). There is no dispute about the facts in this case as they appear in the petition and the return.

It is contended by the petitioner as matter of law that the business transacted by her upon her boat was that of a coasting trader, within the sole jurisdiction of the federal Constitution and laws; that she was engaged in interstate commerce; that she is under the sole authority and control of the federal government, and entirely beyond the jurisdiction of the state and municipal authorities. Further, if there were any ground for municipal interference, that the regulation in question is unreasonable and prohibitory.

There is no doubt about the correctness of the procedure in this case. The writ may be issued in the discretion of a federal judge without awaiting the final determination of the state court. *Ex parte Royal*, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868.

The law in this case is practically settled by two decisions of C. J. Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, and *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678.

In *Brown v. Maryland*, the great Chief Justice says (page 443, 12 Wheat. [6 L. Ed. 678]):

"This indictment is against the importer, for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them or otherwise mixes them with the general property of the state, by breaking up his packages, and traveling with them as an itinerant peddler. In the first case, the tax intercepts the import, as an import in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the state. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the state. In the last cases, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them."

On page 444, 12 Wheat. (6 L. Ed. 678), the learned Chief Justice further says:

"But if it should be proved that a duty on the article itself would be repugnant to the Constitution, it is still argued that this is not a tax upon the article, but on the person. The state, it is said, may tax occupations, and this is nothing more. It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

On page 446, 12 Wheat. (6 L. Ed. 678), the opinion continues:

"What then is the just extent of a power to regulate commerce with foreign nations, and among the several states? This question was considered in the case of *Gibbons v. Ogden*, 9 Wheat. 1 [6 L. Ed. 23], in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. The power is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior. * * * If this power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell."

In *Gibbons v. Ogden*, *supra*, the first proposition laid down is that commerce includes navigation. Speaking of the power to regulate commerce, the court say, on page 196, 9 Wheat. (6 L. Ed. 23):

"This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."

On page 212, 9 Wheat. (6 L. Ed. 23), the court further says:

"To the court it seems very clear that the whole act on the subject of the coasting trade, according to those principles which govern the construction of statutes, implies unequivocally an authority to licensed vessels to carry on the coasting trade. The first section declares that vessels enrolled by virtue of a previous law, and certain other vessels, enrolled as described in that act, and having a license in force, as is by the act required, and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade. This section seems to the court to contain a positive enactment that the vessel it describes shall be entitled to the privileges of ships or vessels employed in the coasting trade. These privileges cannot be separated from the trade, and cannot be enjoyed unless the trade may be prosecuted. The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached, and in the exercise of which its whole value consists. To construe these words otherwise than as entitling the ships or vessels described to carry on the coasting trade would be, we think, to disregard the apparent intent of the act. The fourth section directs the proper officer to grant to a vessel qualified to receive it 'a license for carrying on the coasting trade,' and prescribes its form. After reciting the compliance of the applicant with the previous requisites of the law, the operative words of the instrument are: 'License is hereby granted for the said steamboat to be employed in carrying on the coasting trade for one year from the date hereof, and no longer.' These are not the words of the officer; they are the words of the Legislature, and convey as explicitly the authority the act intended to give, and operate as effectually, as if they had been inserted in any other part of the act than in the license itself. The word 'license' means permission, or authority; and a license to do any particular thing is a permission or authority to do that thing; and, if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer, to do what is within the terms of the license."

On page 215, 9 Wheat. (6 L. Ed. 23), the court further say:

"The license can be granted only to vessels already enrolled, if they be of a burden of 20 tons and upward, and requires no circumstances essential to the American character. The object of the license, then, cannot be to ascertain the character of the vessel, but to do what it professes to do; that is, to give permission to a vessel already proved by her enrollment to be American to carry on the coasting trade."

While certain minor changes have been made by the courts in the doctrine laid down by these two great precedents, as, for instance, that the terms "imports" and "exports" as employed in the Constitution are applicable only to the foreign trade (*Woodruff v. Parham*, 8 Wall. 123, 19 L. Ed. 382), the fundamental principles of both opinions have been repeatedly ratified and affirmed by the Supreme Court of the United States. Perhaps the most exhaustive and elaborate review of these principles may be found in *Austin v. Tennessee*, 179 U. S. 350, 21 Sup. Ct. 132, 45 L. Ed. 224. In this case there was a dissent by four of the justices; but the point upon which the dissent was based was so narrow that the general principles established by these two great cases were reviewed and approved, in both opinions. So that we have here practically a concurrence of opinion by the entire bench as to the propositions involved in the instant case. The doctrine of the original package is traced back and said to rest upon the language of C. J. Marshall in *Brown v. Maryland*. This doctrine was

further developed in *Pittsburg v. Bates*, 156 U. S. 577, 15 Sup. Ct. 415, 39 L. Ed. 538; *Leisy v. Hardin*, 135 U. S. 100, 122, 10 Sup. Ct. 681, 34 L. Ed. 128; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49.

The court in *Austin v. Tennessee*, *supra* (page 362 of 179 U. S., page 139 of 21 Sup. Ct. [45 L. Ed. 224]) remark:

"Of course it is one thing to force into a state, against its will, articles or commodities that can have no possible connection with or relation to the health of the people. It is quite a different thing to force into the markets of a state against its will articles or commodities which, like cigarettes, may not unreasonably be held to be injurious to health."

In the dissenting opinion (page 387 of 179 U. S., page 149 of 21 Sup. Ct. [45 L. Ed. 224]) the dissenting judges say:

"The power cannot be conceded to a state to exclude, directly or indirectly, the subjects of interstate commerce, or by the imposition of burdens thereon, to regulate such commerce, without congressional permission."

See *Lyng v. Michigan*, 135 U. S. 161, 166, 10 Sup. Ct. 725, 34 L. Ed. 150.

In *Fairbank v. United States*, 181 U. S. 283, 21 Sup. Ct. 648, 45 L. Ed. 862, and *Stockard v. Morgan*, 185 U. S. 27, 22 Sup. Ct. 576, 46 L. Ed. 785, the court again reviewed and reinforced the doctrine announced by C. J. Marshall.

In *Leisy v. Hardin*, *supra*, the court say in substance:

"The power vested in Congress by the commerce clause is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution. It is coextensive with the subject on which it acts and cannot be stopped at the external boundary of a state, but must enter its interior and must be capable of authorizing the disposition of the articles which it introduces, so that they may become mingled with the common mass of property within the territory entered; and while, by virtue of its jurisdiction over persons and property within its limits, a state may provide for the security of the lives, limbs, health, and comfort of persons and the protection of property so situated, yet a subject-matter that has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the state."

It has been firmly settled that the transportation does not end when the voyage terminates at the point of destination; but the power of Congress continues until the goods are delivered to the consignee. *Vance v. Vandercook*, 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100; *Adams Express Co. v. Kentucky*, 206 U. S. 129, 136, 27 Sup. Ct. 606, 51 L. Ed. 987; *Heymann v. Railroad Co.*, 203 U. S. 270, 27 Sup. Ct. 104, 51 L. Ed. 178; *Adams Express Co. v. Kentucky*, 214 U. S. 222, 29 Sup. Ct. 633, 53 L. Ed. 972.

The case of *Osborne v. Mobile*, 16 Wall. 479, 21 L. Ed. 470, was pressed upon the court as decisive of the instant case. An examination of the recent decisions of the Supreme Court demonstrates that there has been a return to the proposition laid down by Justice Marshall, that a tax on an occupation is a tax on the business, and eventually a tax on the property involved. *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678; *Lyng v. Michigan*, 135 U. S. 161, 166, 10 Sup. Ct. 725, 34 L. Ed. 150.

In *Welton v. Missouri*, 91 U. S. 275, 278, 23 L. Ed. 347, the court say:

"Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves."

In *Brennan v. Titusville*, 153 U. S. 304, 14 Sup. Ct. 833, 38 L. Ed. 719, the court, speaking of the *Welton* Case, said: While this case turned largely upon the fact of discrimination between products of other states and those of Missouri, nevertheless the decision is an adjudication that the imposition of a license tax upon the peddling of goods is a regulation of commerce.

In *Le Loup v. Mobile*, 127 U. S. 646, 8 Sup. Ct. 1383, 32 L. Ed. 311, the court say that in the present state of law *Osborne v. Mobile*, 16 Wall. 479, 21 L. Ed. 470, would not be held as sound authority. On page 648 of 127 U. S., on page 1384 of 8 Sup. Ct. (32 L. Ed. 311), the court summarize the present views of that tribunal as follows:

"No state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it which belongs solely to Congress."

This case is cited with approval in *Western Union Telegraph Company v. Kansas*, 216 U. S. 1, 22, 30 Sup. Ct. 190, 54 L. Ed. —.

Western Union Telegraph Company v. Kansas is the last reported case where the attention of the Supreme Court has been drawn to the great principles laid down by the Chief Justice in the two earlier cases cited, and concludes an unbroken line of authority sustaining the principles contended for by the applicant in the instant case.

Counsel for the city laid great stress upon certain remarks of Judge Johnson in his opinion in *Gibbons v. Ogden*, supra, that in the opinion of the justice the coasting license was intended to confer a status upon the vessel, rather than a privilege or authority to carry on a trade. The reasoning of C. J. Marshall on this point, in his opinion, is so clear and cogent that it vindicates itself. But the Supreme Court in later cases have repudiated the suggestion of Judge Johnson. In the *License Tax Cases*, 5 Wall. 462, 470, 18 L. Ed. 497, the court say:

"It is not doubted that, where Congress possesses constitutional power to regulate trade or intercourse, it may regulate by means of licenses as well as in other modes, and in case of such regulations a license will give to the licensee authority to do whatever is authorized by its terms. Thus: Congress having power to regulate commerce with foreign nations and among the several states, and with Indian tribes, may without doubt provide for granting coasting licenses, licenses to pilots, licenses to trade with Indians, and any other license necessary or proper for the exercise of that great and extensive power, and the same observation is applicable to every other power of Congress to the exercise of which the granting of licenses may be incident. All such licenses confer authority and give rights to the licensee."

In *Railroad Co. v. Husen*, 95 U. S. 465, 470, 24 L. Ed. 527, the Supreme Court say:

"Transportation is essential to commerce, or rather it is commerce itself, and every obstacle to it, or burden laid upon it by legislative authority, is regulation. * * *

"But whatever may be the nature and reach of the police power of a state, it cannot be exercised over a subject confided exclusively to Congress by the federal Constitution. * * *

"The police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it objects not within its scope cannot be secured at the expense of the protection afforded by the federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion." - Page 473 of 95 U. S. (24 L. Ed. 527).

Based upon the doctrine of this case, the Circuit Court of Appeals of the Ninth Circuit, in *Smith v. Lowe*, 121 Fed. 753, 758, 59 C. C. A. 185, repudiates the doctrine asserted by the counsel for the city here, that a state authority must be exclusively relied upon to construe a state enactment, and that in the present case it rests with state authorities to determine whether the tax imposed by the ordinance is reasonable. On page 758 of 121 Fed., on page 190 of 59 C. C. A., the court say:

"Can state officers accomplish under the protection of a valid law the very results which the state is forbidden to authorize by legislation? Here are state officers who, if the allegations of the bill are true, are so using the police power as to obstruct interstate commerce beyond the necessity for its exercise. The contention of the appellees, followed to its logical conclusion, is that, if the act under which state officers proceed to establish a quarantine is of itself valid and constitutional, it matters not to what extent such authority be abused, nor upon what grounds or information the officers proceed. No matter how arbitrary their act, or how unfounded in necessity or reason, it must be presumed that it is done in good faith, and the bona fides thereof is not subject to investigation. By this doctrine the power of Congress to regulate interstate and foreign commerce is practically taken away and vested in the executive officer of the states.

* * * The provisions of the Constitution must necessarily impose restrictions on the action of the state officers, and restrain them from exercising the police power further than is reasonably necessary to secure protection against disease."

In *Re Lebolt* (C. C.) 77 Fed. 587, Judge Grosscup held that the question whether an ordinance is a proper exercise of police power is one for the United States courts to decide. In *Asbell v. Kansas*, 209 U. S. 251, 256, 28 Sup. Ct. 485, 52 L. Ed. 778, the court hold that this court will determine for itself whether the statute is a genuine exercise of an acknowledged state power, or whether, on the other hand, under the guise of an inspection law, it is really and substantially a regulation of interstate commerce which the Constitution has conferred exclusively on Congress.

There can be no doubt—indeed it was conceded in the argument—that in any view of the case an ordinance imposing a tax of \$20 a day upon the applicant, as a transient trader, was unreasonable and prohibitory. It is obvious that it would destroy the virtue and effect of a coasting license, and for that reason would be null and void.

It is worthy of notice that the statute of 1793, authorizing the enrollment of vessels for the coasting trade, and providing for coasting licenses in such trade, remains practically unchanged. During that

eventful interval a wonderful evolution has taken place in business methods and facilities for transportation by land and by water. Steamboats have driven out the enormous fleet of sailing craft; railroads have interlaced the continent, practically annihilating distance and making neighbors of the people of distant states. Primitive methods have vanished from memory. The present generation is not acquainted with the coasting trader that was formerly so large a factor in the carrying trade, and ministered so much to the convenience and comfort of the people. But the statute remains the same. The license has lost none of its validity. The principles of the law for the protection of the coasting trade are just as sacred and just as imperative as when the coasting trader was one of the chief adjuncts of interstate commerce. The federal authorities are under the highest obligation to protect this right against state or municipal infringement. As the Supreme Court has admonished us in *Railroad v. Husen*, supra:

"It is the duty of the courts to guard vigilantly against any intrusion."

From the showing made and the authorities herein considered, I deduce the following propositions:

First. The applicant was engaged in interstate commerce under a valid coasting license which conferred upon her a right so to do.

Second. The right to trade necessarily includes the right to sell.

Third. The potatoes in the hold of the vessel remained an import until she had sold and delivered them on the deck.

Fourth. Having acquired this right from the federal government, she cannot be required to purchase the same right from the state or municipal authorities.

Fifth. The cargo, being interstate commerce, did not fall under the taxing power of the state, and the conviction of the prisoner was an infringement upon the power exclusively conferred upon Congress.

Sixth. Under any aspect of the case, the ordinance was confessedly prohibitive, and therefore unreasonable, and consequently void.

For these reasons, the prisoner must be discharged, and an order for her enlargement may be prepared.

UNION PAC. R. CO. v. FLYNN, City Clerk, et al.

(Circuit Court, W. D. Missouri, W. D. July 16, 1910.)

1. COURTS (§ 508*)—STATE AND FEDERAL.

Kansas City Charter, art. 10, § 4, confers on the municipal court of such city concurrent jurisdiction with the circuit court of the state of proceedings for the enforcement of special tax bills for taking and damaging private property, and article 6, § 1, provides that such proceedings shall be taken in the municipal court. Section 4 declares that a special tax bill may be issued by the municipal court clerk, attested by the city clerk, and then filed in the office of the clerk of the circuit court and indexed as a judgment in favor of the city against the property described in the bill, on which a special execution may be issued; and also declares that tax bills so filed and recorded shall be subject to the order of the court and may be set aside, or the amount of the assessment reduced on motion of any party interested in the property assessed on reasonable notice to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the city. *Held*, that where a property owner, against which a special tax bill had been ordered, claimed that the proceedings were void for lack of proper notice, it had an adequate remedy at law in the state court either by a proceeding under section 4, or by certiorari, and hence could not maintain a bill in the federal Circuit Court to restrain the city clerk from attesting and the circuit clerk from filing the tax bills against its property on the theory that to do so would constitute a taking of property without due process of law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418-1430; Dec. Dig. § 508.*]

2. MUNICIPAL CORPORATIONS (§ 538*)—BILL—LACHES.

Where complainant had no knowledge of certain proceedings by a city to condemn property for public uses and to assess the cost thereof on an adjoining district, until after the time to appeal from the assessment had expired, he was not guilty of laches.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 538.*]

3. COURTS (§§ 259, 262*)—FEDERAL COURTS—EQUITY JURISDICTION.

The equity jurisdiction of the federal courts is the same as that possessed by the High Court of Chancery in England, and is uniform throughout the states and not subject to limitation nor restraint by state legislation.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 795, 797, 798; Dec. Dig. §§ 259, 262.*]

In Equity. Bill by the Union Pacific Railroad Company against M. A. Flynn, City Clerk, and Oscar Hochland, Clerk of the Circuit Court of Jackson County, Mo. Bill dismissed.

Isaac N. Watson, for complainant.

John G. Park, City Counselor, Francis M. Hayward, and John G. Schaich, for defendants.

VAN VALKENBURGH, District Judge. This cause comes on for hearing upon the amended bill of complaint in which an injunction is prayed restraining the defendant M. A. Flynn, city clerk, from attesting, and the defendant Oscar Hochland, circuit clerk, from filing in the office of the circuit court of Jackson county, Mo., certain tax bills against the property of complainant growing out of proceedings in the municipal court of Kansas City, Mo., for the condemnation of certain lands in Kansas City for the opening and widening of Sixth street in said city, and the assessment of benefits against other property, including the property of complainant, to pay therefor. The facts, as alleged in the bill, and as conceded at the hearing, are as follows:

October 18, 1909, the common council of Kansas City passed an ordinance, which was approved by the mayor of said city on the 19th day of October, 1909, providing for the opening and widening of Sixth street within boundaries therein described, condemning all private property within said limits for public use as a part of Sixth street, and designating and prescribing the limits within which private property should be deemed benefited, and be assessed and charged to pay compensation for such taking. Within these limits lies the property of complainant described in the amended bill. Thereafter, on

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the 1st day of November, 1909, the municipal court of Kansas City, which by charter is given jurisdiction of such matters, made an order notifying all persons who might be concerned in such proceeding that on the 6th day of December, 1909, at 2 o'clock p. m., in the lower house council chamber, on the fourth floor of the city hall building in Kansas City, Jackson county, Mo., a jury would be impaneled to ascertain the compensation for the property to be taken or damaged, and to make assessments to pay for the same, and further directed that a copy of this order should be published in the Daily Record, a newspaper at that time doing the printing for the city, for four consecutive weeks, the last insertion to be made not more than one week prior to the day set for said hearing, and that a copy of the order be served, as by the charter of Kansas City provided, upon each and every resident of Kansas City owning or having an interest in the real estate proposed to be taken or damaged. This order was published in the paper designated, beginning on the 1st of November, 1909, and daily thereafter, exclusive of Sundays, up to and including the 27th day of November, 1909, as shown by affidavit of publication duly set out in the bill. It conclusively appeared that the notice was published once in each week for four consecutive weeks, but that the last publication was but 26 days after the first date of publication, and 9 days instead of one week before the date set for the hearing. The complainant, being a citizen of the state of Utah, was served by no other process than by the publication aforesaid. This it claims to be insufficient and void; that the court thereby acquired no jurisdiction over it; and that, if proper relief be not granted, its property will be taken without due process of law.

On the 6th day of December, 1909, the cause coming on to be heard, the city, by its attorney, submitted to the court the proofs of publication and personal service. Thereupon that court decided that the service was sufficient, and the proceedings were continued until the 13th day of December, 1909, for the purpose of impaneling a jury. On the latter date a jury was impaneled and evidence heard, and as a result the jury returned into court a verdict by which there was assessed against the property of complainant the sum of \$2,478.28, which verdict was within 60 days thereafter duly confirmed by the common council. It is then charged in the bill, and substantially admitted, that the clerk of the municipal court of Kansas City is about to issue special tax bills in said amount under and by virtue of said proceedings in the municipal court of said city against the property of the complainant; that the defendant Flynn, city clerk of Kansas City, Mo., is about to attest the signature of said clerk of the municipal court to said tax bills; and that the defendant Oscar Hochland is about to file and record said tax bills in the office of the circuit clerk of Jackson county, Mo., and index the same as a judgment of Kansas City against the property of complainant. It is further charged that said tax bills when so attested and filed will become and be a cloud upon the complainant's title to the premises. By reason of the diversity of citizenship alleged and shown to exist, this court is asked to restrain defendants from thus placing a cloud upon complainant's title, for the rea-

son that said proceedings are void for want of jurisdiction. Other irregularities are set up in the bill, but no showing was made in support thereof; they were practically abandoned at the hearing, and counsel for complainant frankly stated that complainant's contention rested upon the defect in the publication of notice above referred to.

Assuming, for the purposes of this discussion, that the publication notice complained of was insufficient to confer jurisdiction upon the municipal court, and that no charge upon the property of complainant can or should be enforced by virtue of the proceedings in that court, the question for consideration is: Has this court jurisdiction to afford the relief for which complainant prays?

Counsel for defendants invoke section 720 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 581), which is as follows:

"The right of injunction shall not be granted by any court of the United States to stay any proceeding in any court of a state except in those cases where such injunction may be authorized by any law relating to proceedings in bankruptcy"

—and contend that this proceeding comes within the prohibition of that section. They also insist that, if complainant's contention be true, the tax bills would be void on the face of the record and would create no cloud upon complainant's title, and that by virtue of the charter provisions, and other well-known forms of procedure, complainant has a plain and adequate remedy at law. On the other hand, counsel for complainant contends that this suit does not seek to enjoin any proceeding in the municipal court of Kansas City, and does not interfere with any process issued out of that court, neither does it enjoin any officer of that court from executing any process issued by it, that this action is against parties other than those to the original suit, and, for all these reasons, does not fall within the prohibition of section 720. It is also alleged in the bill that the time for appeal, provided by charter, expired before actual knowledge of the condemnation proceeding was acquired by the complainant; that, if any remedy exists, that remedy lies in a court other than that which rendered the erroneous judgment; and that any subsequent suit to remove cloud would be equitable in its nature, and this court now should prevent an act which some other court of equity, state or federal, must hereafter be called upon to set aside.

A pertinent question for early consideration with regard to the jurisdiction of this court is whether this proceeding is in its nature a separate suit, or whether it is a supplementary proceeding so connected with the original suit as to form an incident of it and substantially a continuation of it. Concerning this distinction the Supreme Court of the United States, in the leading case of *Barrow v. Hunton*, 99 U. S. 80, 25 L. Ed. 407, says:

"If the proceeding is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or an appeal, it would belong to the latter category, and the United States court could not properly entertain jurisdiction of the case. Otherwise, the Circuit Courts of the United States would become invested with power to control the proceedings in the state courts, or would have appellate jurisdic-

tion over them in all cases where the parties are citizens of different states. Such a result would be totally inadmissible."

It is further pointed out that such would be a mere revision of errors and irregularities, or of the legality and correctness of the judgments and decrees of the state courts.

In *Leathe v. Thomas*, 97 Fed. 138, 38 C. C. A. 75, it was said:

"The prohibition of the statute does not extend to proceedings in a court of the state up to and including final judgment only, but to the entire proceedings from the commencement of the suit until the execution issued on the judgment or decree is satisfied." *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253.

The same doctrine is further announced in *Marshall v. Holmes*, 141 U. S. 589, loc. cit. 597, 12 Sup. Ct. 62, 35 L. Ed. 870, cited by complainant.

In *Leathe v. Thomas*, *supra*, in denying jurisdiction under such circumstances, the Circuit Court of Appeals for the Seventh Circuit said:

"The section above cited (section 720, Rev. St. U. S.) is not the only obstacle which prevents the sustaining of the order of injunction. The principle of comity which obtains between courts of concurrent jurisdiction forms a recognized part of their duty. It requires that a subject-matter drawn and remaining within the cognizance of a court of general jurisdiction shall not be drawn into this controversy or litigated in another court of concurrent jurisdiction. This principle prevails in all courts of concurrent jurisdiction deriving their powers from a common source. 'A departure from this rule would lead to the utmost confusion and to endless strife between courts deriving their powers from the same source; but how much more disastrous would be the consequence of such a course in the conflict of jurisdiction between courts whose powers are derived from entirely different sources?' *Buck v. Colbath*, 3 Wall. 334, 341 [18 L. Ed. 257]."

In this circuit this subject has been thoroughly discussed by the Court of Appeals in the case of *Little Rock Junction Ry. v. Burke*, 66 Fed. 83, 13 C. C. A. 341. That was a case in which the Circuit Court of the United States was asked to set aside a decree of a state court on the ground that such decree was utterly void for want of jurisdiction because of irregularities in the proof of publication of a jurisdictional order. As in the case at bar, the irregularity, if it was one, appeared upon the face of the record. Judge Thayer in his opinion said:

"It may be admitted that the federal Circuit Courts have power to entertain suits to enjoin persons from asserting any right or title under a judgment or decree of a state court of co-ordinate jurisdiction that is alleged to have been obtained by fraud or collusion. (Citing authorities.) Possibly, a bill in equity to obtain the same relief may be entertained in any case where it is shown by proper averments that the judgment of a state court which is apparently regular and valid, and for that reason is not subject to collateral attack, for some reason not disclosed by the record is in fact invalid and of no effect. A complaint alleging such facts would furnish a proper foundation for an original suit in equity because additional issues would be raised and new facts would be brought upon the record as the basis for independent judicial action. But a complaint or a petition which seeks to impeach a decree, without the aid of extrinsic evidence, for want of jurisdiction apparent upon the face of the record, simply imposes upon the court to which it is addressed the duty of re-examining questions that have once been tried and decided, and for that reason a proceeding of that nature cannot be regarded as a new action, but is rather a continuation of the original suit."

After reviewing *Barrow v. Hunton*, supra, the court further says:

"We think, therefore, that it may be accepted as a general rule, in the absence of any statutory provisions on the subject, that the proper forum in which to seek relief, otherwise than by an appeal or writ of error, against a judgment or decree which is alleged to be void on the face of the record, is in the court by which such judgment or decree was rendered, and that other courts of co-ordinate jurisdiction have no authority to grant relief in such cases. But, whatever may be the correct rule in this respect as between state courts of equal authority, it is manifestly true, we think, that, owing to the peculiar relations which exist between state and federal courts of co-ordinate jurisdiction, the federal Circuit Court ought not to review, modify, or annul a judgment or decree of a state court, unless such review is sought on a state of facts not disclosed by the record of the state court, which, for that reason, has not undergone judicial examination. * * * The federal court should remit proceedings such as these to the judicial tribunal of the state which made the record that is to be reviewed or impeached."

It seems clear then that if this proceeding seeks, in effect, to stay any proceedings in any court of a state, up to and including final judgment, or flowing necessarily therefrom as necessary to the beneficial exercise of jurisdiction with the result that it is merely tantamount to moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or an appeal, then jurisdiction is wanting in the Circuit Court of the United States, not only by reason of the prohibition of section 720 of the Revised Statutes aforesaid, but under the principle of comity which obtains between courts of concurrent jurisdiction and which makes such a review improper.

What is the situation in this respect in the case at bar? The answer to this question requires a brief examination into the organization of the municipal court of Kansas City, and the proceedings established by the charter of that city for the condemnation of lands and the issuance of tax bills against which this action is leveled.

Section 10 of article 4 of the present charter of Kansas City, among other things, provides:

"In suits for the collection of taxes, or for the enforcement of special tax bills, and in proceedings for taking and damaging private property, for the establishment of bill board restrictions and other easements, and for ascertaining damages caused by change of grade, or other exercise of the power of eminent domain, the jurisdiction of the municipal court shall be concurrent with the circuit court of Jackson county, Missouri."

The second paragraph of section 1, art. 6, is as follows:

"Unless otherwise specified by ordinance, and except as elsewhere in this charter prescribed, such proceedings shall be conducted in the municipal court of the city which shall, while in the discharge of such duty, have and exercise the powers of the circuit court for the preservation of order and enforcing process issued in the course of the proceedings, and may summon and compel by attachment, or otherwise, the attendance of witnesses and jurors, and fine and commit any person guilty of misdemeanor or contempt and the judge of said court shall pass on the competency of evidence, and instruct the jury on questions of law arising. The clerk of such court shall issue process and record orders made by said court."

Provisions follow for the condemnation of property in the manner here followed, or attempted to be followed, resulting in the verdict of a jury as to the amounts of damages and benefits.

Section 4 of article 6 provides that the verdict when reported shall be confirmed by the common council within 60 days from the making of the report. This was done in the present case. The amounts assessed by the verdict shall be collected by the city, as by ordinance provided, by suit or otherwise, as any other special taxes, or by special execution, as follows, namely:

"A special tax bill against any lot or parcel of property assessed may be issued by the clerk of the municipal court, under his hand, and his signature thereto shall be attested by the city clerk under the seal of the city, which tax bill shall contain a description of such lot or parcel of property, and the amount assessed against the same as fixed by the verdict. * * * Each tax bill, so issued, shall be filed in the office of the clerk of the circuit court of Jackson county, at Kansas City, and by such clerk recorded and indexed as a judgment in favor of the city, against the property described in the tax bill. At any time after the filing and recording of any such tax bill, as aforesaid, a special execution may be issued thereon out of the said circuit court in vacation or term time, as on a judgment of the court in favor of the city."

It will be observed that these are the acts of the city clerk and the circuit clerk which are here sought to be enjoined, and such is the nature of the tax bill which it is charged will constitute a cloud on the complainant's title. It will further be observed that this proceeding, which is initiated in the municipal court, does not ripen into a judgment until the filing of the tax bill in the office of the clerk of the circuit court, where it is defined as a judgment, upon which a special execution may be issued as on a judgment of the court (the circuit court) in favor of the city. It must follow, I think, either that the judgment secured is jointly created by proceedings in both the municipal and circuit courts, or that the acts of the city clerk and the circuit clerk are essential steps and proceedings in the consummation of the judgment of the municipal court—for these cases a court of concurrent and competent jurisdiction. The acts of the various clerks in rendering effectual and beneficial the proceedings in the municipal court and the verdict of the jury are not merely ministerial acts of parties foreign to the record, but they constitute an integral part of the court machinery designated by the charter for the rendition of judgments in condemnation cases and for the ultimate collection of these judgments. These steps must be regarded as proceedings in the courts of the state, and it would also seem that the judgment, once it becomes such in fact, is, in effect, a judgment of the circuit court of the state—a court of co-ordinate jurisdiction.

This view receives confirmation from an inspection of a succeeding paragraph of the said section 4 of article 6 of the charter, which is as follows:

"Tax bills filed and recorded as aforesaid shall be subject to the order of the court, and may be set aside or the amount of assessment reduced on motion of any party interested in the property assessed, the city having reasonable notice of the filing of such motion and the object thereof."

This unconditional privilege vouchsafed to the tax bill debtor guarantees complete opportunity for the review and correction of irregularities of this nature in the same court to which the laws of the state and city have confided the final establishment of and control over the tax bill judgment.

If, however, it is insisted that this is the judgment exclusively of the municipal court, that that court is in general of such inferior and narrow jurisdiction that it can afford no relief, and that to remit these proceedings to that tribunal would afford no remedy to complainant, much force must be given to the suggestion of counsel for defendants that a writ of certiorari will lie to correct the proceedings of the inferior court which are apparent upon the face of the record. Section 23 of article 6 of the Constitution of Missouri (Ann. St. 1906, p. 235) provides that:

"The circuit court shall exercise a superintending control over criminal courts, probate courts, county courts, municipal corporation courts, justice of the peace courts, and all inferior tribunals in each county of their respective circuits."

The complainant asserts that it was not properly served with process, was not before the municipal court, and acquired no knowledge of these proceedings until after the time for appeal had expired. No laches, therefore, can be imputed to it. The Supreme Court of the United States, in *Ewing v. City of St. Louis*, 5 Wall. 413, 18 L. Ed. 657, under analogous conditions, prescribed this writ for the review and correction of like irregularities. Mr. Justice Field, delivering the opinion of the court, said:

"With the proceedings and determinations of inferior boards or tribunals of special jurisdiction, courts of equity will not interfere, unless it should become necessary to prevent a multiplicity of suits or irreparable injury, or unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be established by extrinsic evidence. In other cases the review and correction of the proceedings must be obtained by the writ of certiorari. * * * The complainant can ask no greater relief in the courts of the United States than he could obtain were he to resort to the state courts. If in the latter courts equity would afford no relief, neither will it in the former."

The right of the city within proper bounds to direct and control proceedings connected with public improvements within its own limits will be conceded. That the equity jurisdiction conferred on the federal courts is the same as that the High Court of Chancery in England possesses; that it is subject to neither limitation nor restraint by state legislation and is uniform throughout the different states of the union—cannot be denied. That such jurisdiction should be exerted unhesitatingly when properly invoked is one of the most valuable guaranties of the federal Constitution; but so important to the citizen is this constitutional safeguard that it should never be impaired nor discredited by doubtful or injudicious uses.

It appearing then that it is sought by this action, in effect, to review proceedings in a state court of competent jurisdiction for the revision of alleged errors and irregularities therein, apparent upon the face of the record, and that complainant is not without an adequate remedy in the jurisdiction in which such irregularities arose, and are properly reviewable, it follows that this court cannot take jurisdiction of the matter; that the injunction prayed must be denied, and the bill dismissed, without prejudice to another suit at law or in equity in the proper jurisdiction.

It is so ordered.

HAYNE v. WOOLLEY et al.

(Circuit Court, W. D. North Carolina. August 1, 1910.)

COURTS (§ 328*)—FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY—EVIDENCE.

Evidence held to show that damages sought to be recovered in an action did not exceed \$2,000 exclusive of interest and costs, so as to give the Circuit Court jurisdiction.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 328.*

Jurisdiction of Circuit Court as determined by the amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 459.]

Action by Frank B. Hayne against R. J. Woolley and another. Petition by defendants for a writ of habeas corpus. Defendants discharged.

Merrick & Barnard, for plaintiff.

Judge H. G. Ewart, for petitioners.

PRITCHARD, Circuit Judge. The defendants were brought before me on a writ of habeas corpus by the United States marshal for the Western district of North Carolina, on the 4th day of January, 1910. The marshal's return of the writ is in the following language:

"J. M. Baley, answering the writ of habeas corpus in the above-entitled matter by the Honorable J. C. Pritchard, Circuit Judge of the United States, on the fourth day of January, 1910, says: That he is the United States marshal for the Western district of North Carolina and holds in his custody the petitioners, R. J. Woolley and Craton Whitaker, by virtue of a warrant or order of arrest issued by the Honorable W. S. Hyams, clerk of the United States Circuit Court for the Western district of North Carolina, at Asheville, N. C., copy of which is hereto attached and asked to be taken as a part of this answer or return. That he is advised, informed, and believes that it was his duty to arrest and hold the said petitioners under said process issued by the said court, as aforesaid, and is advised and believes that the said order of arrest is regular and lawful in all respects and not in violation of the Constitution or laws of North Carolina, nor of the United States. That he is further advised and believes that the petition of the petitioners should be denied, and they are not entitled to their discharge from custody of this respondent. Your respondent conceiving that he has no discretion in the matter holds and detains the petitioners in his custody as by the said precept he is commanded to do. That the order of arrest, hereinbefore mentioned, and the imprisonment and restraint of said petitioners Woolley and Whitaker are based upon an affidavit of A. R. Ogburn, the authorized agent of F. B. Hayne, of New Orleans, as is set forth in petitioners' petition, and a copy of this affidavit is hereto attached and asked to be taken as a part of this answer or return of respondent to the writ of habeas corpus. That said F. B. Hayne has instituted in the Circuit Court of the United States at Asheville an action at law against said petitioners, as is shown in the affidavit of said A. R. Ogburn, above mentioned, that this respondent alleges, upon information and belief, that the arrest of said petitioners is in all respects lawful and not illegal as charged in petitioners' petition. That it is true, as alleged in petition, that bail in the amount of ten thousand (\$10,000) dollars has been required of said petitioners by the clerk of the United States Circuit Court for the Western District of North Carolina, but not by A. R. Ogburn, as charged in petitioners' petition, and this respondent is advised, informed, and believes, and avers, that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

said clerk had the lawful authority to require said bail, and alleges, on information and belief, that the amount of same is not excessive or unreasonable, as charged in petitioners' petition, and that said arrest is fully warranted by the laws of the state of North Carolina, and is in all respects lawful and just. That a copy of the bond required of respondent by said clerk is hereto attached and asked to be taken as a part of this answer or return. * * *

It appears from an examination of the record in this case that on the 20th day of December, 1909, A. R. Ogburn, as agent of the plaintiff in the above-entitled action, filed with the clerk of this court an affidavit in which, among other things, he stated that the plaintiff had instituted an action in the Circuit Court of the United States for the Western District of North Carolina, at Asheville, N. C., against the defendants, R. J. Woolley and Craton Whitaker, for the possession of certain real property belonging to the plaintiff, situated in Henderson county, N. C., and within the Western district of said state, known as the "Johnston or Morris place," and commonly called "Beaumont," describing the same by metes and bounds. Affiant further alleged:

"* * * And for damages against said defendant for the wrongful, unlawful, willful, and unjust detention and use of a part thereof, to wit, the stable lot, stables, and barn and outhouses within the stable lot on said premises, or a part of the same, and for the wrongful, unlawful, willful, and unjust conversion of the same to their own uses and purposes, contrary to the will and over the protest of the said plaintiff, and in spite of the said plaintiff's repeated efforts to regain possession of the part of said premises so used and occupied by said defendants, as aforesaid, and without any shadow or pretense of right, title, interest, or estate in and to the same in the said R. J. Woolley or Craton Whitaker, or any other person for their benefit or for the benefit of either of them. That the said Woolley and Whitaker have taken possession of a part of the stable lot and the inclosure surrounding the same, including the stable, barns, and certain outhouses within said inclosure, as aforesaid, and are attempting to exercise exclusive dominion and control over the same. That they have locked the gates leading into said inclosure, and have forbidden the agents and representatives of the plaintiff to enter therein, and have actually had this affiant and certain assistants of his arrested on a warrant, charging them with forcible trespass in attempting to enter said inclosure, and to take possession thereof in the name and for the benefit of the said Frank B. Hayne. That said trial was set for hearing before a justice of the peace of Henderson county on December 14, 1909, and said affiant and his said assistants were bound to the next regular term of the superior court of Henderson county for the trial of criminal cases, beginning March 7th next in a penal bond of \$500. That said Woolley has a great number of cattle in said stable lot which he and said Whitaker for him turn out every day, as this affiant is informed and believes, into the fields of said 'Beaumont' property, and they daily inflict considerable damage upon said plaintiff's freehold, without any shadow or pretense of right, title, interest, or estate in the said Woolley or his codefendant, as aforesaid. That this affiant is the lawfully constituted agent and representative of the said Frank B. Hayne, heretofore fully authorized by the said Hayne to take full and exclusive possession of the farm and premises called 'Beaumont,' as aforesaid, and to hold possession thereof in the name of said Hayne and for his benefit. And the facts set forth in this affidavit are within affiant's own knowledge, except as to those facts stated on information and belief, and as to those facts affiant has learned of them through reliable and responsible persons, and not otherwise, that said Frank B. Hayne, the plaintiff in the above-entitled action, is a resident of the city of New Orleans, in the state of Louisiana, and of the United States of America, and the defendants, R. J. Woolley and Craton Whitaker, are each a citizen and resident of Henderson county, in the state of North Carolina; said county being within the Western district thereof."

In pursuance of the foregoing affidavit, the plaintiff applied to the clerk of this court for a warrant of arrest, under the provisions of subsection 1, § 727, Pell's Revisal (N. C. Law) 1908. The subsection in question reads as follows:

"* * * (1) In an action for the recovery of damages, on a cause of action not arising out of contract, where the defendant is not a resident of the State, or is about to remove therefrom, or where the action is for an injury to person or character, or for injuring, or for wrongfully taking, detaining or converting property, real or personal."

When this statute was first enacted, it did not contain the words "real or personal"; but the Legislature at its session in 1891 (Pub. Laws 1891, c. 541) amended the statute by adding the words "real or personal." Prior to the amendment, the case of *Bridgers v. Taylor et al.*, 102 N. C. 86, 8 S. E. 893, 3 L. R. A. 376, was passed upon by the Supreme Court of that state, and Judge Shepherd, who delivered the opinion of the court, in referring to this phase of the question said:

"It is urged that there is no more reason why one should be arrested for injuring a horse, or other personal property, than for burning a house, cutting down trees, and committing other injuries to real estate. To this it may be said that personal property is more perishable in its character, and that injuries to it may be sufficient to wholly impair its value, before the courts can stay the hand of the destroyer, while no considerable damage can be done to real property before the preventive power of the law can be invoked. It may also be said that real estate is peculiarly protected by the criminal law, and that the Legislature could not have intended to subject to arrest and imprisonment one who, honestly mistaking his boundary, commits some slight injury to the land of his neighbor—which could be done if the construction contended for prevails. But the most conclusive answer to such suggestions is that it is not our province to speculate as to what the law should be, but to construe it as it is made. The inquiry then is whether, by the ordinary rules of construction, the statute under consideration warrants an arrest for injuries to real property. Section 3765, paragraph 6, of the Code, provides that the word 'property' shall include all property, both real and personal, and that this construction shall be observed unless it would be inconsistent with the manifest intention of the General Assembly, or repugnant to the context of the same statute. The foregoing definition of 'property' and section 291 of the Code are exact copies of the New York Code upon the subject. The construction of this language, therefore, by the Court of Appeals of that state, is entitled to great weight with us, and we cannot do better than to quote the words of Hunt, J., in delivering the opinion of the court in *Merritt v. Carpenter*, reported in 3 Keyes [N. Y.] 142, overruling the decision of the Supreme Court in that case. It is true that that case was an action for the possession of land and for damages for withholding the same, but the learned judge carefully considers the whole section and concludes that none of its provisions are applicable to real property. He says:

"The following words, 'taking' and 'converting,' would neither of them be appropriate in speaking of real property; one may be readily understood when he says that an action may be sustained for taking personal property, or for converting it, or for taking and converting it, but the words would convey no legal idea when applied to real estate. There is a broad sense in which the word 'detaining' might be applied to real estate, of which the expression, 'forcible entry and detainer,' is an illustration. Such was not, I apprehend, the meaning of its codifiers in its present connection. The expressions, injuring, taking, detaining, and converting, are well used in the same sentence, and, apparently, as applying to the same subject-matter. Three of these words I have endeavored to show are not applicable to real property, and, if the fourth was so intended, the use of the language was singular-

ly unfortunate. I think the words (the italics are ours) *were all intended to be applied to personal property only.*

"We adopt the reasoning of this learned judge in the interpretation he has given us; but, if we were doubtful as to the correctness of his conclusions, there is a well-settled rule of construction, which, when applied to this case, relieves us from all difficulty. It is conceded that the section under consideration was taken from the New York Code of Civil Procedure. Its language, as we have seen, was construed in *Merritt v. Carpenter*, supra, in 1866, and it was enacted by the General Assembly of North Carolina in 1868.

"Dwarris on Statutes, 274, says: 'That words and phrases, the meaning of which, in a statute, has been ascertained, are, when read in a subsequent statute, to be understood in the same sense.'

"In the note of Judge Potter, on the same page, it is said that: 'Where the terms of a statute which have received judicial construction are used in a later statute, whether passed by the Legislature of the same state or country, or by that of another, that construction is to be given to the later statute. *Com. v. Hartnett*, 3 Gray [Mass.] 450; *Ruchmabaye v. Mottichmed*, Eng. L. & Eq. 84; *Bogardus v. Trinity Church*, 4 Sandf. Ch. [N. Y.] 633; *Rigg v. Wilton*, 13 Ill. 15 [54 Am. Dec. 419]; *Adams v. Field*, 21 Vt. 256. It is presumed that the Legislature which passed the later statute knew the judicial construction which had been placed on the former one, and such construction becomes a part of the law.'

Subsequent to the decision of the Supreme Court in the above case, the Legislature, as I have said, amended the statute by adding at the end of the paragraph the words "real or personal." There has been no decision of the Supreme Court of North Carolina since this amendment, but I doubt very much if that court would hold that a case like the one at bar is within the purview of the statute.

At the time of the hearing, no complaint had been filed in the clerk's office, and it was, therefore, impossible to ascertain the amount claimed as damages on account of the detention of the property in question, nor was there any allegation, by affidavit or otherwise, as to the value of the premises; and, as will hereinafter appear, the defendants set up no claim of title to the same, but admitted that the complainant was the legal owner thereof.

It will be observed that the portion of the statute under which this proceeding was instituted, that pertains to real property, reads as follows:

" * * * Or for wrongfully taking, detaining, or converting property, real or personal."

It appears from the affidavit of R. J. Woolley that his mother, L. J. Woolley, on the 23d day of August, 1909, sold and conveyed to the plaintiff the tract of land in question; that under the terms of the sale she said L. J. Woolley agreed to deliver the possession of the residence on the 15th of October, 1909; that prior to the delivery of the deed the plaintiff agreed with the said L. J. Woolley, through her agent, E. W. Ewbank, to permit her, her agents or tenants, to occupy the barns, stables, etc., until the spring months, in consideration of the said Woolley giving up possession of the residence upon said property; that at the time this agreement was entered into affiant had 30 head of cattle which belonged to his mother, and which, up to the time of the institution of this proceeding, he had not been able to sell at any figure approximating their value; that he had made every effort to dispose of the cattle, and had repeatedly advised the agent of the plaintiff that

he would vacate the barns and outbuildings occupied by him and in his possession as soon as he could dispose of the cattle; that in any event he would vacate the entire premises by the last of April, 1910; that in pursuance of said agreement the residence was promptly vacated by the 15th day of October, 1909; that the employes of the plaintiff are now, and have been for several weeks, in possession of the same, and relying upon the assurances and promises of the plaintiff to the said L. J. Woolley, affiant, as her agent, has used the barns for housing the cattle and the smaller cottages and outbuildings for himself and employé, Craton Whitaker; that the allegation of A. R. Ogburn to the effect that defendant is daily turning his cattle out on the valuable meadows of the said Hayne is not true, nor is it true that he has in any way damaged or injured the property of the said Hayne; that the allegation that affiant has locked up the gates leading to the residence and inclosures, and has forbidden the agents of Hayne from entering upon the said premises, is not true. Affiant further states that W. P. Bane, a contractor, employed by Hayne, is and has been for several weeks engaged in remodeling the residence; that he has never, at any time, forbidden the agents or employes of Hayne from exercising the full right of entry upon all parts of the premises.

There was also an affidavit filed by defendant Craton Whitaker, who, in substance, stated that he was employed by Mrs. L. J. Woolley, and occupied a small house on the premises; that he has never at any time been notified by the said Hayne or any of his agents or representatives to deliver possession of the house; that affiant has never, at any time, injured any of the property or the said premises, or converted any of the same to his own purposes.

E. S. Fisher also filed an affidavit in which he stated that the lands known as "Beaumont," where the cattle of Mrs. Woolley were pastured, had been used as a pasture for the last five years during the winter months by Mrs. Woolley, and that the said lands had been greatly benefited by the cattle running on them, and that the productive capacity of the lands had been thereby greatly increased, and that the valuable meadows alluded to in Ogburn's affidavit had grown up in weeds during the past summer, and, without cultivation, could not be called meadows.

E. W. Ewbank filed an affidavit in which, among other things, he says: That he was the agent of the said L. J. Woolley, the mother of the petitioner in this cause, R. J. Woolley, when she sold the premises known as "Beaumont," near Flat Rock, in Henderson county, N. C., to F. B. Hayne, of New Orleans, La. That the said L. J. Woolley told affiant it would not be possible for her to remove her cattle from the premises by the 15th day of October, 1909; that she would require more time for that purpose, but did not state to him how much more time she would require. That affiant had a conversation with F. B. Hayne in which he communicated to the said Hayne this information. That the said Hayne replied that it was not so material as the possession of the house, that he would not need the farm until spring, and further indicated by his talk that he would indulge the said L. J. Woolley, in case she could not promptly remove her cattle from the premises

on or before the 15th day of October, 1909; but that affiant understood from what L. J. Woolley told him that she would make preparation for the removal of the cattle as rapidly as possible after the 15th day of October, 1909, and that she would accomplish the removal as quickly as possible, and affiant had no idea that she even desired the premises as long as the 1st day of January, 1910, or any other particular date. That affiant never entered into any contract on behalf of L. J. Woolley with F. B. Hayne or any other person whereby the said Hayne at all bound himself to allow the said Woolley, or anyone representing her, to remain in possession of the farming part of said property until spring, or for any other definite time, and, in fact, no sort of contract was made by Hayne with Mrs. Woolley whereby he agreed that she should keep any part of the premises beyond the 15th day of October, 1909; but affiant understood that the said Hayne would indulge said Woolley if she found it impossible to remove her cattle by said date. That affiant has never represented the said Hayne, and has never attempted to make any contract for him, but in this entire transaction was acting on behalf of the said L. J. Woolley. That this affiant informed Hon. H. G. Ewart, counsel for petitioners in this case, of the facts of this transaction some time prior to the institution of the action by F. B. Hayne in the Circuit Court of the United States for the Western District of North Carolina, at Asheville. That affiant understood that R. J. Woolley would be advised to vacate said premises at once. That this conversation between H. G. Ewart and affiant occurred about the time the agents of F. B. Hayne were arrested for attempting to take possession of the stable lot and buildings on the premises, or shortly thereafter. That he has no interest of any kind in the outcome of the present controversy, or the controversy between F. B. Hayne and R. J. Woolley, but makes this affidavit at the request of counsel for the respondent, and that he offered to make the same sort of affidavit for counsel for petitioners. That from F. B. Hayne's statement that he would not need the farm until spring affiant inferred that his indulgence referred to that part of the farm occupied by L. J. Woolley's cattle.

Other affidavits were filed, but the foregoing comprise substantially the evidence offered bearing upon this controversy.

The statute under which the defendants in this proceeding were arrested is summary in its character, and among other things is intended to afford relief for injuring, or for wrongfully taking, detaining, or converting property, real or personal. I doubt very much if this statute was ever intended to apply to a case like the one at bar. But, be that as it may, it clearly appears from the evidence that the damages sought to be recovered by the plaintiff could not, in any event, amount to more than \$200 or \$300. The actual damages to the premises—and the only damages of which any evidence was offered—is such damage as may have resulted from permitting the cattle to run at large upon the fields or meadows of the plaintiff during the fall and winter seasons. The damage in this respect, if any, would be very slight. It is a matter of common knowledge that, in many instances, land is improved, rather than damaged, by permitting cattle to run upon it.

It nowhere appears, by affidavit or otherwise, that the damages sought to be recovered in the suit instituted on the law side of this docket are in excess of the sum of \$2,000, exclusive of interest and costs, while, on the other hand, I find as a fact that, in no event, could the damages to the premises in question amount to a sum in excess of \$500.

It is true that plaintiff insists that he is being damaged, in that he is not permitted to have access to the barns and buildings occupied by one of the defendants. But, taking into consideration the damages occasioned by such detention, the amount would not be equal to the sum necessary to give this court jurisdiction of the subject-matter.

The court being without jurisdiction to hear and determine the matters sought to be litigated by the plaintiff in his action at law, I am of opinion that any proceeding, summary or otherwise, instituted in pursuance of this section, would be invalid, inasmuch as the court was, in the first instance, without jurisdiction.

For the reasons herein stated, the defendants will be discharged from custody, and the plaintiff taxed with the costs in this proceeding.

EAGLE WHITE LEAD CO. v. PFLUGH et al.

(Circuit Court, D. New Jersey. August 3, 1910.)

1. TRADE-MARKS AND TRADE-NAMES (§ 96*)—INFRINGEMENT—PRIOR ADJUDICATIONS.

Prior adjudication in favor of complainant in a suit for trade-mark infringement against others and a prior successful prosecution of an interference in the Patent Office between complainant and defendants, with reference to the same mark, while not controlling in a subsequent suit by complainant against defendants for infringement, were forceful factors on the issue of prior adoption and use of such trade-mark by complainant.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 96.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 93*)—INFRINGEMENT—PRIORITY OF ADOPTION.

In a suit for trade-mark infringement, evidence *held* to show complainant's priority of adoption of the mark in question.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 93.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 57*)—"INFRINGEMENT"—EXTENT OF SIMILARITY.

Duplicity or exact imitation is not necessary to the infringement of a trade-mark, nor is dissimilarity in size, form, and color of the label and place where it is applied conclusive, it being sufficient that the competing label contains the trade-mark of another, and that confusion or deception is likely to result, independent of the fact that the accessories are dissimilar.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 65; Dec. Dig. § 57.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3593, 3594.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. TRADE-MARKS AND TRADE-NAMES (§ 55*)—INFRINGEMENT—KNOWLEDGE.

A trade-mark may be infringed, though the appropriation of the symbol, which is the main characteristic of the mark, may have been without knowledge that another had obtained the right to its exclusive use.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 63; Dec. Dig. § 55.*]

Restraining infringement of trade-mark or trade-name as defendant on knowledge or intent of infringer, see note to Hutchinson, Pierce & Co. v. Loewy, 90 C. C. A. 4.]

5. TRADE-MARKS AND TRADE-NAMES (§ 57*)—INFRINGEMENT—IMITATION.

Infringement of a trade-mark may exist, though the method and accompaniments of its use negative the idea of imitation.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 65; Dec. Dig. § 57.*]

6. TRADE-MARKS AND TRADE-NAMES (§ 58*)—INFRINGEMENT—ADJUDICATION.

Trade-marks No. 60,062, registered January 29, 1907, covering a representation of an eagle, and No. 60,993, covering the word "Eagle," used in connection with the sale of white lead, held infringed by defendants' use of the words "Gold Eagle," used in connection with a representation of that bird, though with different accessories.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 58.*]

7. TRADE-MARKS AND TRADE-NAMES (§ 66*)—RIGHT TO PROTECTION.

The owner of a registered trade-mark is not required to await the effect of infringement and prove actual injury either to himself or the purchasing public, but may sue to prevent, as well as to stop, confusion.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 66.*]

8. TRADE-MARKS AND TRADE-NAMES (§ 86*)—INFRINGEMENT—LACHES—FORFEITURE.

Mere delay unattended with such circumstances as show acquiescence in the use by another of an infringing trade-mark will not produce a forfeiture so as to prevent an injunction against further infringement.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 95; Dec. Dig. § 86.*]

Laches as a defense in suits for infringement, see notes to Taylor v. Sawyer Spindle Co., 22 C. C. A. 211; Santana Live Stock & Land Co. v. Pendleton, 26 C. C. A. 613.]

9. TRADE-MARKS AND TRADE-NAMES (§ 86*)—INFRINGEMENT—DAMAGES—LACHES.

Complainant on February 1, 1893, advised defendants of its right to a trade-mark which defendants were then infringing, but complainant not then operating in defendants' field did not follow up the letter with legal proceedings. In July 1901, complainant again wrote defendants, reasserting its right and demanding that defendants desist from using the infringing mark. On March 12, 1906, an interference was declared in the Patent Office involving complainant's right in the marks in question and successfully prosecuted. *Held*, that complainant was guilty of such laches as to be tantamount to a license to defendants to continue the infringement, which, though revocable at will, precluded complainant from recovering damages which incurred before suit brought, entitling complainant only to an injunction against further infringement.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 95; Dec. Dig. § 86.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suits by the Eagle White Lead Company against Albert Pflugh and another, copartners, doing business as Pflugh & Co., for infringement of complainant's registered trade-marks as applied to white lead, to wit, trade-mark No. 60,062, registered January 29, 1907, covering a representation of an eagle and trade-mark No. 60,993, registered February 26, 1907, covering the word "Eagle." Prayer for injunction granted, but accounting of profits denied.

W. H. Singleton and C. E. Riordon, for complainant.

Clifton V. Edwards and Julian S. Wooster, for defendants.

RELLSTAB, District Judge. This is a trade-mark case, and not one of unfair competition. The bills allege ownership of the trade-marks in complainant, and continuous use by it and its predecessors since 1843, adjudication in complainant's favor in a prior suit, decision in its favor in an interference in the Patent Office against these defendants, acquiescence in complainant's rights therein by the public, except by the defendants, and use by them without permission of the infringing trade-marks. The answers admit the adverse decision in the Patent Office, deny infringement by the use of either of said alleged trade-marks, deny general acquiescence in complainant's alleged rights, deny that any deception has been practiced by defendants, set up anticipation, and assert that complainant's rights, if it ever had any, to an injunction or accounting, have been forfeited by laches.

The complainant was incorporated in 1867, and at that time succeeded to the business of Wood & Co. and Wood & McCoy, who had been in the white lead business since 1843. For brevity, the word "complainant" will be used to include not only the present complainant, but its several predecessors. As early as 1854 and ever since, the complainant has manufactured and sold a pure white lead designated as "Eagle" lead. The packages (wooden kegs and tin cans) containing this lead always bore the word "Eagle" or a representation thereof, usually both. The complainant's place of manufacture, as well as its principal business office, was and is Cincinnati, Ohio. During its early existence, its sales were confined to that and neighboring states. No business was done by it in New York City and vicinity until after the formation of the defendant firm and the adoption by it of the alleged infringing trade-mark, and very little until about 1900. The defendants began the manufacture and sale of paints and white lead in 1889. Their place of manufacture was and is Hoboken, N. J., and their principal market is in the city of New York and vicinity. In 1890 defendants adopted as a trade-mark for their white lead (not pure, but a combination) the words "Gold Eagle," accompanied with the representation of an eagle, with which it branded or labeled such product, which was marketed in wooden kegs and tin cans. This trade-mark was registered on February 7, 1893, No. 22,437, and has since continually been used and advertised by defendants in the marketing and sale of such product. In the course of years, the business of the complainant and the defendant increased considerably, and their products are now, and have been for some time, marketed amongst the same trade in certain places.

In a suit brought in the United States Circuit Court, Northern District of Illinois, E. D., against Monroe Heath and William F. Milligan, for infringement of the trade-marks here involved, a decree was entered under date of July 7, 1876, in which the complainant was adjudged to be the owner of the trade-mark, and the defendants therein were restrained from using the words "Eagle," "American Eagle," or "Western Eagle," or any words similar to, or only colorably different from, such words, or any mark, especially the figure of an eagle, as applied to white lead. In an interference in the United States Patent Office between the complainant and the defendants, No. 25,816, following application by complainant for registration of its said trade-marks, the complainant was held to be the first to adopt and use the trade-marks in issue and entitled to registration thereof over the defendants. These adjudications, while not controlling, are forceful factors on the questions of prior adoption and use by complainant of such trade-marks, the acquiescence of others in complainant's rights thereto, and the similarity of defendants' trade-mark to that of complainant.

The evidence is overwhelming that as between the parties to this suit the complainant, by at least 35 years' continuous use before the defendants' advent into the business world, had obtained the right to the trade-mark "Eagle" in both word and representation, as applied to white lead. The several instances of the use by others of an eagle as a trade-mark to white lead are all, except in the case of Wetherill & Bro., of recent date as compared with either complainant or Wetherill & Bro., and are not evidential on the question of prior adoption and use. In the case of Wetherill & Bro., however, a serious question of priority is raised. They and the complainant have been manufacturers and vendors of white lead for many years. Both very early in their business career adopted and used the trade-mark "Eagle," both by word and representation, on their white lead products, the former on their first quality (pure), the latter on their second quality (combination). The exact time when each first used such trade-mark is not established. On the evidence submitted, however, giving full credit to the country order book obtained from the Wetherills, I am of the opinion that the complainant was the first to use such trade-mark. The earliest date given of the use of such mark by Wetherill & Bro. is in 1855. Complainant's witness, Edmund S. Wood, speaks of the use of such mark by complainant when he was about the age of 10 or 12 years, which, with his other testimony, fixes the time as between 1853 and 1855. The bill of complaint filed by the complainant in its suit against Heath & Milligan, hereinbefore mentioned, and which was introduced in evidence by the defendants, alleges that a representation of an eagle as a trade-mark was used by the complainant long before 1854.

While this evidence is not satisfying beyond a reasonable doubt, yet in view of the recognized difficulty in securing at this day satisfactory evidence of the condition of affairs of 55 or 60 years ago, and the voluntary abandonment by Wetherill & Bro., of its claim in such interference proceedings, and the subsequent assignment by them to complainant, without compensation, of whatever rights they had to

such trade-mark, it is persuasive of the priority of use by complainant of such trade-mark, even against Wetherill & Bro. Again, it must be remembered that, in view of the satisfactorily established long continued use by the complainant and the subsequent official registration of such trade-marks, the burden of proof on the question of prior use is upon the defendants. This burden, suffice it to say, has not been met.

But it is said that the complainant's trade-mark, as used before the registration, is not the word "Eagle" nor the picture of one alone. True, in the use of these trade-marks, neither the word or representation was used alone nor in conjunction with one another only. Other printed matter always accompanied them, and this matter was not always the same. The succession of proprietorship occasioned a change of the name accompanying such trade-marks, such as the substitution of "William Wood & Company" for "Conkling, Wood & Company," and "Eagle White Lead Company" for "William Wood & Company." Changes in other of the printed matter occasionally took place, such as eliminating the words "Eagle Works," and transposing the word "pure"; but with all such changes the one prominent and dominant feature of the brand or label was "Eagle," whether manifested by word or picture, and however accompanied. It was this feature that characterized this particular brand of white lead among other manufactures, whether of the same or other manufacturers. This was the trade-mark, and the registration of it alone in the one instance by word and the other by representation accorded with the fact.

The question of infringement is to be determined by this test of dominance. The dissimilarity in size, form and color of the label, and the place where applied are not conclusive. If the competing label contains the trade-mark of another, and confusion or deception is likely to result, infringement takes place, regardless of the fact that the accessories are dissimilar. Duplication or exact imitation is not necessary; nor is it necessary that the infringing label should suggest an effort to imitate. The appropriation of a symbol may be without knowledge that another has obtained the right to its exclusive use. *Bass et al. v. Feigenspan* (C. C.) 96 Fed. 206; *Morgan Sons Co. v. Ward*, 152 Fed. 690, 81 C. C. A. 616, 12 L. R. A. (N. S.) 729; *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828; *Hutchinson, Pierce & Co. v. Loewy*, 163 Fed. 42, 90 C. C. A. 1; *Gilka v. Mihalovitch* (C. C.) 50 Fed. 427; *Hygeia Distilled Water Co. v. Consolidated Ice Co.* (C. C.) 144 Fed. 139, affirmed 151 Fed. 10, 80 C. C. A. 506. The method and accompaniments of its use may negative the idea of imitation and yet infringement exist.

Having this test and the rules in applying it in mind, do the words "Gold Eagle," used in connection with a representation of that bird, infringe the complainant's trade-mark? The eagle is its trade-mark, not the size and color of the letters constituting the word, or the posture of the representation; nor the form, color, or size of the label upon which the word or picture appears; nor the color of the imprint; nor the particular place on the goods where the label or brand is applied. All of the latter are accessories. They furnish but the en-

vironments. They may be changed at will. That the owner of the trade-mark "Eagle" has begun its use by employing a round label of light color printed in black ink and pasted on top of the package does not bind it to continue to so use it, or permit another to use it, by merely changing its size, form, or character, or the size or position of the letters constituting the word, or the posture of the bird or the color of the ink in which it is pictured. These are nonessentials. The defendants' own reservations in their application for their trade-mark furnish their mental attitude in regard to these. They said:

"Our trade-mark consists of the arbitrary words 'Gold Eagle.' These have generally been arranged as shown in the accompanying facsimile, in which they appear in capital letters in a curved line above a representation of an eagle with wings spread, but other styles of letters may be employed, or it may be differently arranged or colored, and the representation of an eagle may be changed at pleasure or omitted altogether without materially altering the character of our trade-mark, the essential feature of which is the words 'Gold Eagle.'"

Nor does the fact that no confusion in the trade has resulted from the use of these "Eagle" labels by the parties to this suit prevent the complainant from maintaining his present bill. *Gannert v. Rupert*, 127 Fed. 962, 62 C. C. A. 594; *Hutchinson, Pierce & Co. v. Loewy*, *supra*.

That confusion is likely to result from the use of eagles as trade-marks when applied to white lead products is established by the experience of complainant and Wetherill & Bro. after complainant's eagle brand of goods entered the Philadelphia market in competition with Wetherill & Bro's. products. As already shown, it is only of late years that the product of these parties has entered the same market. The party owning a trade-mark registered for his protection may prevent, as well as stop, confusion. He is not required to await the effect of the onslaught of the infringer, and be put to the burden of proving actual injury either to himself or the purchasing public. In fact, if he delays too long to assert his rights, he may find himself estopped from recovering damages as a penalty for his delay in bringing suit. The question is not, How far has the infringement proceeded? but, Does it exist? In my judgment there can be but one answer to this question. What has been said of the prominent and dominant feature of the complainant's label applies equally to the defendants'. It is the eagle that strikes the eye and gives character and potency to the brand. In the defendants' application for registration they said that the words "Gold Eagle" is the essential feature, and the accompanying drawing shows but the words and the representation. The eagle in both labels is the dominant feature. All the rest of the printed matter, as well as the form and color of the label, is but accessorial, and may be changed without affecting its potency as a trade-mark. The defendants' trade-mark so closely resembles the complainant's as to constitute a clear infringement.

The remaining question relates to laches. The complainant has been guilty of delay in bringing this suit, and because of it the defendants contend that it has forfeited its right to an injunction and accounting. Mere laches will not produce such forfeiture. Even in

cases of unfair competition the proprietor of an unregistered trade-mark is not bound as a matter of law to bring suit against one using a similar mark unless and until such person enters his field and seeks to deprive him of his trade, and until his business is actually affected. The delay must be attended with such circumstances that acquiescence in the use by another is inferred. There must be either a waiver or an abandonment of rights. Nims, *Unfair Competition*, pp. 506, 512, 513. As long as the person originally entitled to the use of his trade-mark asserts his right thereto, no such equities arise in favor of the infringer as to prevent his being enjoined from further use.

A number of labels used by other traders showing representations of an eagle were introduced in evidence by defendants under their defense of laches, but many of these were not used on white lead, and of the others some during very short periods, and none seem to have been brought to the attention of complainant before its present suit, except in the few instances in which the use of the labels ceased upon complainant's remonstrances.

In the present case, when the infringement began, complainant had no market in the territory covered by the defendants' operations. No pecuniary injury was likely to result to it while such condition continued. Being entitled to the exclusive use of its trade-mark, it had the right at any time to prevent such infringement. It did remonstrate by letters and the prosecution of interference proceedings in the Patent Office. As early as 1893, the defendants were advised by letter (dated February 1, 1893) of complainant's asserted rights in such trade-mark. The failure of complainant to follow up this letter with legal proceedings in my judgment disentitles it to an accounting for past profits, but it is not sufficient to forfeit its rights to protection against future infringement. From that time the defendants took the risk of continued infringement, and the complainant that of waiving its rights in whole or part by a long continued delay in bringing suit. After sending this letter, complainant established an agency in New York City, which, however, was soon abandoned, and no further effort to secure a market in that vicinity was made until 1900. In July, 1901, complainant again wrote to defendants, reasserting its rights and calling upon them to desist from using the infringing mark. On March 12, 1906, an interference was declared in the Patent Office involving the application of complainant, defendants, and Wetherill & Bro. for trade-marks, resulting in the establishing of complainant's rights to the trade-mark in issue as against these defendants. The continued assertions of complainant's rights negative the notion of acquiescence and entitles it to the injunctive relief prayed.

The neglect of complainant, however, to bring suit for such length of time, must be considered as a waiver of damages. By its delay in proceeding against defendants, they were encouraged in their insistence that their trade-mark did not infringe complainant's, and to a continued use of it in building up their trade. Such delay on complainant's part was tantamount to a license, and, while revocable at will, should be treated in equity as a waiver of the profits that have inured before bringing suit. These conclusions on the question and

effect of laches are supported by *McLean v. Fleming*, *supra*; *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526; *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.* (C. C.) 121 Fed. 357; *Hygeia Distilled Water Co. v. Consolidated Ice Co.*, *supra*.

The prayer for injunction is granted, but that for an accounting of profits and damages is denied.

WRIGHTSVILLE HARDWARE CO. v. HARDWARE & WOODENWARE
MFG. CO. et al.

(Circuit Court, S. D. New York. August 5, 1910.)

1. REMOVAL OF CAUSES (§ 60*)—CITIZENSHIP—SEPARABLE CONTROVERSY.

Where two persons, one a resident of the state and one a resident of another state, were joint receivers of a corporation, and acted jointly in receiving and holding what they have received from their predecessor, so that they were both indispensable parties to an action concerned with their receivership, or with their conduct as receivers, there was no separable controversy between the nonresident receiver and plaintiff suing for relief from certain transactions of the receivers' predecessor relating to the receivership, which would entitle the nonresident receiver to remove the cause to the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 114; Dec. Dig. § 60.*]

Separable controversy, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Valleytown Mineral Co.*, 35 C. C. A. 155.]

2. REMOVAL OF CAUSES (§ 102*)—RIGHT OF REMOVAL—DOUBTFUL CASE.

Where the right to remove a case from the state to the federal court is doubtful, the doubt is resolved in favor of a remand; and hence in an action against receivers, where it is a doubtful question whether the acts and jurisdiction of the successive receivers, which are complained of, were in carrying on the business connected with the property placed in receivers' hands by the federal court, so that no leave to sue would be necessary under the express provisions of Act Cong. Aug. 13, 1888, c. 866, § 3, 25 Stat. 436 (U. S. Comp. St. 1901, p. 582), the case will be remanded.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 218-224; Dec. Dig. § 102.*]

Action by the Wrightsville Hardware Company against the Hardware & Woodenware Manufacturing Company and others. On motion to remand to the state court. Motion granted.

Elbridge L. Adams, for plaintiff.

Lawrence & Lawrence, for defendants.

LACOMBE, Circuit Judge. This action was brought in the New York Supreme Court by the plaintiff, a Pennsylvania corporation, against the Hardware & Woodenware Manufacturing Company, a New York corporation, and three individuals, Colwell, Crandell, and Cudworth, of whom the first two are residents of the Southern District of New York and the third is a resident of Vermont. Colwell and Crandell were, respectively, president and treasurer of the Hardware & Woodenware Company. That corporation was placed in the hands of a receiver by decretal order of this court on February 7,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

1908, and Colwell was appointed receiver. He resigned in September, 1909, and Crandell and Cudworth were jointly appointed receivers in his stead.

The complaint alleges: That prior to receivership the defendant corporation was the owner and holder of a majority of the stock of the plaintiff, and managed and controlled its policy through a board of directors of which Colwell and Crandell and certain employes of the Hardware & Woodenware Company were a majority. That through their control of the plaintiff corporation the defendants the Hardware & Woodenware Company, Colwell, and Crandell wrongfully procured the making of certain promissory notes and bonds by the plaintiff for the benefit of the Hardware & Woodenware Company and converted to the use of the latter certain property and assets belonging to plaintiff. The greater part of these acts are alleged to have been committed prior to the appointment of Colwell as receiver. That on December 12, 1908, plaintiff was compelled to execute and deliver to Colwell as receiver a demand note for \$5,000 and a check for \$11.60 ostensibly in payment of commissions for the year 1908, which had actually been paid in advance at the beginning of the year upon the demand of Colwell. That, notwithstanding the making and delivery of said note ostensibly in full payment for commissions for the year 1908, Colwell as receiver did on January 9, 1909, wrongfully demand of the plaintiff another payment of \$5,011.77, and compelled the plaintiff to give him a demand note for that amount. That on January 16 and January 22, 1908 (before receivership), notes for \$4,875 and \$5,000, respectively, were illegally and fraudulently obtained by the defendant corporation from the plaintiff without any consideration and wholly for the accommodation of the woodenware company, and that said notes are still held by the defendants Crandell and Cudworth as receivers, who have refused to return them to the plaintiff. It is further alleged that the woodenware company or its receiver or receivers also compelled the plaintiff to assign and deliver to said woodenware company or to its receiver or receivers, as collateral to said notes mortgage bonds of the plaintiff, which the defendants still hold and refuse to return on demand. The complainant also avers that Colwell as receiver wrongfully, illegally, and fraudulently charged to plaintiff expenses connected with his receivership, for which plaintiff was not liable, and compelled plaintiff to pay to him as such receiver certain moneys as and for fictitious claims and expenses and appropriated to his own use or to the uses of the woodenware company certain of plaintiff's assets. The relief demanded is an accounting of these various transactions, for a decree adjudicating the said notes and bonds void and requiring the defendants to restore the same to plaintiff, or, if the restitution of the bonds and notes cannot be had, that plaintiff recover damages from such of the defendants as may be liable, that a trust be impressed on any property or money of the plaintiff found in the possession of Crandell and Cudworth as receivers, and that an injunction issue restraining receivers from negotiating any of the bonds or notes which may be in their possession. The action was removed into this court by a veri-

fied petition signed by all the defendants. In opposition to the motion to remand it is contended that there is a separable controversy between plaintiff and Cudworth, who is the only nonresident; and also that the action arises under the Constitution and laws of the United States.

From the extended reference to the averments of the complaint, which will be found above, it is difficult to see how there could be found any separable controversy between plaintiff and Cudworth, if he were sole receiver. But he is not. He and Crandell are joint receivers, and act jointly in holding onto whatever they have received from their predecessor. Both of them are indispensable parties to an action concerned with their receivership, or with their conduct as receivers. Crandell, being a resident, cannot remove, and Cudworth has no personal controversy separable from Crandell which he can drag into this court.

The other ground on which it is sought to sustain removal is that the action arises under the Constitution and laws of the United States. Manifestly no constitutional question is anywhere presented, and it is well settled by authority that a suit against a receiver does not arise under the laws of the United States merely from the fact that he was appointed by a federal court. The defendant's theory is that the trial of the cause will involve a construction of Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 436 (U. S. Comp. St. 1901, p. 582), which reads as follows:

"Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property without the previous leave of the court in which such receiver or manager was appointed."

In this suit no previous leave to sue was obtained, and defendants contend that there exists a controversy between the parties as to whether this is or is not such an action as is contemplated by the statute above quoted, and that a federal question is thereby presented. Reliance is had on *Evans v. Dillingham* (C. C.) 43 Fed. 177, where suit was brought to enjoin a federal railway receiver from removing certain shops, in which the court said:

"It is urged by defendant's counsel with certainly some apparent force that it is material what is the sound construction of the act of 1877 affecting this case; that the fact that it must be construed in order to determine the plaintiff's right to sue presents such a federal question as authorizes the removal. Whether this view be sound or not, it seems to me that in the as yet unsettled state of judicial opinion as to the correct construction of the provisions of the act on the subject the petition for removal does present a federal question, which the defendant is entitled to have passed upon by the United States courts."

The utmost that can be contended for in the case at bar is that it is a doubtful question whether or not the acts and transactions of the successive receivers which are complained of were "in carrying on the business connected with the property" placed in receivers' hands by this court. The question does not seem doubtful to me, but, conceding that it is, the practice in this circuit differs from that followed in *Evans v. Dillingham*. When the right to remove is doubtful, the

doubt is resolved in favor of a remand. *Plant v. Harrison* (C. C.) 101 Fed. 307; *Fitzgerald v. Missouri Pac. Ry. Co.* (C. C.) 45 Fed. 812. This is for a very good reason. There can be no question that the state court has jurisdiction of the case and having jurisdiction can decide all questions which may arise, federal questions included. And if it decide the federal questions correctly, and the case eventually goes to the Supreme Court, its decision will be sustained, and the trial will have accomplished something. If, however, there is no federal question (and no right to remove because of nonresidence), the United States Circuit Court would have no jurisdiction. There is no appeal from an order granting or refusing remand, so the question of removal could not be decided until after trial and on appeal from final judgment. If then decided adversely, the time and expense of trial would be wasted.

The motion to remand is granted.

WRIGHTSVILLE HARDWARE CO. v. COLWELL et al.

(Circuit Court, S. D. New York. August 5, 1910.)

REMOVAL OF CAUSES (§ 102*)—RIGHT TO REMEDY—DOUBTFUL CASE.

Where the question whether a case is removable to the federal court, as involving the construction of a federal statute, is doubtful, the case will be remanded to the state court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 218-224; Dec. Dig. § 102.*]

Action by the Wrightsville Hardware Company against Nicholas H. Colwell and others. On motion to remand to the state court. Motion granted.

Elbridge L. Adams, for plaintiff.

Lawrence & Lawrence, for defendants Colwell and others.

Einstein, Townsend & Guiterman, for other defendants.

LACOMBE, Circuit Judge. The plaintiff is a Pennsylvania corporation. Defendants are Colwell, Collins, Dockendorff, and Crandell, residents of the Southern district of New York; McElroy and Keller as executors of McElroy, deceased, Birnstock, and Harry McElroy, residents of Pennsylvania; Crandell and Cudworth joint receivers of the Hardware & Woodenware Manufacturing Company, a New York corporation, and the Trust Company of America, a New York corporation. This court on usual bill in equity appointed Colwell receiver of the woodenware company February 9, 1908. He resigned in September, 1909, and Crandell and Cudworth were jointly appointed receivers in his place. Cudworth is a resident of Vermont. Colwell and Crandell were, respectively, president and treasurer of that company. The defendants resident in Pennsylvania have not been served, nor have they appeared. The suit was begun in the state Supreme Court, and was removed on petition of Colwell, Collins, Dock-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

endorff, Crandell, and Cudworth. The following synopsis of the cause of action is taken from defendants' brief:

"The complaint alleges that on or about February 7, 1908, the Hardware & Woodenware Manufacturing Company was placed in the hands of a receiver (Colwell); that shortly before the appointment of said receiver, and for the benefit of the said Woodenware Manufacturing Company, the various defendants herein, except Dockendorff and Trust Company of America, made an agreement by which certain notes and bonds were executed by the plaintiff without consideration, and were given to the Pennsylvania defendants and are now in their hands; that the Hardware & Woodenware Manufacturing Company, Colwell, Collins, and Crandell caused these notes and bonds to be executed because of their control over the plaintiff. These acts occurred prior to the receivership. The Trust Company of America is made a party merely as a trustee for the holders of the said bonds, and the only relief asked against it is that it be restrained from taking any proceedings to enforce said bonds. No relief is asked against defendant Dockendorff. The relief demanded against the other defendants is that said notes be declared void, and that said bonds be decreed void and be surrendered for cancellation; that, if this cannot be done, plaintiff have damages against defendants McElroy, Birnstock, and Keller for an accounting and damages; in case the court should find it inequitable that defendants McElroy, Birnstock and Keller should surrender their bonds, that Colwell, Collins, and Crandell may be required to account for their conduct in the management and disposition of the funds and property of the plaintiff and for damages against said Colwell, Collins, and Crandell, and, if complete relief cannot be had in any of the foregoing forms, then for judgment against the receivers of the Hardware & Woodenware Manufacturing Company for the amount which the treasury of the plaintiff has been depleted for the benefit of the Hardware & Woodenware Manufacturing Company."

Leaving out the Pennsylvania defendants, the only nonresident defendant is Cudwell, one of the joint receivers of the manufacturing company. There is no suggestion of any separable controversy to which he is a party. Indeed, it is an open question whether the present receivers are necessary or proper parties at all. The plaintiff's brief asserts that they "are connected with this suit only in a remote way," and that, "if not necessary parties, they have a remedy" presumably by demurrer. The only ground for removal relied upon is that the suit involves a construction of the act of August 13, 1888 (section 3), because they have been sued without previous leave of the court, and the acts complained of were not performed in the transaction or carrying on of the business connected with the property of which they are receivers.

This point was considered in memorandum of opinion in suit by same plaintiff against the Hardware & Woodenware Company (filed to-day) 180 Fed. 586. The question whether the construction of a federal statute is involved in this case may possibly be considered as it was in that, a doubtful one, and the cause had better be relegated to the state court. It would be regrettable if the cause should be retained, the receivers secure a dismissal of the action against themselves on demurrer, and the federal court be left with a controversy on its hands with which it has nothing to do.

Motion to remand is granted.

STITZER v. HORSHAM TP.

(Circuit Court, E. D. Pennsylvania. June 27, 1910.)

No. 552.

1. JUDGMENT (§ 199*)—NEW TRIAL (§ 10*)—COMPROMISE VERDICT—NEW TRIAL—JUDGMENT NON OBSTANTE.

Where, in order to prevent a mistrial, both sides agreed that the jury might return a compromise verdict, they thereby waived the right to a new trial and to a judgment non obstante for that reason.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 367-375; Dec. Dig. § 199;* New Trial, Cent. Dig. § 13; Dec. Dig. § 10.*]

2. HIGHWAYS (§ 113*)—IMPROVEMENTS—EXTRAS.

Where a contract for the improvement of a highway provided that no extra work would be allowed unless authorized in writing by the township supervisors, and that any extras allowed would be paid for at the unit prices named by the contractor in his bid unless another price should be agreed on before the extra work was done, the contractor could not recover for extra work which was neither authorized in writing nor ordered by the supervisors as a board.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 348; Dec. Dig. § 113.*]

3. HIGHWAYS (§ 113*)—SUPERVISORS—INDIVIDUAL ACTION.

The action of one or all of the supervisors of a township in contracting for extra work in the construction of a highway, acting individually, and not as a board, cannot bind the township.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 174; Dec. Dig. § 113.*]

4. HIGHWAYS (§ 113*)—CONSTRUCTION—APPROVAL OF WORK.

Where work done on a highway under a contract was estimated and approved as done, and the proportionate price thereof was fixed as the work progressed, and 80 per cent. of it paid, and there was evidence that it had been substantially completed, and it had been used continuously for public travel, the contractor was entitled to recover the balance of the price, though the work had not been formally accepted by the supervisors as required by the contract.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 349; Dec. Dig. § 113.*]

At Law. Action by James Herbert Stitzer against the Township of Horsham. On plaintiff's motion for a new trial and defendant's motion for judgment non obstante veredicto. Denied.

Ira J. Williams and Simpson & Brown, for plaintiff.

Jos. T. Foulke and J. G. Johnson, for defendant.

BUFFINGTON, Circuit Judge. This case involved a contract for the building of a new macadamized road for a township. The verdict—clearly a compromise one—was in favor of the plaintiff for \$2,500, and in view of the expense and delay incident to a retrial, to say nothing of the natural unwillingness of the township to make repairs, which may be needed on the road pending the settlement of the case, we are strongly inclined to allow the present verdict to stand as rendered.

Indeed, the case is one where it is desirable on all sides that there should be an end of strife. When the jury went out the court was

satisfied, from its experience in cases of this kind, the jury would probably be unable to agree and ask to be discharged. With a view of avoiding a retrial, we called the counsel before us and said that, under the instructions we had given and from which we could not recede, the jury would likely ask to be discharged, because under those instructions they could not find a compromise verdict. In view of that contingency, both counsel agreed that if such a contingency arose the court should do as it seemed best in the way of allowing a compromise verdict to be found. The contingency did arise, and after protracted deliberation the jury reported to the court they were unable to agree, and inquired "whether we may make a compromise verdict." Wishing to avoid a retrial, and feeling counsel desired an end of the case, we answered the inquiry in the affirmative.

In view of the verdict being reached in this way, we feel that both sides have waived the right to insist on the position they now take, and the court would be justified in entering judgment on the compromise verdict. 2 *Graham & Waterman on New Trials*, 149, and footnote extract from *Broom's Legal Maxims*. But without resting on that ground, we are of opinion that the motions of the several parties should be denied. As to the plaintiff's contention that the court erred in holding that his claim for extras—save to the amount conceded by the township—should be denied, we see no reason to differ from the view we took on the trial. As to the extras allowed, the plaintiff's own letter established the unit rate of compensation therefor, for there was nothing in the proof to contradict or countervail its effect. Then, as to the necessity of having such extra work duly authorized by the township, we are clear. To hold otherwise would be to disturb the well-recognized principles established by the courts of Pennsylvania, bearing on the creation of legal liabilities by townships. The plaintiff was here dealing with a local municipality, and he was bound to take notice of the limited powers of the agents of the municipality with which he dealt. In *Rice v. Lake Township*, 40 Pa. Super. Ct. 344, it was said:

"It is doubtless true that a township, like every other member of a civilized society, should be required to pay its honest debts; but township officers act, not for themselves, but for the whole body of taxpayers. It is of the first importance that those who undertake to deal with such officers should not, in their eagerness to deal, allow themselves to become blinded to the fact that the public safety requires that those who deal with such officers, with the expectation of binding the municipality they represent, must see to it that the officers act within the scope of their authority, and comply with the requirements prescribed by the law in order that their acts may become official and binding on their principal."

Now the involved contract in the present case provides:

"No extra work will be allowed unless authorized in writing by the township supervisors and any extras allowed will be paid for at the unit prices named by the contractor in his bid unless another price should be agreed upon before the extra work is done."

The extra work sued for was neither authorized in writing nor was it ordered by the action of the supervisors as a board. This extra work was not mere incidental ministerial work, e. g., repair of a road that had run down, but was a matter of substance and expense, which

imposed an indebtedness, as plaintiff claimed, of substantially a thousand dollars on the township. Under such conditions the Pennsylvania decisions are clear that the action of one or even of all the supervisors acting individually cannot bind the township, but they must act collectively and deliberatively as a board. Thus, in *Cooper v. Lampeter Township*, 8 Watts (Pa.) 130, it is said:

"An implied assent, which would bind a private corporation, does not, I apprehend, apply to a public trust. Those who deal with such agents must take care to have the express consent of all to whom the law has intrusted the transaction of the public business. The inhabitants of the township whose interest must be protected have a right to the counsel and judgment of all to whom such trusts are committed."

In *Machine Co. v. Washington Township*, 9 Pa. Super. Ct. 108, that court, speaking of an outlay of \$700 for a road machine, said:

"The judgment and discretion to be applied to the purchase of a machine of the value of \$700, its material, construction, and efficiency, the business judgment required in providing for its payment, without disturbing the usual rates and levies of the township, place this act clearly within the deliberative duties of the officers."

As is aptly stated by the learned trial judge:

"It is only by meeting regularly in session that there can be that deliberative consideration which the law expects and requires. A result reached in a way which does not afford to each individual member of the board the benefit of the advice and judgment of every other member, at least the opportunity to get these, cannot be said to be the deliberate action of the board. What is expected is in conference a mutual interchange of views and result based upon those reached by a majority of those present."

In *Union Township v. Gibboney*, 94 Pa. 537, the distinction between ministerial and deliberative duties of supervisors is drawn, and it is said:

"One supervisor cannot bind the township for performance of a contract, the propriety of entering into which is the subject of deliberation, consultation, and judgment. All should be convened, because the advice and opinions of all may be useful, and, though they do not unite in opinion, a majority may act when there are more than two. Before constructing a new bridge, they must meet and act as a board, for this can only be done on deliberation and consultation, and with the assent of both or a majority. But the ordinary repairs of roads and bridges, and opening roads authorized by the court of quarter sessions, are classed with ministerial duties, and may be performed by one. *Cooper v. Lampeter Township*, 8 Watts (Pa.) 125. The court says: 'It is conceded that one supervisor cannot levy a tax to pay the debts contracted and expenses incurred in the township. The consent of both is required, because it is a deliberative and not a ministerial duty. For the same reason such contracts cannot be made by less than a majority of the board, as this would enable the one to involve a township in expenses which would render a tax inevitable. They are not permitted to do indirectly what they cannot do directly. When damage is done to a road or bridge by a freshet or other accidental cause, or when it needs repair from the natural progress of decay, there can be no objection to the necessary expenditure being authorized by less than a majority. This is an absolute duty, which calls neither for deliberation nor consultation.' The sound doctrine of that case has not been overruled by the later cases relied on by the plaintiffs below."

Supported by these decisions we think the jury was properly instructed that there could be no recovery for these unauthorized extras.

As to the defendant's contention that judgment should be entered

for the defendant because it was not shown the work had been approved and accepted by the supervisors, passing by the question whether the defendant can insist on this contention when it consented to a compromise verdict, we think this motion should not be allowed. The facts are peculiar. The road, whether accepted by the supervisors or not, has been and is now used for public travel. The work as done upon it was estimated and approved as done, the proportionate price thereof fixed as the work progressed, and 80 per cent. of such price paid and the other 20 withheld until completion. Moreover, there was testimony, which, if believed, tended to prove the work had been substantially completed. In view of these disputed questions, we cannot say, as a mere question of law, that the absence of an acceptance of this road by the supervisors was an absolute bar to the plaintiff's recovery. The question of performance was for the jury. *Crawford v. McKinney*, 165 Pa. 605, 30 Atl. 1045; *Elizabeth v. Fitzgerald*, 114 Fed. 548, 52 C. C. A. 321.

On the whole, therefore, we have reached the conclusion that substantial justice was done in the case, and that both parties will be gainers by an acceptance of this verdict.

The several motions are therefore discharged, and, in view of the possible absence of counsel for vacation, the clerk is directed in 30 days hereafter to enter judgment for the plaintiff on the verdict.

FOREIGN MINES DEVELOPMENT CO., Limited. v. BOYES.

(Circuit Court, N. D. California. July 11, 1910.)

1. CORPORATIONS (§ 268*)—STOCKHOLDERS' LIABILITY—ACTION TO ENFORCE—ACTIONS—PLEADING.

In suing a stockholder on his liability, it is essential to allege the contract of the corporation out of which it arises.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1134; Dec. Dig. § 268.*]

2. ATTACHMENT (§ 11*)—SECURED DEBTS.

An action against a stockholder to enforce his proportionate liability as a stockholder on notes given by a corporation and secured by mortgage is one based on the notes so as to preclude attachment under Code Civ. Proc. Cal. § 537, providing for attachment in an action on a contract, where the same is not secured by mortgage, etc., or, if so secured, the security has become valueless.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 37; Dec. Dig. § 11.*]

Action by the Foreign Mines Development Company, Limited, a corporation, against E. J. Boyes. Motion by defendant to discharge attachment. Granted.

Charles W. Slack, for plaintiff.

Elliott B. Davis, for defendant.

VAN FLEET, District Judge. This is a motion by the defendant to discharge an attachment levied upon his property, based upon these facts:

The California Trona Company, a corporation, in consideration of money advanced to it by the plaintiff herein, gave to the latter its promissory notes secured by a mortgage upon its real and personal property in this district. Default in payment having been made, the plaintiff filed its bill in this court for a foreclosure of the mortgage, which proceeding is still pending. Thereafter the plaintiff commenced this action against the defendant, Boyes, counting upon the same notes, to recover the amount of his proportionate liability thereon as a stockholder in the Trona Company; and therein sued out and procured to be levied the attachment in question based upon an affidavit that its claim is founded upon "an express contract for the direct payment of money, to wit, upon the contract of the plaintiff with California Trona Company, a corporation incorporated, organized, and existing under and by virtue of the laws of the state of California, and the contract and liability of the said defendant as a stockholder of the said last-named corporation. That the said contract of the said defendant was made and is payable in this state, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property."

There are three grounds urged in support of the motion:

(1) That the contract sued on is secured by mortgage, and under the law of this state an attachment is not allowed in an action upon a contract secured by mortgage, lien, or pledge where the security has not become valueless.

(2) That the affidavit for the writ is false in stating that the contract sued upon is not secured, which entitles defendant to a discharge of the attachment.

(3) That the pendency of the proceeding to foreclose precludes the present remedy, since, under section 726 of the Code of Civil Procedure:

"There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property."

The first ground, as I regard it, is the material one for consideration; the second being merely formal and technical and leading to no conclusive results, while the third goes to the right to maintain the action rather than to that of invoking the auxiliary remedy here sought. The real proposition presented is as to the right of plaintiff, under the facts appearing, to the remedy of attachment at all, and that is involved in the first ground stated.

Section 537 of the Code of Civil Procedure, which prescribes the instances in which an attachment may issue, so far as pertinent here, provides that the plaintiff may have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered:

"In an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this state, and is not

secured by any mortgage or lien upon real or personal property, or any pledge of personal property; or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless."

The position of the defendant is that the action is to enforce his liability as a stockholder upon the notes given by the corporation; and as it appears that those obligations are secured by mortgage, and that security is not shown to have been impaired or lost, the plaintiff is precluded by the terms of the statute just quoted from availing himself of the remedy of attachment.

The plaintiff, on the other hand, insists that the action is based upon the statutory liability of the defendant and not upon the notes, the latter being pleaded merely to show the origin of that liability; that this liability is a primary one upon which a separate action lies and is wholly independent of that of the corporation and unaffected by the fact that the obligation of the latter is secured; that while founded upon the statute it is in its nature contractual and one in the enforcement of which the remedy of attachment exists.

It will be observed from these contentions that the case is made to turn upon the question of the identity of the obligation sued upon with that given by the corporation. If the action is to be construed as one founded upon the notes, the latter being secured by mortgage, it would seem obvious that attachment will not lie, since the statute does not require that the security which constitutes a bar to that remedy shall have been given by the party sued, but only that the obligation be secured in the manner there specified.

While it is true that the liability of a stockholder is one which is created by law rather than the contract, is primary in character and so far separate and independent from that of the corporation that it may not be extended beyond the limitations prescribed by the statute (*Hunt v. Ward*, 99 Cal. 612, 34 Pac. 335, 37 Am. St. Rep. 87), it is not true, as contended, that it is wholly distinct and separate from that of the corporation. It must have its origin and inception in the act of the corporation, since, while the corporation may by its contract create a liability that binds the stockholder, the latter cannot contract for the former. There must always therefore in a primary sense exist an identity of obligation on the part of both the corporation and its stockholder; and it is held that in suing a stockholder upon his liability it is essential to allege the contract of the corporation out of which it arises. *Knowles v. Sandercock*, 107 Cal. 629, 637, 638, 40 Pac. 1047, 1048, 1049. In that case, which was an action against stockholders to recover the amount of their liability upon an indebtedness of the corporation evidenced by its promissory note, in answering an objection that the complaint should have counted upon the original obligation, and not upon the note, it is said:

"Perhaps some confusion has arisen on this subject by expressions to the effect that the stockholder's liability is not that of a surety but that of an original debtor. These expressions, from the point of view from which they were made, correctly state the law. Nevertheless the statute expressly makes the stockholder liable for the debts of the corporation, and it would not be good pleading to aver that the stockholder borrowed the money or bought the goods for which the indebtedness arose. The debt to be alleged is the

debt of the corporation, and I see no reason why it may not be placed in the usual mode. The original contract here, upon which the indebtedness arose, was the note, and the allegation of it is a sufficient allegation of the debt of the corporation."

And it is further said:

"The stockholder is, perhaps, not strictly liable on the contract, but on the statute. Still, if the debt of the corporation is created by a written contract, the debt of the corporation must be pleaded in the usual mode. The liability of the stockholder in this case is no more based on a supposed original implied contract than on the note."

Moreover, it is held in *Kennedy v. Californian Sav. Bank*, 97 Cal. 93, 96, 31 Pac. 846, 847 (33 Am. St. Rep. 163), that the corporation acts as the agent of its stockholders in the making of contracts and creating the liability by which they are bound, and that an action against a stockholder for such liability is essentially an action founded upon the contract. In that case, after quoting the provision of the Constitution of California declaring the individual liability of stockholders in corporations, it is said:

"This section prescribes the terms upon which individuals are permitted to transact business through the medium of a corporation, and the necessary legal effect of the conditions thus prescribed is that a corporation when created becomes the agent of its stockholders to make such contracts and incur such liabilities as are authorized by law and its articles of incorporation, and the contracts which it thus makes bind the stockholders to the extent named. * * * It would seem, therefore, that an action against a stockholder to recover his proportion of the amount due upon a contract made by a corporation, which is only an agency adopted by him for the transaction of business, was essentially an action founded upon a contract. *Norris v. Wrenschall*, 34 Md. 496; *Corning v. McCullough*, 1 N. Y. 47 [49 Am. Dec. 287]; *Hawthorne v. Calef*, 2 Wall. 10 [17 L. Ed. 776]; *Dennis v. Superior Court*, 91 Cal. 548 [27 Pac. 1031]; *Cook on Stockholders*, § 223; *Allen v. Sewall*, 2 Wend. [N. Y.] 327; *Ex parte Van Riper*, 20 Wend. [N. Y.] 616."

When we apply the principles declared in these cases to the present action, it must, I think, be regarded as one so far based upon the notes of the corporation as to bring it within the class excluded under the terms of the statute from the remedy of attachment. The allegations of the complaint, as also those of the affidavit for attachment, disclose the same identity and coincidence in the character of the obligation sued on as existed in *Knowles v. Sandercock*, where, as there expressed, the liability of the stockholder "is no more based upon a supposed original implied contract than on the note." And if, as held in *Kennedy v. Cal. Savings Bank*, the corporation was the agent of the defendant in making the contracts sued on, it was equally his agent in securing those contracts by a mortgage of its property, in which he had at least an equitable interest; and, being bound by the act of his agent in creating the obligation, he should enjoy the protection of its act in giving the security—at least to the extent of protecting him against so harsh a remedy as that here sought. Moreover, the plaintiff in dealing with the corporation was bound to know that it was contracting with the defendant's agent; and, if it saw fit to make a contract in a form which would circumscribe it in the manner of its enforcement, it cannot be heard to complain.

In *Kennedy v. Cal. Savings Bank*, the demand sued on was un-

secured, and all that was held was that, the obligation being one founded on contract, attachment would lie. The case did not involve the question here presented and in no way helps the plaintiff; to the contrary, as we have seen, the principles announced make in favor of the defendant.

Nor do I think the foregoing considerations affected by the passing suggestion in *Knowles v. Sandercock* that the stockholder is neither injured nor benefited by the fact that the corporation has given security. That was said in answer to an entirely different proposition to the one here involved, and for the purposes for which the expression was used was perhaps not improper, although I think wholly unnecessary. The existence of the mortgage there was being considered only with reference to the claim by the stockholders that it constituted a defense to the action against them on their liability on the note of the corporation; and it was held that it was no defense, which, of course, under the statute, was obvious. Here we are considering its effect upon a contract under the terms of a statute affording an exceptional and drastic remedy, which under all the authorities is to have a strict construction and not to be extended beyond its plain and obvious purport.

As stated by Mr. Waples:

"Attachment, considered as a means of creating a lien in favor of an ordinary debtor, as a preliminary levy anticipatory of execution after judgment, is an innovation on the common law and as the means by which extraordinary jurisdiction is acquired and exercised is a harsh and exceptional remedy; and because it is such the statutes authorizing it should be strictly construed." *Waples, Attachment & Garnishment*, § 23.

As a result of these views, I am constrained to hold that the motion to discharge the attachment herein should be granted, and it is so ordered.

CLARK et al. v. ATLANTIC CITY.

(Circuit Court, D. New Jersey. June 23, 1910.)

1. COMMERCE (§ 64*)—ORDINANCES—VALIDITY—REGULATION OF INTRASTATE COMMERCE.

An ordinance governing and fixing fees of mercantile licenses and regulating the businesses licensed, expressly authorized by Laws N. J. 1902 (P. L. p. 293) § 14, par. 27, providing for the government of cities, would be valid as a regulation of intrastate business.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 104-106; Dec. Dig. § 64.*]

2. JUDGMENT (§ 648*)—CONCLUSIVENESS.

As between the parties, the judgment of every tribunal acting judicially within the scope of its jurisdiction is conclusive, where it only comes collaterally in question, so long as it is unreversed, and hence, where plaintiff was erroneously convicted in a recorder's court of violating an ordinance requiring a license for carrying on the business in which she was engaged, she being immune therefrom because engaged in interstate business, but did not directly attack the judgment on such ground, but

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

acquiesced therein, she could not attack it collaterally under the guise of an action against the city for damages for having erroneously rendered it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1309, 1310; Dec. Dig. § 648.*]

3. MUNICIPAL CORPORATIONS (§ 747*)—LIABILITY FOR INJURY FROM NEGLIGENCE OR MISCONDUCT.

Municipalities are agents of the state invested with the exercise of legislative, judicial, and administrative functions, and the doctrine of respondeat superior and of implied liability applicable to ordinary corporations cannot be invoked against a municipal corporation for the tortious acts of its officers, unless such misconduct results while acting within the scope of its corporate powers, and then only if it results from the exercise of such of those powers as are strictly corporate and intended for its special benefit, as distinguished from acts done in its public capacity in the discharge of the duties imposed for the public and general benefit, and where a valid ordinance was passed it was an exercise of legislative power, and where an arrest thereunder, and trial, conviction, and sentence, were an exercise of judicial power conferred by the state by a general law, capable of being applied throughout the state, and on a subject directly affecting the welfare of the public at large, and not one that was exclusively or peculiarly benefiting the city in its corporate capacity or as the owner of property, that the arrest was erroneous, the ordinance not applying to the person arrested, would not render the city liable in damages.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1570-1577; Dec. Dig. § 747.*]

Liability for torts of public officers, see note to Mayor, etc., of City of New York v. Workman, 14 C. C. A. 534.]

4. COURTS (§ 359*)—UNITED STATES COURTS—LOCAL LAW.

Whether a municipal corporation is responsible in damages for torts of its officers in a stated case is a matter of local law, which it is, the duty of the federal courts within said state to follow when made manifest by legislative action or the decisions of the highest state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 939-949; Dec. Dig. § 359.*]

State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

At Law. Action by Lizzie Lewis Clark and husband against the City of Atlantic City. On demurrer to declaration. Demurrer sustained.

George Demming, for plaintiffs.
Harry Wootton, for defendant.

RELLSTAB, District Judge. The declaration has two counts, framed to recover alleged damages to the wife and husband respectively. The cause of action is the same in both counts, and, briefly stated, is that the wife, while working as agent in taking orders for corsets from sample and measurements from persons at Atlantic City, was arrested, tried, convicted, and fined by the municipal authorities for her failure to procure a license to carry on such business, as required by an ordinance of said city, which was void as far as she and such business were concerned, as an obstruction of and interference with interstate commerce, as she and her principal were

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

citizens of another state, and the orders taken by her were to be filled from a sister state.

The demurrer assigns the reasons, *inter alia*, that the defendant passed the ordinance, and took all such proceedings thereunder pursuant to legislative and judicial powers conferred on it by the state, and that it is not liable in damages for injuries resulting from the exercise of such powers, and that the judgment in the recorder's court is conclusive between the parties, and so remains until set aside by direct proceedings instituted in the state court. From the plaintiff's declaration we learn that the ordinance in question is entitled "An ordinance governing, regulating and fixing fees of mercantile licenses in Atlantic City, N. J., and regulating the businesses licensed," and that by section 4 the license fees were to be paid annually for conducting the businesses, trades, professions, or occupations therein named. No other reference to the provisions of this ordinance is made. The declaration does not allege that the soliciting carried on by the plaintiff wife was included in such ordinance, or that it contemplated the regulation of interstate commerce.

A general act of the state Legislature adopted by the defendant authorizes the passage of an ordinance such as is indicated in the title. *Laws N. J. 1902 (P. L. p. 293) § 14, par. 27*. Such an ordinance would be valid as a regulation of intrastate business. *Flanagan v. Plainfield*, 44 N. J. Law, 118; *Johnson v. Asbury Park*, 60 N. J. Law, 427, 39 Atl. 693. The declaration failing to show that the ordinance attempted to tax interstate commerce, the invalidity of the ordinance is not established. However, on the facts stated in the declaration and admitted by the demurrer, the conviction of such plaintiff was erroneous, as it was an interference with interstate commerce. *Robbins v. Shelby Tax Dist.*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 33 L. Ed. 719; *Rearick v. Penna.*, 203 U. S. 507, 27 Sup. Ct. 159, 51 L. Ed. 295; *Dozier v. Ala.* (No. 105, decided May 31, 1910, not yet officially reported) 30 Sup. Ct. 649, 54 L. Ed. —.

As to the right to bring such action while the judgment stands unreversed, if the facts accord with the allegations in the declaration, undoubtedly the judgment in question would have been set aside, if attacked directly. No such attack was made, and it stands unchallenged, save for these proceedings. But the judgment may not be attacked collaterally. The recorder's court had jurisdiction of the person and the subject-matter. As already stated, the ordinance so far as it regulated intrastate business is valid. The constitutional immunity now invoked applies only to interstate commerce, and that is a defense. If it was offered and not sustained by the proofs, the judgment was correct; if so sustained, and the court refused to give it its legal effect, that was error which could be corrected on review by the state courts. The judgment was not final unless the party convicted chose to have it so. Having acquiesced in such judgment, the plaintiff may not here attack its legal effect under the guise of an action for damages for having erroneously rendered it.

It is hornbook law that as between the parties the judgment of

every tribunal acting judicially, within the sphere of its jurisdiction, is final and conclusive, where it only comes collaterally in question, so long as it is unreversed. 7 Enc. U. S. Sup. Ct. Rep. p. 618; 23 Cyc. 1055.

This conclusion is sufficient to dispose of the present demurrer; but it is deemed advisable to deal with the question of the defendant's liability in damages for the erroneous judgment alleged to have been rendered against such plaintiff, regardless of the fact that such judgment remains unreversed.

Municipalities can act only through duly authorized officers and agents, and they are not liable for every tortious act of such persons. They are agencies of the state and are designed for the government of localities; they are invested with the exercise of legislative, judicial, and administrative functions. Some of the conferred powers are mandatory, others discretionary; some call for the performance of public duties imposed upon them; others authorize the carrying out of works and the making and enforcing of regulations intended for their special benefit or advantage. While the powers and duties of our modern municipalities are growing more and more varied, comprehending not only the regulation of many subjects which have their origin in the recent progress and development of urban life, but the carrying on of works, rendered necessary by the same cause, the latter of which could be (some of which have been) carried on by ordinary public corporations, yet their liability in damages to persons injured by their neglect or misconduct in the absence of legislative declaration is to be determined, not by the principles applicable to corporations generally, but by the nature of the power and duty exercised and the charter and legislative provisions applicable thereto. 2 Dillon's Mun. Corp. (4th Ed.) § 948, p. 1156.

Whether a municipal corporation in a state is responsible in damages for the torts of its officers in any stated case is a matter of local law, which it is the duty of the federal courts within such state to follow when made manifest by legislative action or the decisions of the highest state court. *Claiborne v. Brooks*, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470; *Detroit v. Osborne*, 135 U. S. 492, 10 Sup. Ct. 1012, 34 L. Ed. 260; *Denver v. Porter*, 126 Fed. 288, 61 C. C. A. 168; *Winona v. Botzet*, 169 Fed. 321, 94 C. C. A. 563, 23 L. R. A. (N. S.) 204.

The attention of the court has not been called to any legislation of the state of New Jersey regulating the liability of municipalities for torts committed in the exercise of the powers conferred, whatever their nature, nor any adjudication of the courts of said state wherein their liability for causing an arrest under a void statute or ordinance, or in seeking to enforce a valid statute or ordinance against subjects or persons not legally comprehended therein has been determined. The cases of the state courts wherein municipal liability for torts was considered are numerous, however, and they uniformly maintain the distinction already referred to, viz., that the nature of the power exercised, and not the principles applicable to corporations generally, determine liability or nonliability, and hold that the doctrines of respondeat superior and of implied liability applicable to ordinary cor-

porations cannot be invoked against a municipal corporation for the tortious acts of its officers unless such misconduct results while acting within the scope of its corporate powers, and then only if it results from the exercise of such of those powers as are strictly corporate and intended for its special benefit and advantage as distinguished from the acts done in its public capacity in the discharge of the duties imposed for the public and general benefit. *Wheeler v. Essex Pub. R. Bd.*, 39 N. J. Law, 291; *Tomlin v. Hildreth*, 65 N. J. Law, 438, 47 Atl. 649; *Condict v. Jersey City*, 46 N. J. Law, 157; *Valentine v. Englewood*, 76 N. J. Law, 509, 71 Atl. 344, 19 L. R. A. (N. S.) 262. For other New Jersey cases, see 5 N. J. Dig. Ann. Title Torts, p. 9487.

These distinctions and resultant doctrine of limited liability of municipalities for torts which pertain in the New Jersey courts are in harmony with those adopted in other jurisdictions. See chapter 23, *Dillon's Mun. Corp.*; 28 Cyc. 1257-1265.

Neither the passage of the ordinance in question, nor the attempt to enforce it against the plaintiff wife, makes the defendant liable on the doctrine of implied liability or respondeat superior. As far as the passage of the ordinance is concerned, as already shown, it must be deemed valid on this demurrer. But if it were invalid, and the illegality consisted in the attempt to enforce a void ordinance rather than (as the pleading shows) an illegal attempt to extend the application of a valid ordinance to subjects or persons prohibited by the United States Constitution, the result would be the same. For the passage of the ordinance was an exercise of legislative power, and the arrest, trial, conviction, and sentence an exercise of judicial power, conferred by the state by a general law, capable of being applied throughout the state, and on a subject directly affecting the welfare of the public at large, and not one that was exclusively or peculiarly benefiting the city in its corporate capacity or as the owner of property. For an error of judgment committed in the exercise of such powers, the municipality cannot be made liable in damages.

While this precise question has not been presented for judicial determination in the New Jersey courts, it has in other jurisdictions, in all of which the liability of the municipality was denied. *Trescott v. Waterloo (C. C.)* 26 Fed. 592; *Kansas City v. Lemen*, 57 Fed. 905, 6 C. C. A. 627; *Cottam v. Oregon City (C. C.)* 98 Fed. 570; *Masters v. Bowling Green (C. C.)* 101 Fed. 101; *Simpson v. Whatcom*, 33 Wash. 392, 74 Pac. 577, 63 L. R. A. 815, 99 Am. St. Rep. 951; *McIllhenny v. Wilmington*, 127 N. C. 146, 37 S. E. 187, 50 L. R. A. 470; *Bartlett v. Columbus*, 101 Ga. 300, 28 S. E. 599, 44 L. R. A. 795; *Caldwell v. Prunelle*, 57 Kan. 511, 46 Pac. 949; *Trammell v. Russellville*, 34 Ark. 105, 36 Am. Rep. 1; *Buttrick v. Lowell*, 1 Allen (Mass.) 172, 79 Am. Dec. 721.

This immunity of municipal corporations may occasionally work injustice; but it is within the province of the Legislature, and not the courts, to bring it to an end.

The demurrer is sustained.

In re RIPPA.

(District Court, S. D. Florida. June 29, 1909.)

1. BANKRUPTCY (§ 396*)—EXEMPTION—NATURE OF LAW.

The law of homestead exemption is strictly a state law, applicable in bankruptcy as well as in local litigation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 668; Dec. Dig. § 396.*]

2. HOMESTEAD (§ 5*)—EXEMPTION—CONSTRUCTION OF LAW.

The homestead exemption law, being one of public benefits, is entitled to such liberal construction as will protect the community, without encouraging dishonesty or fraud.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 7; Dec. Dig. § 5.*]

3. BANKRUPTCY (§ 400*)—EXEMPTIONS—BURDEN OF PROOF.

One objecting to the allowance of a bankrupt's exemption must show affirmatively that bankrupt was not entitled to claim the property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 674; Dec. Dig. § 400.*]

4. BANKRUPTCY (§ 400*)—EXEMPTIONS—PLEADING.

Under the Florida statutes (Rev. St. 1892, §§ 2003, 2007), requiring an execution debtor who claims exemptions to point out all his personalty and verify an inventory thereof, and authorizing suit to ascertain omitted property, property claimed as exempt in bankruptcy being presumed to have been paid for, a pleading contesting bankrupt's right to claim an exemption on the ground that the property had not been paid for must be verified.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 674; Dec. Dig. § 400.*]

5. BANKRUPTCY (§ 399*)—EXEMPTIONS—COMMINGLED GOODS.

An allowance of exemptions in bankruptcy out of a stock of goods cannot be defeated on the theory that the stock, being made up by commingling goods paid for with goods not paid for, must be treated as a unit, and that, since it is not all paid for, no part of it can be exempted, or that, since the assets are less than the liabilities, presumably nothing has been paid for.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 669; Dec. Dig. § 399.*]

6. BANKRUPTCY (§ 400*)—EXEMPTIONS—RIGHTS OF CREDITORS.

On a bankrupt's claim of exemptions out of a stock of goods, creditors, objecting that certain shoes were unpaid for, should have an opportunity to point out such shoes.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 672; Dec. Dig. § 400.*]

7. EVIDENCE (§ 568*)—OPINIONS—KNOWLEDGE OF WITNESS—EXEMPTIONS—ALLOWANCE.

On allowance of a bankrupt's exemptions, opinions by representatives of creditors as to the value of a stock of goods, based on casual observation, cannot be considered sufficient to defeat the bankrupt's rights.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2392-2394; Dec. Dig. § 568.*]

In the matter of Abe Rippa, bankrupt. On certificate of review from decision of referee. Referred back, with directions.

F. M. Simonton, for creditors.

E. M. Semple, for bankrupt.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

LOCKE, District Judge. The law of homestead exemption is strictly a state law, applicable as well in bankruptcy as in local litigation. A creditor has no greater rights against his debtor because he lives a thousand miles away than if he lived in the next town; nor does the debtor lose any rights under the state law giving him a homestead exemption, by being a bankrupt, that he might have under the enforcement of an execution by the sheriff of his county. The convenience or inconvenience of complying with the law should have no weight in determining the rights of the parties.

In this state the law provides that a debtor is entitled to \$1,000 worth of personal property, regardless of character, save and except that no property is exempt from the payment of the purchase money; and the principal question involved in this case is whether the burden is upon the bankrupt, when a creditor objects to the allowance of an exemption on the ground that the purchase money had not been paid, to affirmatively prove that the purchase money therefor had been paid.

It is contended, following the decisions of some courts of other states, that the burden of proof is upon the bankrupt to prove that each and every article claimed as exempt has been fully paid for, and that any creditor, regardless of the nature of his claim, or any knowledge of the payment, can put the bankrupt to such affirmative proof by simply denying that the purchase price has been paid.

Construing the homestead laws of this state, the Supreme Court of Florida, in *Camp v. Wullen*, 46 Fla. 498, 35 South. 399, say:

"Section 2003 of the Revised Statutes of 1892 requires the party, when a levy is made upon his personal property and he desires to have the officer set apart his exemption, to point out the whole of his personal property to the officer, and the officer is required to make an inventory of such property, which the party is required to verify by affidavit. The officer is then required to summon appraisers, and after the appraisement the party is entitled to select from the inventory \$1,000 worth of the property as exempt, and in case he fails to do so the officer selects for him. If the party fails to point out the whole of his personal property, or to include a portion thereof in his inventory, and conceals some, as is alleged in this bill, which the motion to dissolve does not deny, then, under section 2007, Rev. St., the jurisdiction of a court of equity may be invoked to ascertain the property omitted, and to determine what property shall be set apart as exempt, and pending the proceedings it is entirely proper to enjoin the sheriff from setting apart as exempt any personal property which has been levied upon."

The Circuit Court of Appeals of the Fifth Circuit, in construing the exemption laws of this state in *Re Carpenter*, 109 Fed. 558, 48 C. C. A. 545, say:

"The provisions of the Constitution of Florida with reference to exemptions are liberally construed in that state, so much so that a waiver of any benefit of exemption laws or an agreement that all the debtor's property shall be subject to levy and sale, contained in a promissory note, is inoperative as against the policy of the exemption laws."

The homestead exemption is a law of public benefits, and is entitled to such a liberal construction as will protect the community, yet not encourage dishonesty or fraud. Construing the law of this state liberally, in view of the decisions of the Supreme Court of this state and the recognized policy embraced in their construction of the law, it would appear that the filing by the bankrupt of a sworn schedule of

all his property takes the place of pointing it out to the sheriff, and the oath required in the state practice, and that, upon the bankrupt filing such sworn list of his property and having the same appraised and selecting that portion he claims exempt, he has complied with the provisions of the law, and under the law of this state the burden is upon any one objecting to the allowance to show affirmatively that he is not entitled to claim the property as exempt. It certainly would appear no greater hardship for the creditor to show this fact in the bankruptcy proceedings than the creditor in the state court to maintain the necessary allegations of his bill in equity.

The numerous authorities cited have been examined; but it is considered they can have no bearing upon the construction and practice under the Florida law where the policy of the state in that regard is so well established and recognized. Under this law, the presumption is that the property claimed as exempt has been paid for and requires a formal bill to contest such presumption, and although it is not considered necessary that a formal bill should be filed to contest such point in bankruptcy, yet it is required that any pleading alleging a matter of fact must be verified under oath.

The numerous contentions that a stock of goods, made up by commingling goods paid for with goods not paid for, must be treated as a unit, and, inasmuch as it is not all paid for, none of it can be exempted, or, since the assets are less than the liabilities, the presumption is that nothing has been paid for, simply tends to completely defeat the homestead laws and do away with the benefits derived therefrom, and cannot be accepted. It can be no greater hardship on the creditor to show what items sold to the bankrupt have not been paid for, according to the credits given him, than it is for the bankrupt to show that they have been paid for. And certainly, where running accounts between wholesaler and retailer have been continuing for years, with the creditor having the right to apply payments as he chooses, does so apply them, it is not as difficult for the creditor to determine which of the goods sold the bankrupt has not been fully paid for as it is for the bankrupt.

In this case it appears that some 180 yards of Panama sheeting and 57¾ yards of Paragon sheeting, claimed as exempt, have been disallowed by the referee. It further appears that "about 174 pairs of shoes, valued at about \$160," have not been paid for; but there is no evidence of the exact number or value, or that they were so identified by the witness that they could be separated from the other property claimed as exempt. It is considered that the creditors owning these shoes, or their agent, should have an opportunity to point out the shoes not paid for, and the matter will be returned to the referee to permit such further proof and selection.

It is contended that the referee should have found that the bankrupt had concealed large amounts of personal property, which should be considered as claimed by him as exempt, which would reduce or defeat his right to claim the articles set apart to him by the trustee. It appears that this exception has reference to certain articles of furniture, bought in whole or in part under contracts in which the title was reserved in the seller until paid for; that they had not been fully

paid for, but had been bought in the name of the bankrupt's wife, and claimed by him to be her property. While the testimony in this regard is not clear, it is not considered that the evidence so clearly shows that this claim of the bankrupt is not true as would justify the court in overruling the finding of fact by the referee. It is true there is testimony raising suspicions as to payments on other property, but nothing under the law of the state sufficiently certain to defeat the exemption. The opinion of the representatives of certain creditors as to the value of stocks of goods, simply upon a casual observation, without a more careful examination than appears to have been made in this case, cannot be accepted to defeat the rights of the bankrupt.

The cause will be referred back to the referee, to proceed in accordance with this opinion.

THE DIRECTOR.

(District Court, S. D. Alabama, S. D. July 29, 1910.)

No. 1,249.

1. COLLISION (§ 9*)—HARBOR RULES—NONENFORCEMENT.

Where a navigation rule adopted for Mobile Harbor provided that on the arrival of vessels in the Mobile river they should rig their outriggers, etc., but it had not been enforced for many years, such nonenforcement might be considered as permission to vessels to keep their outriggers out.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 8; Dec. Dig. § 9.*]

2. COLLISION (§ 9*)—OUTRIGGERS—HARBOR RULES.

Nonenforcement of a harbor rule for a considerable period, requiring vessels at anchor to take in outriggers, did not relieve a vessel from responsibility for damage to other vessels by reason of outriggers not taken in.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 8; Dec. Dig. § 9.*]

3. COLLISION (§ 69*)—SCHOONER AT ANCHOR—PRECAUTIONS.

Where a schooner at anchor in Mobile river was in the proper place, but by reason of stress of weather swung into the channel, resulting in collision with a steamer, and it appeared that the weather had been unsettled during the day and storm warnings displayed, the vessel was at fault in failing to let out a stern anchor, or to provide a proper anchor watch, under the rule that a vessel at anchor in a dangerous position should take such precautions as are commensurate with the perils assumed.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 89; Dec. Dig. § 69.*]

4. COLLISION (§ 71*)—VESSEL AT ANCHOR—DUTY TO VESSEL UNDER WAY.

In general a vessel under way is prima facie at fault for collision with a vessel at anchor, though the latter is brought up in an improper place, provided the vessel under way could with ordinary care have avoided her.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. § 71.*]

5. COLLISION (§ 43*)—DUTY OF STEAMSHIP.

A steamship about to collide with a schooner easily seen is bound to use due precaution and care and to come to a standstill by reversing her engines if necessary before she should collide.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 43-47; Dec. Dig. § 43.*]

6. COLLISION (§ 72*)—STEAMER IN COLLISION WITH SCHOONER AT ANCHOR—FAULT.

Where a schooner at anchor in the channel of a river by reason of stress of weather had swung astern into the channel, and notwithstanding notice of the weather conditions had not been protected by a stern anchor or anchor watch, and collision with a steamer resulted from this and from the steamer's failure to come to a standstill when collision was imminent, or to have deflected sufficiently to avoid collision as could easily have been done, both were at fault, requiring a division of damages.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 102; Dec. Dig. § 72.*]

In Admiralty. Action by Adrian E. Hooper, as master of the schooner Henry Lippitt, against Steamship Director to recover damages for collision. Damages divided.

Gregory L. & H. T. Smith (W. G. Caffey, of counsel), for libellant. Pillans, Hanaw & Pillans (H. Pillans, of counsel), for claimant.

TOULMIN, District Judge. This is a suit for damages for a collision. I find, as is not unusual in such cases, a want of consistency and harmony in much of the evidence, and some positive conflict as to material facts. But from a careful examination and analysis of it I think the weight of the evidence establishes these facts:

On the night of February 25, 1910, the schooner Henry Lippitt, in charge and under the direction of a regular licensed pilot of the bar and river of Mobile, was brought into said river and anchored on the east side of the channel opposite to, and east of, Dauphin street in the city of Mobile, and about 450 feet from said wharf. She was anchored in a customary place for anchoring schooners of her description. On February 27, 1910, she was lying up and down the river at her place of anchorage with her bow to the north or a little northeastward and her stern to the south or southwestward, with an anchor out at her bow on 15 fathoms of chain. Between 2 and 3 o'clock p. m. on that day, the steamer Director, in charge of the deputy harbor master of the port of Mobile as pilot, was proceeding up the west side of the middle of the channel of said river at slow speed—two to four miles an hour. By force of the wind then prevailing the schooner was driven around westwardly into and partly across the channel, and came astern, resulting in collision with said steamer, which was at the time crossing the backward course of the approaching schooner. By the impact the schooner was damaged. The steamer was also slightly damaged. By the force of the wind, which was variably blowing from the southeast and east, and the ebbing tide, the schooner was swinging on her anchor. At the time of the collision a strong puff of wind from the east drove the schooner further westward in the channel, and she struck the steamer amidships with her davits, causing

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

some small damage to the steamer, and breaking down one of the schooner's davits with some of its rigging. During the day of the collision, the weather was unsettled, with occasional puffs of wind varying from southeast to east, and characterized by some of the witnesses, who were seafaring men, as "squally." The velocity of the wind on that day was estimated by witnesses at from 10 to 15 miles an hour, and was shown by the records of the local weather bureau to have been 17 miles an hour from 12 o'clock m. to 2 p. m.; at 2:05 p. m. 20 miles, and at 2:30 p. m. for several minutes 28 miles. These records also showed storm warnings of high east and northeast winds the afternoon and night of February 26th, and continued storm warnings in the forenoon of February 27th. The schooner was temporarily anchored where she was awaiting her assignment by the harbor master to a berth at the dock. When such is the case, it is not customary in this port to let out two anchors, except in stormy weather or in emergency; and, if this is not done, then an anchor watch should be on deck. The schooner had no second anchor out, and no anchor watch on deck at or about the time of the collision. She was anchored as near the east bank of the river as she could be anchored at the time. From the east side of the channel to the city wharf on the west side of the river is 450 feet, and what is designated as the channel is from 150 to 200 feet wide. The depth of the river from the west side of said channel to the city wharf on the west side of the river, from several hundred feet south of Dauphin street wharf to 200 or 300 feet north of same, was from 22 to 25 feet.

There was evidence that the schooner, at the time of the collision, had lapped into the channel on its east side 75 to 100 feet, and there was also evidence that she was two-thirds across the channel proper. The steamer was 420 feet (perpendiculars) long and 48½ feet beam. She was partly laden and with 18 feet 6 or 8 inches draught. She was proceeding up the river west of the center of the channel in the customary place of navigation for vessels of her class. When the lookout on the steamer, who was her chief officer, first saw the schooner, the steamer was to the southward of her down the river and about a quarter of a mile away. The schooner was then stationary. When about 60 yards distant, said lookout noticed that she was swinging around and coming astern toward the steamer. She swung to the westward in the channel with her stern a little to the north. The master of the steamer was on the bridge during her progress up the river. When he first saw the schooner she was a quarter of a mile distant, and there was nothing to indicate that she would get in the course the steamer was pursuing. It first became apparent to him that she would come in contact with the steamer or the steamer with her when he was about 200 yards of her. He then noticed the schooner was swinging around with her stern toward the west and in direction of the course the steamer was going. The master, with the assistance of the pilot, controlled the movements of the steamer. When 150 or 200 yards distant from the schooner, the pilot, with the approval of the master, starboarded the helm of the steamer, putting it about half over.

There was also evidence tending to show that if the schooner had had two anchors out, or a second anchor on deck with a watch in position to let it out in case of emergency, she would probably have been prevented from going astern into the channel, at least so far across the channel as to collide with the steamer.

There is a rule for Mobile Harbor which provides that vessels entering the port of Mobile must, on arrival in the river, rig in their jib booms, and other outriggers, etc. The rule also provides that, when permission is given a vessel to keep her jib boom and outriggers out, the vessel having such permission will be held responsible for any damage done to other vessels by them. In this case the schooner had her davits out. They were shown to be outriggers that were easily movable and taken in. She had no express permission to keep them out. But the evidence was that this rule was not enforced, and had not been for many years. So I think the nonenforcement of the rule might well be considered as a permission to keep such outriggers out. This, however, does not relieve the vessel from responsibility for any damage to other vessels by such outriggers. Rule 2, Rules for Mobile Harbor.

The schooner was not anchored in an improper place. But I am of opinion that she was at fault in omitting to anchor herself on the day of the collision in such a manner as in all probability to have prevented her swinging in, or at least from going astern across the channel sufficiently to avoid the collision. In view of the unsettled condition of the weather on that day, the course and character of the wind, being sudden and "squally," the storm warnings displayed by the local weather bureau and exhibited in the elements themselves, there was imposed upon the schooner increased vigilance in reference to her anchorage. I think, as a matter of precaution, she should have let out another anchor or had a proper anchor watch. It seems to me her situation was such as required her to use all necessary precautions to meet the uncertainties of wind and current.

A vessel at anchor in a dangerous position should take such precautions as are commensurate with the perils assumed. *The Clara*, 102 U. S. 200, 26 L. Ed. 145; *The Sapphire*, 11 Wall. 170, 20 L. Ed. 127.

Notwithstanding the error or want of proper precaution on the part of the schooner mentioned, it did not excuse the steamer from adopting every proper precaution required by the special circumstances of the case to prevent the collision. "It behooves those in charge of the navigation and movements of vessels to avail themselves of every resource to avoid not only collision, but the risk of collision." It has been said that "legislation has, for the safety of navigation, given to those in charge of ships rules as to their conduct, which will, if observed, not only prevent collision, but the risk of collision." *The America*, 92 U. S. 432, 23 L. Ed. 724; *The Eleanora*, 17 Blatchf. 88, Fed. Cas. No. 4,335.

The general rule is that a vessel under way is *prima facie* in fault for a collision with a vessel at anchor, although the latter is brought up in an improper place, provided the former could with ordinary care have avoided her. The vessel under way is bound to keep

clear of another at anchor. This rule applies though the vessel at anchor is improperly anchored, if it is possible for the vessel under way, with safety to herself, to avoid a collision. *Marsden*, Coll. 544.

"The vessel in motion must exonerate herself from blame by showing that it was not in her power to prevent the collision by adopting any practicable precautions." *In re D. H. Miller*, 76 Fed. 877, 22 C. C. A. 597; *The Virginia Ehrman*, 97 U. S. 309, 24 L. Ed. 890.

The master of the steamer first saw the schooner when she was at least a half mile away. She was then at anchor and stationary. When it became apparent to him that there was risk of a collision between the steamer and the schooner, the latter was swinging into the channel and coming astern toward the course the steamer was pursuing. They were then about 200 yards apart. The steamer starboarded her helm, but put it only half over. The evidence was that in from 200 feet to 150 yards, or say 450 feet, the steamer, at the way she was going, could have deflected her course sufficiently to have passed the schooner without contact with her. The master of the steamer stated that he and the pilot thought they had starboarded her helm enough to clear the schooner and keep the steamer in deep water. The evidence showed that for several hundred feet south of Dauphin street wharf and for at least 200 feet north of said wharf there were from 22 to 25 feet of water between the course of the steamer and the wharves on the west side of the river, and that there was in fact plenty of water for the steamer to have gone to the Dauphin street wharf, at which there was no vessel lying at the time. It also appeared from the evidence that there were 400 to 450 feet from the east side of the channel to said wharf, and that the schooner, while in the channel, was not exceeding 100 feet from said east side. This would have placed her from 300 to 350 feet from the wharf, leaving, in my opinion, ample room and sufficient water for the steamer, by the exercise of due care and necessary caution, to have passed the schooner safely.

A steamer is bound to use due precaution and care and to come to a standstill by reversing her engine, if necessary, before she should collide with another vessel which she could easily see. *The Colorado*, 91 U. S. 692, 23 L. Ed. 379; *The Nacoochee*, 137 U. S. 330, 11 Sup. Ct. 122, 34 L. Ed. 687.

If it was impracticable for the steamer to have come to a standstill when risk of a collision was apparent to the master, then he should have deflected his vessel to the westward sufficiently to have avoided a collision.

My opinion is that both parties were at fault; the schooner in failing to have a second anchor out, or to have a proper anchor watch on deck, and the steamer in failing to deflect its course sufficiently to avoid the collision.

If both are in fault, the damages and costs will be divided. *The Morning Light*, 2 Wall. 550, 17 L. Ed. 862; *Union S. S. Co. v. N. Y. & Va. S. S. Co.*, 24 How. 307, 16 L. Ed. 699.

And it is so ordered.

THE J. M. GUFFEY.

(District Court, E. D. New York. July 30, 1910.)

1. SHIPPING (§ 84*)—EXPLOSION—INJURY TO WORKMEN—CARE REQUIRED.

Where workmen of contractors were engaged in repairing the oil tanks of a steamer at the time one of them was injured by an explosion of oil flowing from a pump they were disconnecting, the workmen and contractors by whom they were employed were bound to use reasonable care in doing the work and in using lights in the tank, according to their experience, to obviate dangers that might be anticipated.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 84.*]

2. SHIPPING (§ 84*)—REPAIRS—INJURIES TO WORKMEN—EXPLOSION—CONTRIBUTORY NEGLIGENCE.

Where the tanks of an oil steamer were about to be repaired, and for this purpose the ship emptied and cleaned the tanks with live steam, and the ship's officers informed the contractors' servants that the pump in one of the tanks was ready to be disconnected, the workmen were not negligent in assuming that they could proceed with freedom from danger as to matters which officers of the vessel or those furnishing the place for the work might have made safe.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 84.*]

3. SHIPPING (§ 84*)—REPAIRS—LIABILITY OF CONTRACTORS.

Where the servants of contractors for repairs on a tank steamer were injured by an explosion of gas therein, the contractors were responsible for the ordinary risks which they should have guarded against for the purposes of their own work, but were not responsible for hidden risks or unascertainable dangers which the officers of the vessel should have anticipated.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 84.*]

4. SHIPPING (§ 84*)—REPAIRS—DANGERS—NEGLIGENCE OF VESSEL.

A tank steamer having contracted for repairs to certain of its tanks attempted to clean them with live steam, and, after having done so, the contractors' servants appeared, and were informed that the pump in one of the tanks was ready to be disconnected. While doing this work, with the aid of an open light, oil ran out from some portions of the pump, resulting in an explosion of gas by which libelant was injured. *Held* that, the ship having undertaken preparations for the work, the contractors were only responsible for the method of doing the work in the light furnished them, and that the ship was negligent in permitting the contractors' servants to perform the work with open lights without warning.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 84.*]

5. DAMAGES (§ 132*)—PERSONAL INJURIES—AMOUNT OF RECOVERY.

Libelant, a steam fitter, was injured in an explosion on a vessel while engaged in repairing the same. His hands and lower arms were so burned that he was unable to work from November until April, and at the trial he had injuries resembling scars over the back of his hands, fingers, and lower arms. The muscles of his hands and lower arms were so affected that he could not thereafter grip the tools necessary in following his trade, but, after his recovery, he was enabled to obtain the same wages by acting as a foreman for his employers. He suffered considerable pain, and his injuries appeared to be permanent. His physician's expenses amounted to \$150. *Held*, that he was entitled to recover \$1,650.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 132.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Admiralty. Libel by James W. Dalton against the steamship J. M. Guffey. Decree for libelant.

Hirsh & Rasquin (Hugo Hirsh, of counsel), for libelant.
James J. Mahoney, for claimant.

CHATFIELD, District Judge. The steamer J. M. Guffey is used for the carrying of oil in six tanks, each of which is connected by steam pumps with discharge and intake supply pipes. She burns oil for fuel, and is so arranged that No. 6 tank can be connected with the engine for supplying the fuel oil, if necessary.

In the year 1908 she arrived at the port of Philadelphia, in the month of October, and, after unloading her cargo, she came up by way of the Atlantic Ocean, and while at sea cleaned out the five empty oil tanks by steam. Some crude oil was stored in No. 6 tank for fuel on the voyage. Upon arriving at Gravesend Bay this tank was also cleaned out with live steam, the balance of the fuel oil having been pumped into a barge before the steam was turned in. The testimony of the various witnesses for the ship, including the experts, shows satisfactorily that the tanks were thoroughly and properly cleaned, and there seems to have been no negligence or carelessness in so far as the methods of doing what was done are concerned. Certain repairs were to be made and the cleansing of the tanks was preparatory to that work, in which the use of lights and hot riveting necessitated the removal of all inflammable material. The vessel was towed to the wharf and a number of workmen, of whom the libelant was a pipe fitter and repairer, went to work on the various parts of the ship requiring attention. In particular one of the pumps was to be shifted or lowered, and upon the 11th day of November, 1908, the libelant, in company with another pipe fitter and with three helpers or apprentices, went down to disconnect this pump at about 9 in the morning. This was the first job which these men had attempted to do upon that day, and on going upon the vessel they communicated with one of the men, who turned out subsequently to be an assistant engineer (the chief engineer being on the vessel, but not having anything to do with these conversations), to learn if things were in readiness for them to disconnect the pump in question. The testimony of the libelant and of these witnesses is to the effect that they asked whether it would be all right to take a light into the hold, it appearing that the place where the work had to be done was not absolutely dark, but that artificial light was needed in order to disconnect this pump; while the assistant engineer in question testified that the men asked him if the pump was ready to be disconnected, and that he spoke about going down after he had finished his breakfast, but that they did not make specific inquiry about the use of lights.

It appears from the testimony that electric torches were used by the officers and men upon the vessel, and that signs prohibited smoking and uncovered lights. It also appears that the vessel did not furnish any of these electric lights or other means of illuminating the place where the work was to be done, but left that to the men making the repairs. Three of the five workmen stopped upon a grating or pas-

sageway at the foot of the ladder leading into the space where the pump was located, while the libelant and another workman went down below this grating into the space immediately around the pump, and, using an open gasoline torch, disconnected the pipe, when water, and later a dark brown liquid, ran out of some portion of the pump. The gas rising from this liquid became ignited, and an explosion resulted which filled the entire space with flames, which burned for some short time. The three men upon the grating succeeded in getting out without serious injury. The libelant and the man who was below were burned; the libelant being incapacitated for work from November until April. He still has injuries resembling scars over the back of his hands and fingers and lower arms. The muscles of his hands and lower arms are affected to such an extent that he cannot grip the tools necessary in following his trade, but since April, 1909, he has been enabled to obtain the same wages by acting as a boss or foreman of the men engaged in the work for his old employers, and has therefore not lost his wages since that time. The injuries, however, to the muscles and skin of his hands and forearms appear to be permanent. His expenses for physician were \$150. He, of course, suffered considerable pain.

The only questions in the case are whether any negligence was shown on the part of the officers of the ship, and whether the libelant was guilty of contributory negligence in undertaking to do the work which he did with an open light, in view of the risks which he should have anticipated and guarded against in the light of his occupation and experience. As has been said, no negligence is shown in the general condition of the ship or its readiness for the making of the repairs. The testimony shows that no amount of cleansing or steaming could entirely remove all possibility of the formation of gas or the secretion of inflammable liquid in the internal parts of such a pump, and in the joints or corners of the pipes and tanks the witnesses agree that gas may form even after cleansing with live steam. The libelant knew that this might happen. He himself testified that the reason he asked whether the pump was ready to be disconnected was because he knew that it would be dangerous to enter this space with an open light unless all of the oil and gas had been removed. The officers of the vessel also knew of these dangerous conditions and of what work would be necessary in uncoupling the pump. The risks in connection therewith were something that the vessel was bound to obviate, if possible, or else give warning to those who might be subject to such danger. The workmen or the contractors who were employing these workmen must be held to the use of reasonable care with reference to the sort of work which they undertook to do, and in the light of what experience would show would be reasonable care in order to obviate the dangers that might be anticipated.

The case comes down finally to a determination of whether pipe fitters, sent to disconnect a pump, which they knew had been used for the pumping of oil, and which involved danger if any gas or oil were present when open lights were used, were bound to use precautions or tests, in spite of a representation that things were safe. In view of the preparations made by the ship for the repairs, the possibility of

using lights and red hot materials in the various parts of the tanks under repair, and the safety of the apparatus after the treatment with live steam, unless some unforeseen or inexplicable collection of gas occurred, it would not seem to have been negligence for these workmen to assume that if the pump in question was said to be in readiness to be disconnected, and if the officers of the vessel allowed them to go to work upon it without any warning, they could proceed with freedom from danger as to matters which the officers of the vessel or those furnishing the place for the work might have made safe.

On the other hand, it does not seem to be advisable to excuse the officers of a vessel who have knowledge of its construction and its particular dangers and conditions from all responsibility to those who may be called upon to do work merely because they have made a contract to have certain work done, and turned the vessel over to the people who are to do the work for that purpose. The contractors in this case were responsible for the ordinary risks which they should have guarded against for the purposes of their own work. They are not responsible for hidden risks or the unascertainable dangers that the officers of the vessel should anticipate. It would seem that the removal of this pump involved a danger of that sort. A warning not to use open lights, or a direction not to do the work until the engineer could see how it was to be done, was called for both from the standpoint of the safety of the men and of the vessel itself. Ordinary signs against smoking and lights had no significance at this time. And it would seem to be negligence for the officers of the vessel to assume that contractors could or would safely guard against all dangers in such work, as if these contractors understood the necessary dangers as well as the officers of the ship itself.

If the vessel had been entirely turned over to the contractors, or if the work in question had been in the hands of the contractors, so that all preparation for the work and all responsibility for the conditions under which the work was to be undertaken rested upon the contractors, then the ship would not be responsible. But in the present instance the preparation was done by the ship. The place at which the work was to be done was furnished and its condition established by the ship, and the only responsibility upon the contractors was the method of doing the work in the light that was furnished them. The libellant may recover \$1,650 and costs.

COWAN v. BURCHFIELD.

In re GWIN.

(District Court, N. D. Alabama, W. D. August 1, 1910.)

Nos. 12, 144.

1. BANKRUPTCY (§ 175*)—FRAUDULENT TRANSFERS.

Where a bankrupt by deeds conveyed his realty simultaneously as part of a scheme to put it beyond reach of his creditors, in view of his imminent and inevitable bankruptcy, and the grantees knew or should have

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

known of such intent, and kept the conveyances from record with the intent to assist in its accomplishment, the conveyances should be set aside.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 247; Dec. Dig. § 175.*]

2. BANKRUPTCY (§ 396*)—HOMESTEAD EXEMPTION—PROPERTY CONSTITUTING.

Where one lived with his family on premises on which his store was situated, the lot being used by him at least as much for homestead as for business purposes, and not incidentally only as a homestead, it should be considered as his homestead.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 668; Dec. Dig. § 396.*]

3. BANKRUPTCY (§ 179*)—FRAUDULENT TRANSFERS—CONVEYANCE OF HOMESTEAD.

The conveyance, in view of inevitable bankruptcy by one of his homestead, could not operate as a fraud on creditors, as they were not entitled to subject such land to payment of their claims if it had not been so conveyed.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 179.*]

4. BANKRUPTCY (§ 400*)—SETTING ASIDE BANKRUPT'S EXEMPTIONS OUT OF RETAINED ASSETS.

Under Code Ala. 1907, §§ 4183, 4184, an execution debtor in claiming his exemption after levy of execution or attachment is required to schedule all his personalty and deliver it to the officer, and that not claimed as exempt is to be sold by the officer under the writ. Upon contest of the debtor's exemption, if he is shown to have other personalty not scheduled and not delivered to the officer, it is the court's duty to set aside his exemption from such property shown to have been omitted by him, and undelivered, so far as it will reach, thus releasing from the claim the property or a corresponding part of it, selected by the debtor. *Held*, that the same rule applies in bankruptcy proceedings, the filing of the petition in bankruptcy operating as a levy, and the filing by the bankrupt of a schedule, being analogous to the filing of the schedule with the levying officer, and the failure to list and surrender to the trustee in bankruptcy assets not claimed operates as a selection of such unsurrendered assets, leaving claimed assets in the possession of the trustee in the same amount, subject to the bankruptcy proceeding.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 671-675; Dec. Dig. § 400.*]

5. BANKRUPTCY (§ 396*)—HOMESTEAD EXEMPTION.

A man purchased 160 acres of land on which was a dwelling house, but he did not actually occupy the premises until after his receiver in bankruptcy had taken possession of his store and dwelling, where he was residing at the time, and it appeared that he purchased the premises with the intention of occupying them at some future time, and had delivered on the land some hardware which he testified was to be used for repairing the premises; the fair inference from the evidence being that he purchased the land for a refuge if and when his then residence and business should be interfered with by creditors, and that so long as his creditors permitted him and his wife to carry on his business at his joint store and dwelling it was his intent to reside there and not upon the land which he claimed as a homestead. *Held*, that the character of his occupancy was not such as to render the premises exempt as his homestead.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 668; Dec. Dig. § 396.*]

Action by A. S. Cowan, trustee in bankruptcy of J. M. Gwin, against Walter H. Burchfield. Petition to review order of referee

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

disallowing bankrupt's exemption. Decree for complainant and report of referee disallowing homestead exemption, modified.

London & Fitts, for trustee.

Lee Cowart, for bankrupt.

GRUBB, District Judge. These two matters arising out of the same bankruptcy proceeding were submitted together for decision, and are so related to each other as to make one opinion cover both.

The bankrupt had conducted a small mercantile business at Kellerman, Ala., for seven years before the filing of the petition, and, with his family, had lived on the premises where one of his stores was located. His patrons were principally coal miners; Kellerman being the location of a coal mine. Prior to July 1st there had been a strike at this coal mine, and its existence had embarrassed the bankrupt by diminishing his trade and delaying his collections. The evidence taken before the referee upon the bankruptcy hearings, which, by agreement, is to be used in the plenary suit, together with the independent evidence, is convincing that the bankrupt, foreseeing financial embarrassment about July 1st, from then until the filing of the petition against him, was preparing himself for it by transferring his real estate to others, and reducing his merchandise to cash by selling it and collecting for it to as great an extent as possible.

On July 1st he executed four deeds to substantially all his real estate. One was executed to his brother to secure an alleged debt, not otherwise evidenced in writing; two were executed to his clerk and kinsman partly to pay an alleged debt and partly for an alleged present consideration of \$440; and one for an alleged present consideration, to the brother of his clerk, who was also his kinsman. The two latter were young men of little business experience and of no means except whatever consideration, if any, was paid by them. The bankrupt by these conveyances divested himself of even the property on which was located his dwelling and stores. Pressing need of money by the bankrupt is claimed to have been the reason for the transfers; but this would not account for the conveyance to his brother, from whom he got no cash. None of the deeds were placed on record by the grantees until about the time of the filing of the petition against him early in December. The uncertainty shown by the evidence of two of the grantees as to the amount of the consideration paid by them for the conveyances is inconsistent with the existence of a serious transaction between the bankrupt and themselves. The considerations were also inadequate. The trustee filed a plenary bill in the District Court to set aside the four conveyances as made with intent to defraud creditors and for simulated or inadequate considerations, making the grantees parties.

The validity of the four conveyances as against the trustee is the question presented by the plenary suit.

The petition for review relates to the bankrupt's exemptions.

From July 1st the only attention given by the bankrupt to his business was that of traveling around the country making collections, and, though his oral testimony is to the effect that his efforts were unsuc-

cessful, his books show that a considerable amount was collected. The referee, taking August 1, 1909, as a basing point, calculated that the bankrupt failed to account to the trustee for from \$800 to \$1,600 of assets that he should have been in possession of when the petition was filed against him. This estimate was arrived at by taking into consideration the amount of his stock and accounts on August 1st, as compared with the inventory of the receiver. The referee also found that the bankrupt, after November 12, 1909, actually collected \$516.62, and paid out subsequently but \$127.06, leaving a balance collected and not disbursed of \$389.58. The petition was filed December 2d. No money was turned over to the trustee by the bankrupt. The trustee set aside to the bankrupt as exempt specific property of the value of \$225, which left a balance of \$775 due him on his personal property exemption, which the trustee satisfied by allowing it to him from assets found by the referee to have been in his possession at the time the petition was filed and not surrendered to the trustee. The trustee also disallowed his claim of exemption to a piece of land purchased by him on November 12th, upon the ground that he was not occupying it at the time of the filing of the petition as required by the Alabama exemption statute. The land was purchased about three weeks before the filing of the petition, and the bankrupt did not move upon it until after the receiver in the bankruptcy proceedings had taken possession of his store in part of which he lived. The evidence showed that he bought the land with the intention at some time in the future of making it his home, and that before the petition was filed he had caused some hardware to be delivered on the land for the purpose of making repairs on it. No other evidence of occupancy or intention to occupy is shown in the record. The referee confirmed the report of the trustee setting aside the bankrupt's exemptions, and the bankrupt seeks to review this order by his petition.

The conclusion of the court, from the facts in the record of the plenary suit, is that the bankrupt made all four conveyances simultaneously as part of a scheme to put his real estate beyond the reach of his creditors in view of his imminent and inevitable bankruptcy, and that the grantees knew or should have known of such intent, and that they kept the conveyances from record with the intent to assist in its accomplishment, and that all the conveyances should be set aside except that conveying the land on which the bankrupt lived with his family at the time of the conveyance. The evidence shows that this lot was used by the bankrupt at least as much for homestead as for business purposes, and not incidentally only as a homestead, and should be considered as the homestead of the bankrupt. *Marx v. Threet*, 131 Ala. 344, 30 South. 831. If considered the homestead of the bankrupt, the conveyance of it could not operate as a fraud on creditors, since they would not be entitled to subject the land to the payment of their claims, if it had not been so conveyed. *Pollak v. McNeil*, 100 Ala. 203, 13 South. 937; *Kennedy v. Bank*, 107 Ala. 170, 18 South. 396, 36 L. R. A. 308; *Bank of Talladega v. Browne*, 128 Ala. 560, 29 South. 552.

In the plenary suit a decree will be entered setting aside the conveyances, except as to defendant, Walter H. Burchfield, of the home-

stead tract, and ordering respondents to surrender possession to trustee.

The petition for review presents three questions for decision: (1) Did the bankrupt withhold from the trustee assets of which he was in possession when the petition was filed against him, and in what amount? (2) Is it proper that such assets as he may be shown to have withheld from the trustee should be set aside under the statutes of Alabama as part of his personal property exemption? (3) Is the bankrupt entitled to a homestead exemption in the tract of land purchased by him on November 12, 1909?

1. The referee found that the bankrupt did withhold assets from the trustee in amount in excess of the balance of his personal property exemption, after deducting the specific articles selected by him. This finding is based on a statement of the business from August 1, 1909, to the date of the bankruptcy, December, 1909, ascertained by charging him with the approximate amount of stock and accounts on that date and thereafter acquired, and crediting him with subsequent disbursements and the receiver's inventory. The referee also arrived at a somewhat different result by a finding of the amount collected in money as shown by the bankrupt's books after November 12, 1909, and crediting him with subsequent disbursements. The latter method is the more accurate, as it eliminates all reference to the amount of stock and accounts, which is a matter of unsatisfactory estimate. By the latter method, it seems free from practical doubt that the bankrupt had in his possession at the time of the filing of the petition against him \$389.58, which he failed to surrender to the trustee.

2. The inquiry then arises whether the bankrupt's exemption should be set aside to him pro tanto from this amount. The bankrupt contends that his failure to surrender assets or his fraudulent disposition of them is no excuse for disallowing him his exemptions, and cites the case of *In re Park* (D. C.) 102 Fed. 602, in support of this proposition. In that case the referee declined to allow the bankrupt any exemption because he had not accounted for all of his assets, and was in possession of assets which he had not turned over, to the trustee. In this case the referee allowed the bankrupt his personal property exemption, setting aside specific property in part satisfaction thereof, and the assets found by him to have been in the possession of the bankrupt unsurrendered to satisfy the balance. No attempt was made to penalize the bankrupt for his wrong by denying to him his exemptions. He was entitled to a money exemption of \$775. The referee found that he had that much money of the estate in his possession which it was his duty to pay to the trustee. It would be a futile thing for the court to order the trustee to pay to the bankrupt this \$775 as his partial exemption, and immediately order the bankrupt to pay back a like amount to the trustee, because of the bankrupt's failure to surrender that amount of assets upon the filing of the petition. It would seem worse than futile, since a higher degree of proof than that exacted in civil cases is requisite to an order directed to the bankrupt to surrender assets, which is a quasi criminal order, enforceable only by imprisonment as for contempt. The liability of the bankrupt to

the trustee to surrender his assets is a civil liability, though, owing to the bankrupt's insolvency, one enforceable only in such a quasi criminal proceeding and one which requires proof beyond all reasonable doubt. The injustice to the estate of requiring the trustee to set aside the bankrupt's exemption out of assets in his possession, under such circumstances, is clear, and would prevent the adoption of such a rule in the bankruptcy court, in the absence of a declaration to the contrary in the state exemption laws. The exemption laws of Alabama, however, cover the case. By Civ. Code Ala. 1907, §§ 4183, 4184, the execution debtor in claiming his exemption after levy of execution or attachment is required to schedule all his personal property and deliver it to the officer. That not claimed as exempt is to be sold by the officer under the writ. Upon contest of the debtor's exemption, if he is shown to have other personal property, not scheduled and not delivered to the officer, it is the duty of the court to set aside his exemption from such property shown to have been omitted by the debtor and undelivered, so far as it will reach, thus releasing from the claim the property or a corresponding part of it selected by the debtor. The filing of the petition in bankruptcy operates as a levy. The filing of the bankrupt of his schedule is analogous to the filing of the schedule with the levying officer under the state law. The result in each instance should be the same, viz., that the failure to list and surrender to the levying officer or the trustee respectively assets not claimed should operate as a selection of such unsurrendered assets leaving claimed assets in the possession of the levying officer or trustee in the same amount, subject to the writ or bankruptcy proceeding.

3. The bankrupt claimed as his homestead 160 acres of land in Jefferson county, Ala., purchased by him from one Fox on November 12, 1909, for \$2,600, on which he paid \$600, giving a mortgage for the balance. There was a dwelling house on the property, but he did not actually occupy the premises until after the receiver in bankruptcy had taken possession of his store and dwelling lot in Kellerman. The evidence shows that he bought the premises with the intention of occupying them at some future time. It also shows that he had delivered on the land some hardware which he testified was to be used for repairing the premises.

The case of *Blum v. Carter*, 63 Ala. 235, is relied on by the bankrupt. The facts of that case are very like those of this case. The principle which furnishes the test of the kind of occupancy necessary is formulated in these words:

"Guided by these principles, we hold that, to constitute a valid claim of homestead, there must be an occupancy in fact, or a clearly defined intention of present residence and actual occupation, delayed only by the time necessary to effect removal, or to complete needed repairs, or a dwelling house in process of construction. An undefined floating intention to build or occupy at some future time is not enough. And this intention must not be a secret, uncommunicated purpose. It must be shown by acts of preparation, or by something equivalent to this."

Conceding that the placing of material on the premises to be used in their repair was sufficient visible evidence of preparation for oc-

cupancy, the evidence in this case does not disclose "a clearly defined intention of present residence and actual occupancy delayed only by the time necessary to effect removal, or complete needed repairs, or a dwelling house in process of construction." The fair inference to be drawn from the record as to the bankrupt's intention is that he purchased the land for the purpose of making it a refuge if and when his then residence and business should be interfered with by creditors. So long as his creditors permitted him and his wife to carry on his business at his joint store and dwelling in Kellerman, it was his intention to reside there, and not upon the land which he claimed as a homestead. This constitutes "an undefined floating intention to build or occupy at some future time," which is held to be "not enough," rather than the "clearly defined intention of present residence and actual occupation, delayed only by the time necessary to effect removal or to complete needed repairs," which is held sufficient by the Alabama court.

The report of the referee, so far as it disallows the homestead exemption, is confirmed; and, so far as it sets aside as part of the bankrupt's personal property exemption \$775 of assets, found by the referee to have been withheld from the trustee by the bankrupt, is so modified as to allow the bankrupt, as exempt, out of funds in the possession of the trustee the sum of \$385.42, being the balance of his personal property exemption, after deducting the value of specific articles selected by him, and the amount found by the court to have been withheld by him from the trustee.

THE SARATOGA.

THE TAUNTON.

(District Court, E. D. Pennsylvania. May 6, 1910.)

Nos. 38, 47.

1. COLLISION (§ 123*)—SUIT FOR DAMAGES—CONTRIBUTORY FAULT.

The fault of one vessel being plain and sufficient to have brought about a collision, fault in the other must be clearly proved before she can be required to contribute to the damages.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 259-261; Dec. Dig. § 123.*]

2. COLLISION (§ 91*)—STEAM VESSELS MEETING—NEGLIGENT NAVIGATION.

A collision occurred in the Delaware river at Horseshoe Bend, below Philadelphia, between the steamship *Saratoga* going down light and the *Taunton*, an English vessel, coming up from the sea. It was daylight. The vessels saw each other when two miles apart, and exchanged passing signals when a mile apart, and were on courses involving no danger of collision until the *Saratoga* ran against a mud bank on the side of the channel which was well known, and gave her a sheer that she could not overcome until she struck the *Taunton*. The *Saratoga* was going at a speed not less than eight knots an hour. *Held*, on the evidence, that the *Taunton* was on the proper side of the channel, and not in fault, but

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that the fault was solely that of the Saratoga in striking the bank, and in going at too high speed.

[Ed. Note.—For other cases, see Colliston, Cent. Dig. §§ 187-192; Dec. Dig. § 91.*]

In Admiralty. Suit by the owners of the steamship Saratoga against the steamship Taunton, and cross-libel against the Saratoga. Decree against the Saratoga alone.

H. Alan Dawson, and J. Rodman Paul (Biddle, Paul, Miller & Jayne, of counsel), for the Saratoga.

J. Parker Kirlin, Henry R. Edmunds, and Charles R. Hickox, for the Taunton.

J. B. McPHERSON, District Judge. These cross-libels seek to determine the liability for a collision that occurred on the Delaware river shortly before 8 o'clock in the morning of June 17, 1907, between the steamships Taunton and Saratoga. There is little dispute about the facts, save in one or two particulars.

The Taunton is a British vessel, single screw, of 2,461 registered tons, 350 feet long, and 47 feet beam. She was carrying a full cargo from Calcutta to New York by the way of Philadelphia, and drew 22 feet 6 inches of water. The Saratoga is an American vessel, twin screw, 430 feet long, 50 feet beam, and (being in ballast) drew only about 18 feet forward and aft. She was upon her trial trip, having just been finished, and was proceeding down the river in charge of a licensed pilot. The Taunton was also in charge of a licensed pilot, but was coming up the river from the capes on her road to Philadelphia. It was broad daylight in clear weather, and there was no obstruction to the vision of those upon either ship. The tide was about two-thirds ebb—say, a foot above mean low water—and was running from 2 to 2½ knots an hour. There were no other vessels in the neighborhood that interfered in any respect with navigation. At first the speed of the Taunton was about 6 knots, while the Saratoga was steaming at a faster rate—not less than 12 knots—as she approached the black buoy hereafter referred to. The vessels caught sight of each other at least two miles away, thus having ample space and opportunity for the proper passing maneuvers. At this time the Taunton had passed the town of Red Bank on the New Jersey shore, and was following a course that lay a little south of the Lower Horseshoe range. She was also south of League Island, and was proceeding eastwardly along the curve of the river known as the Horseshoe Bend. This bend begins not far above a black can buoy, C 37, as will appear by reference to the official chart. Coming down from Philadelphia, the direction and course of the river and the navigable channel are nearly north and south until the neighborhood of this buoy is reached. Below it the direction and course are nearly east and west, until League Island is passed; so that in going down the river below the buoy the Pennsylvania shore is on the north or starboard side, while the New Jersey shore lies on the port or south side. In other words, the buoy marks the turn where both the river and (especially) the channel bend abruptly about 45 degrees to the westward,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and its position is close to the northern or Pennsylvania side of the deep water channel. An extensive and dangerous shoal lies between the buoy and the visible shore. A red spar buoy, S 46, lies five-eighths of a mile further west, and marks the southern or New Jersey side of the deep channel. The shoal is a large mud bank, which makes out for about a half mile from the Pennsylvania shore. Its outline along the channel is irregular, projecting at one point especially, which is referred to in the testimony as the "seventeen-foot lump," and falling off there abruptly almost at the channel's edge. As the shoal is always covered with water, the surface of the river from shore to shore is wide, although the navigable deep water channel is much narrower. At or near the black buoy 24 feet of water can only be found for about 700 feet, while 20 feet can be found for about 150 feet more to the north. Below the red buoy the width is greater—about 900 feet for a draft of 24 feet, and about 1,300 feet for a draft of 20 feet. The channel course in this east and west reach beginning not far below the turn at the black buoy and extending to a point about two miles below League Island is west by north in going down, and east by south in coming up, the river. It is customary for vessels coming up the river through this reach and rounding the Horseshoe, especially when they are stemming an ebb tide, to keep upon the southern side of the channel, so as to make a gradual turn around the bend, and to lessen the set of the tide against their bows.

The *Saratoga* was well above the black buoy and was on the *Taunton's* port bow when the vessels became aware of each other's presence. As they approached, but while they were still a mile or more apart, the *Taunton* was slowed to half speed. Then, or not long afterwards, she blew one blast on her whistle, which the *Saratoga* promptly accepted and answered. The *Taunton* ported slightly at this time, although the maneuver was unnecessary, as both vessels were apparently on courses that would certainly carry them clear. The *Saratoga* did not slacken speed until she was nearly abreast of the black buoy, when she gave the signal to slow the engines, and some reduction in speed was thereupon made; but at no time before the collision was she moving more slowly than eight knots. She rounded the buoy closely, and straightened out on a westerly course to pass south of the Horseshoe shoal. The two steamships were then proceeding in opposite directions on nearly parallel courses, and would have easily cleared each other, port to port, if each had continued as she was heading. Unfortunately the *Saratoga*, as she was straightening out, got too far to the northern edge of the channel, struck and slipped off the 17-foot lump, suddenly sheered in a marked degree, changed her course decidedly—about four points—and stood across the channel towards the *Taunton*, the two vessels being then about a quarter of a mile apart. Immediate efforts were made by both vessels to prevent the threatened collision. The *Taunton* ported again, and promptly stopped her headway by going full speed astern, and the *Saratoga* made an unsuccessful attempt to break the sheer by the vigorous use of her port helm, then by backing her starboard engine, and afterwards by going ahead on her port engine. In spite of these efforts, however, the disaster could not be averted. The sheer

persisted, and the Saratoga struck the Taunton nearly amidship at an angle of about 45° , and injured her so badly that it was necessary to beach her at once. Neither vessel sounded any signal after the first exchange until shortly before the collision, when a danger signal was blown by the Taunton; but no signals after the first were imperatively called for by the situation, and the collision was in no respect due to their absence. The Saratoga was also injured, although not so severely, and, after continuing down the river for a short distance, returned to the shipyard. The Taunton was beached by her own engines on the south or New Jersey side of the river, just inshore of the red buoy, and remained there making temporary repairs until the following day, when she was pulled off and towed to Philadelphia. As already stated, the sheer of the Saratoga was caused by touching, or "smelling," the shelving side of the Horseshoe shoal (almost certainly at the 17-foot lump), just after rounding the black buoy while her speed was still too great for safety in a situation that called for cautious movement.

These facts are either conceded or clearly proved, and I think it must be agreed that not much remains to be decided. There can be no doubt that the sudden sheer of the Saratoga was the primary cause of the disaster, and that the sheer was the direct result of her contact at too high a speed with the steeply shelving bank of the shoal. It follows inevitably that she was at fault for being there at all, and, in any event, for the speed at which she approached. No adequate or satisfactory explanation is offered on her behalf—except that the Taunton "crowded" her, and this will be considered in a moment—and the inference must therefore be drawn that she had carelessly got out of the channel, perhaps in reliance on the fact that she was light, and was drawing several feet less than if she had been loaded. Really, as it seems to me, the only question that admits of controversy is the position of the Taunton when she was struck. If she was out of her proper course, if she was too far to the Pennsylvania side of the channel, so that it might fairly be inferred that she had been crowding the Saratoga, or had been taking an unnecessary risk by seeking to pass too closely, she may also be at fault, and may be obliged to share the damages. There is much testimony upon this point, conflicting, as may readily be assumed, and I see no good reason for discussing its rather voluminous details. The questions are all of fact, and in my opinion the fundamental dispute should be decided in favor of the Taunton. I believe, and so find, that she was on the proper side of the channel, namely, toward her starboard, or the New Jersey shore of the river, when she observed the other steamship, and that she maintained this relative position throughout. She proceeded at all times south of the Lower Horseshoe range, and ported twice in order to get farther to starboard and afford the Saratoga more room. I am satisfied that she was not to the north of the range at any time, and did not crowd the Saratoga in the least. The collision took place (as I think) where the weight of the testimony decidedly tends to place it, namely, a little west of the red buoy, and close to the spot where the Taunton was immediately afterward beached. The fault of the Saratoga being plain, it is well settled that fault in the Taunton must

be clearly proved before she can be called upon to contribute to the cost of the injury. *The Caldý* (D. C.) 123 Fed. 802; *Id.*, 153 Fed. 837, 83 C. C. A. 19; *The Australia*, 120 Fed. 220, 56 C. C. A. 568; *The Fontana*, 119 Fed. 853, 56 C. C. A. 365; *The Umbria*, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053.

A decree may be entered adjudging the *Saratoga* to be solely at fault, and appointing a commissioner to ascertain the damages.

WINKLEY CO. v. BOWEN MFG. CO. et al.

(Circuit Court, N. D. New York. July 25, 1910.)

1. COURTS (§ 357*)—SECURITY FOR COSTS—FEDERAL COURTS.

A motion for security for costs in a federal court sitting in the Northern District of New York is governed by the provisions of Code Civ. Proc. N. Y. § 3268, etc.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 938; *Dec. Dig.* § 357.*]

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

2. COSTS (§ 136*)—SECURITY FOR COSTS—LACHES.

Where a bill showed on its face that complainant was a nonresident and that defendant was entitled to security for costs, but no application was made therefor until some 18 months after issue joined, nor until after defendant had been taking proof for 8 months, to rebut plaintiff's prima facie case, defendant's right to security was waived by laches.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 531-536; *Dec. Dig.* § 136.*]

Action by the Winkley Company against the Bowen Manufacturing Company and another. Motion to compel the complainant to give security for costs. Denied.

Parsons, Hall & Bodell, for the motion.
Offield, Towle, Graves & Offield, opposed.

RAY, District Judge. This cause—suit in equity for alleged infringement of a patent—has been at issue some 18 months, and for some 8 months the defendant has been taking proofs in answer to complainant's prima facie case. Many motions for extensions of time to take such proofs have been made, and now, when complainant has fixed a time in July when it will take proofs, the defendant makes this motion, and asks security in the sum of \$2,500, with securities in New York state and a stay until such security is given. There is no pretense that the complainant is insolvent or unable to pay any judgment against it in case the bill is dismissed. The bill shows on its face that complainant is a nonresident of the state of New York, and was when the suit was commenced. The defendant has no new information bearing on the question whether complainant should file security for costs. I think this application comes too late, and that defendant should be held to have waived security for costs. In this district the matter is regulated by the provisions of the New York Code of Civil Procedure (section 3268, etc). See opinion *Coxe*, District Judge,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Huginin v. Thatcher (C. C.) 18 Fed. 105; rule 4, Circuit Court; rule 64, District Court; Conkl. Treat. (5th Ed.) 468; Lyman Vent. Co. v. Southard, 12 Blatchf. 405, Fed. Cas. No. 8,633.

The defendant is entitled to security for costs in the sum of \$250 as a matter of right when not guilty of laches in applying therefor. See cases cited by Coxe, District Judge (now Circuit Judge), in above case, and Willson v. Eveline, 39 App. Div. 129, 56 N. Y. Supp. 632; Sims v. Bonner (Super. N. Y.) 16 N. Y. Supp. 800. In this case the defendant claims it has now incurred expenses to the amount of \$2,500, not giving the items however, which are taxable in case the bill is dismissed. If the defendant had seasonably applied for security perhaps the complainant would not have pressed the suit. I think it incumbent on a defendant who desires security for costs of a nonresident complainant to move seasonably after being informed of the facts, and that if he does not he is deemed to have waived or lost the right. To now grant this motion would prejudice the complainant by delaying the taking of proofs. In Willson v. Eveline, supra, the court said:

"The right of the defendant to require the plaintiff, a nonresident, to give security for costs is absolute (Wood v. Blodgett, 49 Hun, 64 [2 N. Y. Supp. 304]; Churchman v. Merritt, 50 Hun, 270 [2 N. Y. Supp. 843]), unless waived by laches."

The other cases cited hold the same, and such is the rule in this district. It seems to me that a delay of 18 months and until defendants' proofs are completed in making the application is laches if anything can be so considered.

Motion denied.

ZUBER v. MICMAC GOLD MINING CO. et al.

(Circuit Court, D. Maine. August 8, 1910.)

No. 651.

1. RECEIVERS (§ 3*)—GROUNDS OF RECEIVERSHIP—REMEDY INCIDENTAL TO OTHER RELIEF.

To justify appointment of a receiver, some proper final relief in equity must be asked for in the bill, which will justify the court in proceeding with the case, and a receivership cannot be considered final relief because the receivers may bring suits, and in that way obtain some ultimate relief.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 3; Dec. Dig. § 3.*]

2. CORPORATIONS (§ 557*)—PROCEEDINGS FOR APPOINTMENT OF RECEIVER—SUFFICIENCY OF BILL.

A bill for a receiver for a mining company, alleging that certain persons owning a substantial majority of the stock in another company had fraudulently conspired to dispose of the property of such other company, and divide the proceeds among themselves, and had fraudulently contracted to organize the company for which a receiver was asked, and to issue and divide the stock among themselves, and alleging that the issue of stock in the new company was fraudulent, and that such persons as officers thereof had fraudulently caused the stock to be sold to the public to se-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Ind-ces 180 F.—40

cure the purchase money to be paid to the old company, and alleging gross mismanagement of the new company, praying that the receivers be appointed to manage its property, bring suits against the old company to recover the fraudulently issued stock in the new company, and for an injunction against the new company from transacting further business, paying its debts or transferring its property, but not praying for a cancellation of the alleged fraudulent contract nor for the winding up of the corporation, nor for the aid of the court in putting back the parties as nearly as possible in the position in which the persons alleged to have acted fraudulently, had found them, nor for any specific relief, and not joining as parties such persons, though it prayed that a writ of subpoena might issue against them to make them parties if they should come within the jurisdiction, is insufficient as praying for no ultimate relief.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2227-2236; Dec. Dig. § 557.*]

In Equity. Bill by Michael Zuber against the Micmac Gold Mining Company and others. Bill dismissed.

Lewis & Carpenter and Charles F. Johnson, for complainant.
Verrill, Hale & Booth, for respondents.

HALE, District Judge. This case now comes before the court on final hearing upon bill, answer, replication, and proofs. The complainant, a citizen of Maryland, brings this bill of complaint against two mining corporations, citizens of Maine. It alleges that Thomas W. Moore and certain associates, citizens of Massachusetts, owned a substantial majority of stock in the Micmac Mining Company, and that they fraudulently conspired with one Phil H. Moore to dispose of the property in that company for \$166,666 and to divide the proceeds among themselves; that they entered into a certain fraudulent contract to organize a new company called the Micmac Gold Mining Company, and to issue and divide the stock among themselves. The bill alleges that the issue of the stock in this new company was fraudulent; that Thomas W. Moore and his associates, as officers of the new company, fraudulently caused stock to be sold to the public for the purpose of securing the purchase money to be paid to the old company. The bill further alleges gross mismanagement of the Micmac Gold Mining Company, and prays that receivers be appointed to manage its property, and to bring suits against the Micmac Mining Company, its officers and stockholders, for the purpose of recovering the fraudulently issued stock in the new company. It prays also for an injunction against the Micmac Gold Mining Company from transacting any further business, or paying its debts, or transferring any of its property; and generally for other and further relief. The bill does not pray for a cancellation of the alleged fraudulent contract nor for the winding up of either corporation, nor for the aid of the court in putting back the parties as nearly as possible in the position in which Thomas W. Moore and his associates found them, nor for any specific relief; nor does it join as parties Thomas W. Moore and his associates; although it prays that a writ of subpoena may issue against them to make them parties if they should come

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

within the jurisdiction. Both the pleadings and the proofs disclose a sharp controversy on questions of fact. Before passing upon these questions it is the duty of the court to consider the character of the bill now before it. Its whole purpose is manifestly to obtain a receiver. In this district, in *Hutchinson v. American Palace-Car Co.* (C. C.) 104 Fed. 182, 185, Judge Putnam has stated the three essential conditions, compliance with which is necessary to justify the appointment of a receiver:

"First, that the case be fairly within the jurisdiction of the court having in view both the limited jurisdiction of federal tribunals and the true nature of proceedings in equity; second, that some proper final relief in equity be asked for in the bill which will justify the court in proceeding with the case; and, third, that the circumstances calling for a receiver be of a clear and urgent character."

Judge Putnam further observes that upon application for receivership, even though the parties have already agreed upon a receiver, the court is not relieved from looking at the question of jurisdiction, and from inquiring whether the application for receivership is really with the view of obtaining final relief, or merely for the purpose of securing a receivership for the mere sake of a receivership. He adds that, when the subject-matter is of itself of an equitable nature, certain conditions which might be availed of to defeat jurisdiction may be waived, citing *Hollins v. Iron Company*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113. But I find no conditions stated in that case which affect in any way the questions now before me. In the case at bar there is no final relief asked for in the bill. A receivership cannot be held by this court to be final relief; and it cannot be made final by the suggestion that the receivers may bring suits, and in that way obtain some ultimate relief. The purpose of a receivership in equity is to be ancillary to, and in aid of, the primary object of the litigation. It cannot be the primary object of the litigation. The final relief sought by the bill cannot be made contingent upon the incidental relief of a receivership. Many cases have held that where the complainant has prayed for some final relief, and it is found that he is not entitled to the specific relief prayed for, he may nevertheless have other relief consistent with the proofs.

In the case before me there is no ultimate relief prayed for. Although the attention of counsel was expressly called to this matter at the final hearing, they have failed to point out any proper ultimate relief which this court can grant, even though their allegations of facts should be found to be true. And it is not evident from the pleadings, or from the proofs, what final relief could properly be asked for. In the present aspect of the case it is not fitting to enter upon the discussion of the proofs, or to decide whether or not they sustain the allegations of the bill; nor is it necessary to decide whether the bill presents all the parties affected by the subject-matter in controversy, or whether a decree for full and final relief could be passed with the present parties to the bill; nor is it necessary to pass upon other defenses raised by the learned counsel for the respondents. The court can only pass upon the bill as it finds it. In view of the rule an-

nounced by Judge Putnam in the Hutchinson Case, and in accordance with general equitable principles, I must hold that the bill before me does not contain such prayer for proper final relief as will justify the court in proceeding with the case.

The bill is dismissed, with costs for the respondents.

THE SCOUT.

THE A. W. SMITH.

(District Court, E. D. New York. July 21, 1910.)

SALVAGE (§ 7*)—COMPENSATION—ASSISTING VESSEL AFTER COLLISION.

Awards in the nature of salvage made for services rendered to a steam yacht after collision, and when she had been abandoned by her crew, while still under steam with her engines reversed, in keeping her afloat, and preventing further collisions with other vessels.

[Ed. Note.—For other cases, see Salvage, Dec. Dig. § 7.*

Awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.]

In Admiralty. Suits by Martin Haigh and William Deviling by Peter Cahill, and by George F. Barnes against the steam yacht *Scout*, and by August Belmont and others against the steam tug *A. W. Smith*. Decrees against the *Scout*. Libel against the *Smith* dismissed.

Peter S. Carter, for plaintiffs Haigh and another.

Foley, Martin & Nelson, for plaintiff Cahill.

Kneeland & Harison, for plaintiffs Belmont and others.

MacFarland, Taylor & Costello, for plaintiff Barnes.

Kneeland & Harison, for *The Scout*.

Harrington, Perkins & Englar for *The A. W. Smith*.

CHATFIELD, District Judge. The *Scout* was injured while entering the gateway of the Erie Basin, at high speed. The actual blow was occasioned by the movements of the *Scout* under a reversed engine, the captain of the *Scout*, immediately upon the imminence of collision, assuming that it was his duty to reverse. While perhaps he cannot be blamed for forming that conclusion under the circumstances, nevertheless the fact that his actions seem to have made the collision inevitable is sufficient to relieve the *Smith*, there being no negligence on the *Smith's* part prior to the time when the engines of the *Scout* were reversed. For that reason the libel against the *Smith* must be dismissed.

The injuries to the *Scout* by reason of the collision caused her to settle by the head, but her watertight bulkheads did not give way and she remained afloat, moving rapidly astern under the reversed engine, in such a direction as to pass entirely around the *Smith* and into the Basin. Her speed astern was such as to carry her entirely across the Erie Basin and into collision with the steamer *Luckenbach* before she could be reached by any one. In the meantime the crew had climbed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

on board the Smith, while the Scout was working around the Smith under the reversed engine, and the Smith proceeded to turn around and follow the Scout. As the Scout touched the Luckenbach, Haigh succeeded in getting on board and making what appears to be a brave and quick-witted attempt to prevent further loss and any possible danger by shutting off the engines and pulling the fires, which had to be done in a space where the possibilities of danger to himself were very great. While he was occupied in this, the exact occurrences being accompanied with so much excitement that none of the parties seem to have a satisfactory recollection of just the order of events, the Smith caught up with the Scout, and the crew of the Scout again came on board, the engineer of the Scout then going down to the engine room to see about his engines and fires. The tug Moran also came alongside of the tug on the other side from the Smith, and from that time on both the Moran and the Smith lent the proper amount and kind of aid in supporting the bow of the Scout, arranging a sling with hawsers, standing by her during the night, and leaving in the morning after about 10 hours of service. The Smith continued to assist the Scout until she was placed in a dry-dock some three or four hours later.

Under the circumstances, the Moran and the Smith should be compensated for their services in the nature of salvage, not for services under great danger nor of extreme difficulty. The repairs of the Scout which must be borne by the owner are considerable, and, if the whole situation is taken into account, it would seem that 10 per cent. of the Scout's value ought to compensate the different parties for what they did. I will allow Haigh \$400, the Moran and her crew \$700, and the Smith and her crew \$700.

While the services of the Smith were longer in duration, there was nevertheless some obligation on her to do what she could, inasmuch as she had been in collision with the vessel; and the services of the Moran, while they were not called for by any relation between the Moran and the Scout, nevertheless accomplished no more than the services of the Smith.

As to the engineer, who apparently suggested to Haigh his action at the same time that the idea occurred to Haigh, I think the matter should be left to be adjusted between themselves.

UNITED STATES v. ILLINOIS CENT. R. CO.

(District Court, N. D. Iowa, C. D. June 23, 1910.)

MASTER AND SERVANT (§ 13*)—HOURS OF SERVICE—REGULATION—INTERSTATE CARRIERS—STATUTES—"DUTY."

Act March 4, 1907, c. 2939, § 2, 34 Stat. 1415 (U. S. Comp. St. Supp. 1909, p. 1170), provides that it shall be unlawful for any common carrier subject to the act to require or permit any employé subject thereto to be or remain on duty for a longer period than 16 consecutive hours, and whenever such employé has been continually on duty for 16 hours he shall be relieved, and not required or permitted again to go on duty until he has had at least 10 consecutive hours off duty; and no such employé who has been on duty 16 hours in the aggregate in any 24-hour period shall be required or permitted to continue or again go on duty without having had at least 8 consecutive hours off duty. The act further provides in section 1 that the term "employés" as used in the act, shall be held to mean persons actually engaged in or connected with the movement of any train. *Held*, that where an interstate carrier had a rule requiring engineers to report 30 minutes before leaving time, during which they were required to overlook their engines in preparation for the trip, to see that they were properly oiled and the brakes O. K., and to connect the engines with their trains, the time so occupied constitutes a part of their time of duty; and this, though it was the custom of the carrier not to strictly enforce the rule.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*

For other definitions, see Words and Phrases, vol. 3, pp. 2283, 2284; vol. 8, p. 7646.]

Action by the United States against the Illinois Central Railroad Company to recover a penalty. Verdict directed for plaintiff.

F. F. Faville, U. S. Atty.

Kelleher & O'Connor, for defendant.

MORRIS, District Judge (orally). The question here is as to the effect of the rule of the company requiring men to report 30 minutes before the leaving time of the train to do the things required by the rule, coupled with the fact that this man did comply with that rule.

I do not think the custom of the company not to strictly enforce the rule makes any difference. This man complied with the rule. He arrived at the engine 30 minutes before the leaving time of the train, and was actually engaged in doing the things required by the rule; and the question here is whether he was during that time, within the meaning of the act, actually engaged in or connected with the moving of that train. That is the question here. In my opinion this man was on duty, within the meaning of the act, from the time he went there and commenced to supervise, or overlook, that engine in preparation for the trip. It does not make any difference whether he was paid for this time or not. That was the time his work and the strain on him began. The work of an engineer, an employé of the railroad, begins when under the rule of the company he is there and is at work in connection with the preparation of the engine for the moving of the train.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

He must look over that engine. He must see that it is oiled up. He must see that the air brakes are all right. He must move the engine down over the tracks and across the switches to connect it with the train. And in my opinion he is on duty, within the meaning of the act, during the time he is doing these things. If he goes there a half an hour before the time to start to do these things, during the time he is there doing them he is on duty. That is my view of it.

As to the constitutional question, the Supreme Court of Wisconsin seems to have pointed out, at least to some extent, a distinction between the wording of the employer's liability act (Act June 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1909, p. 1148]) and the wording of this act, and I prefer to follow the Supreme Court of the state of Wisconsin in that regard, showing the distinction between the acts.

I think the motion will be granted. Just let a verdict be prepared.

HERSKOVITZ & ROTH v. UNITED STATES.

GROSS, ENGLE & CO. v. SAME.

(Circuit Court, S. D. New York. July 1, 1910.)

Nos. 5,592, 5,593.

CUSTOMS DUTIES (§ 37*)—GOOSE SKINS WITH DOWN—"FURS DRESSED ON THE SKIN"—"BIRD SKINS DRESSED IN ANY MANNER."

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 426, 30 Stat. 191 (U. S. Comp. St. 1901, p. 1675), for "furs dressed on the skin," does not include dressed goose skins with the down on. Such articles are dutiable as "bird skins, * * * dressed * * * or manufactured in any manner," under paragraph 425, 30 Stat. 191 (U. S. Comp. St. 1901, p. 1675).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 37.*]

On Application for Review of Decisions by the Board of United States General Appraisers.

The decision below related to merchandise imported at the port of New York, which the Board of General Appraisers described as consisting "of goose skins with the feathers plucked and the down remaining on the skins; the same having been advanced in condition by cleaning and dressing." The Board held that these articles had been properly classified under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 425, 30 Stat. 191 (U. S. Comp. St. 1901, p. 1675), the pertinent portion of which reads as follows:

"Feathers and downs of all kinds, including bird skins or parts thereof with the feathers on, * * * dressed, colored, or otherwise advanced or manufactured in any manner, including * * * manufactures of down, * * * not specially provided for, fifty per centum ad valorem."

Joseph G. Kammerlohr, for importers.

D. Frank Lloyd, Asst. Atty. Gen., for the United States.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HAZEL, District Judge. The rationale of the decision of the Board of General Appraisers, holding that the merchandise, consisting of goose skins with the down on, was assessable at 50 per cent. ad valorem under paragraph 425 of the tariff act of 1897, is based upon the evidence that the skins have been dressed by having a leather dressing applied to them and the feathers cleaned, but not colored, and in the opinion of the Board they had therefore been "otherwise advanced or manufactured"; that because the down was left on the skins does not require a different conclusion than is given when it is removed therefrom.

I think the Board correctly decided the question of classification. The importers contend that as paragraph 425 contains the qualification "not otherwise provided for," and the succeeding paragraph (426) does not include such phrase, that the latter provision is more specific and duty should have been levied under it. Such paragraph reads as follows:

"Furs dressed on the skin but not made up into articles, * * * twenty per cent. ad valorem."

The contention seems to find support in *Zucker & Levett Chemical Co. v. Magone* (C. C.) 37 Fed. 776; but it is unnecessary to apply this holding to this case, for the two provisions in my estimation do not apply to the articles in question.

It is further contended that said merchandise for many years has been held dutiable as fur skins under the paragraph last quoted, and therefore such continued practice of the customs officials must control. Such practice, however, prevailed under the tariff act of 1894 (Act Aug. 27, 1894, c. 349, 28 Stat. 509) and not under the act of 1897. (G. A. 4,213; T. D. 19,714.) Paragraph 425 specifically mentions goose skins "dressed, colored, or otherwise advanced or manufactured in any manner," and the latter portion of the phrase covers the treatment given the skins in question. It is true that the paragraph is not wholly free from the criticism of lack of clearness, in that it does not specifically mention skins with the down on, but refers merely to "feathers and downs of all kinds." Nevertheless, I think the intention of Congress is fairly perceivable, and the fact of leaving the down on the skin is immaterial.

The merchandise has been properly classified by similitude under paragraph 425, and the decision of the Board of General Appraisers is approved.

HAMBURGER & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. June 28, 1910.)

No. 5,301.

1. CUSTOMS DUTIES (§ 37*)—BOUTONNIERES—"ARTIFICIAL FLOWERS"—"TOYS."
Imitation roses of celluloid and metal, which are worn as boutonnieres, chiefly by children on occasions of frolic and fun, and are also used as gifts in prize packages, are not "toys" within the meaning of Tariff Act

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

July 24, 1897, c. 11, § 1, Schedule N, par. 418, 30 Stat. 191 (U. S. Comp. St. 1901, p. 1674), but are dutiable as "artificial * * * flowers," under paragraph 425, 30 Stat. 191 (U. S. Comp. St. 1901, p. 1675).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 37.*

For other definitions, see Words and Phrases, vol. 1, p. 516; vol. 8, pp. 7036, 7818.]

2. CUSTOMS DUTIES (§ 19*)—TOYS—ARTICLES SOLD BY TOY DEALERS.

Articles do not become dutiable as toys because of the mere fact that they are imported and generally sold by toy dealers, nor because they may be used chiefly by children.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 19.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

Brown & Gerry (Allan R. Brown, of counsel), for importers.

D. Frank Lloyd, Asst. Atty. Gen. (William K. Payne, Deputy Asst. Atty. Gen., of counsel), for the United States.

HAZEL, District Judge. The merchandise in question consists of imitation roses made of celluloid and metal, and worn as boutonnières, chiefly by children on occasions of fun and frolic, and also used as gifts found in prize packages. The evidence shows that they are generally sold for two to five cents each at toy stores. They were invoiced as "rose pins," and the importers contend that they are properly classifiable as "toys," under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 418, 30 Stat. 191 (U. S. Comp. St. 1901, p. 1674), at 35 per cent. ad valorem. The Board of General Appraisers, however, affirming the collector, held that they were assessable for duty as artificial flowers, under paragraph 425, 30 Stat. 191 (U. S. Comp. St. 1901, p. 1675), at 50 per cent. ad valorem, under the tariff act of 1897.

There is some testimony tending to show that articles of this description were generally known as toys prior to the enactment of the law of 1897; but such testimony in relation to commercial designation as toys is insufficient to establish the claim. The mere fact that they were imported by dealers in toys, and are generally sold by such dealers, of course, does not justify taking such articles out of the provision under which the assessment was made, which in terms includes "artificial or ornamental feathers, fruits, grains, leaves, flowers, and stems or parts thereof, of whatever material composed." The case of *U. S. v. Cattus*, 167 Fed. 532, 93 C. C. A. 64, presented a somewhat similar question, except that there the articles were known as "shamrocks." It was there contended that the "shamrocks" were toys, within the meaning of the tariff act; but the court, remarking in its opinion that "toys are playthings for the amusement of children," held such articles did not come within that definition. The testimony in the case is to the effect that the adornments or rose pins are chiefly used by children; yet they are clearly not toys or playthings, as those terms are ordinarily understood.

The decision of the Board is affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

COHEN v. UNITED STATES.

(Circuit Court, S. D. New York. June 28, 1910.)

No. 5,117.

CUSTOMS DUTIES (§ 35*)—CLASSIFICATION—SILK ORGANZINE—DAMAGED GOODS
—“ORGANZINE”—“SILK WASTE.”

Silk organzine, damaged in dyeing, is not by reason of the damage removed from the provision for “organzine,” in Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 385, 30 Stat. 185 (U. S. Comp. St. 1901, p. 1668), and is classifiable as such, rather than as “silk waste,” under section 2, Free List, par. 661, 30 Stat. 201 (U. S. Comp. St. 1901, p. 1688).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 35.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

Comstock & Washburn (George J. Puckhafer, of counsel), for importer.

D. Frank Lloyd, Asst. Atty. Gen. (Martin T. Baldwin, Sp. Atty., of counsel), for the United States.

HAZEL, District Judge. The merchandise, which consists of dyed silk in skeins, was classified by the collector and assessed with duty as “silk organzine,” at 30 per cent., under paragraph 385 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule L, 30 Stat. 185 [U. S. Comp. St. 1901, p. 1668]), and the Board of General Appraisers affirmed such classification. The petitioner contends that the merchandise should be free of duty under section 2, Free List, par. 661, 30 Stat. 201 (U. S. Comp. St. 1901, p. 1688), as “silk waste.”

Although additional testimony was taken in this court concerning the trade meaning of the phrase “silk waste,” yet I am satisfied, as was the Board, that the goods became damaged, probably in the process of dyeing, and known to the trade as damaged or cut skeins, but not as silk waste. The use to which the merchandise is put in its damaged condition does not destroy its character or identity as organzine. The Board in its decision says:

“We know of no reason for excluding this article, which retains its character and identity as organzine, from the denominative provision therefor in paragraph 385, which could not with equal propriety be urged to change the classification of any article, if such article when imported is damaged or imperfect. In some instances silk fabrics are imported in a damaged or imperfect condition, but they are nevertheless classified under the provision in paragraph 387 for woven silk fabrics; and the same is true of embroideries which are in a damaged or imperfect condition, but which are classified as embroideries.”

A number of adjudications are cited in support of this view. The importer contends that such decisions are inapplicable to the facts of this case, but I think they support the proposition that organzine which is damaged in dyeing is still subject to classification as organzine.

Hence it follows that the article was properly assessed for duty, and the decision of the Board is affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

THE VENUS.

(District Court, E. D. Louisiana. May 11, 1910.)

No. 14,214.

NEUTRALITY LAWS (§ 4*)—FORFEITURE OF VESSEL—ENFORCEMENT—AUTHORITY TO SUE IN NAME OF UNITED STATES—APPEARANCE BY ATTORNEY GENERAL.

Libel instituted by an informer against a vessel for forfeiture thereof for violating Rev. St. § 5283 (U. S. Comp. St. 1901, p. 3599), prohibiting the arming of vessels against people at peace with the United States, was criminal in its nature, maintainable only in the name of the United States, either express or implied, and primarily for her use and benefit; and hence the Attorney General may intervene and move to dismiss the libel, regardless of the rights of the informer.

[Ed. Note.—For other cases, see *Neutrality Laws*, Dec. Dig. § 4.*]

Libel by Albert J. Olivier against the steamship *Venus* to forfeit the vessel for alleged violation of Rev. St. § 5283 (U. S. Comp. St. 1901, p. 3599), prohibiting the arming of vessels against people at peace with the United States. Dismissed.

Armand Romain, for libelant.

Jno. D. Grace and Sol. Wolff, for claimant.

Charlton R. Beattie, U. S. Atty., and W. J. Waguespack, Asst. U. S. Atty.

FOSTER, District Judge. In this case libelant caused the seizure of the steamship *Venus*, alleging that vessel to be forfeited to the United States, one-half to his use as informer, by reason of her violation of section 5283, Rev. St. (U. S. Comp. St. 1901, p. 3599), now merged into section 11 Cr. Code. Act March 4, 1909, c. 321, 35 Stat. 1090 (U. S. Comp. St. Supp. 1909, p. 1393). Thomas F. Hyland appeared as claimant and filed certain exceptions to the libel. At the hearing of these exceptions the United States attorney appeared, and by direction of the Attorney General intervened in the suit and moved to dismiss the libel.

It was strenuously urged by libelant that the United States was without the right to intervene in the case, that he, as informer, had standing in court to sue for the forfeiture of the ship, not depending in any way upon the action of the government.

I cannot agree with this view. Libelant's rights do not arise from either tort or contract, but merely from the grace of the government in allowing to informers one-half of the penalty recovered. It may be that he had the right to institute the action, but as to this I express no opinion. It is certain, however, that the United States had the right to intervene, as, no matter by whom instituted, the action is criminal in its nature, and could only be in the name of the United States, express or implied, and primarily for her use and benefit. The United States having intervened, any action taken by her is paramount. When she moved to dismiss the libel, it was necessarily the end of the case.

For these reasons, the motion for a new trial will be denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

STROHMEYER & ARPE CO. v. UNITED STATES.

(Circuit Court, S. D. New York. June 28, 1910.)

No. 4,758.

CUSTOMS DUTIES (§ 85*)—APPEAL—ADDITIONAL EVIDENCE—ABANDONED PROTESTS.

Where importers abandoned protests before the Board of General Appraisers without taking testimony, it was within the sound discretion of the Board to refuse to reopen the cases or restore them for hearing; and on appeal to the Circuit Court the importers were not entitled to introduce further evidence, under the provisions of Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 138 (U. S. Comp. St. 1901, p. 1886).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 85.*]

On Application for Review of Decisions by the Board of United States General Appraisers.

Brown & Gerry (James L. Gerry, of counsel), for importers.

D. Frank Lloyd, Asst. Atty. Gen. (William K. Payne, Deputy Asst. Atty. Gen., of counsel), for the United States.

HAZEL, District Judge. No evidence was introduced by the importers before the Board of General Appraisers, and it appears that they abandoned their protest. They now claim that such abandonment was under the mistaken belief that the importations were covered by other protests filed by them. The decision of the collector was affirmed by the Board, and when it became final the importers requested permission to withdraw the abandonment on the ground that it was made owing to a misapprehension. The Board, however, declined to restore the case, and an appeal was then taken to this court, and evidence adduced under rule 11, subject to the objection of the government.

I think this case is controlled by *United States v. China & Japan Trading Co.*, 71 Fed. 864, 18 C. C. A. 335, and *Plummer & Co. v. United States*, 166 Fed. 730, 92 C. C. A. 420. These cases substantially hold that under the customs administrative act of June 10, 1890 (26 Stat. 131, c. 407 [U. S. Comp. St. 1901, p. 1886]), it is necessary for importers to give evidence before the Board, and, not having done so, their protest must be considered abandoned. It is in the sound discretion of the Board to refuse to open a case, or to restore it for hearing, and in this case there is nothing shown to indicate that such discretion was abused. The case of *Cowl v. United States* (C. C.) 124 Fed. 475, upon which the importers rely, is not in point; for there the case was continued, and after some testimony had been taken was held open for the importer to introduce additional testimony, and later the Board decided the case on the ground that the testimony offered was immaterial. In the present case no testimony whatever was taken, and the case was closed by the Board.

The decision of the Board is approved.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

GUARANTY TRUST CO. OF NEW YORK v. METROPOLITAN ST. RY.
CO. et al.

FARMERS' LOAN & TRUST CO. v. SAME.

(Circuit Court, S. D. New York. June 27, 1910.)

1. STREET RAILROADS (§ 58*)—INSOLVENCY—SALE OF ASSETS—POSTPONEMENT.

Where a corporation, organized to take over and operate a street railway in the city of New York then in the hands of a receiver, could not operate the road until its organization and securities had been approved by the Public Service Commission, an application by reorganization committees to adjourn a sale of the assets until an application for such approval could be acted on will be granted.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.*]

2. RECEIVERS (§ 158*)—STREET RAILROADS—INSOLVENCY—PERSONAL INJURY CREDITORS—PRIORITIES.

Personal injury claimants against a street railroad company in the hands of a receiver are not preferred creditors.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 158.*]

3. RECEIVERS (§ 158*)—STREET RAILROADS—INSOLVENCY—LEASES—PERSONAL INJURY CLAIMANTS.

Where a street railway company leased its property, which was subject to mortgages securing bonds, to an operating company, personal injury claimants were only creditors of the lessee, and were not entitled to payment as against the holders of the bonds secured by the mortgages.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 158.*]

In Equity. Bills by the Guaranty Trust Company of New York and by the Farmers' Loan & Trust Company, as successor to the Morton Trust Company, against the Metropolitan Street Railway Company and others. On application for an adjournment of the sale of the railroad company's property. Granted.

L. C. Krauthoff and John C. Spooner, for the application.

LACOMBE, Circuit Judge. This is an application, by the committee representing both series of bonds and also the joint committee which has undertaken reorganization, to adjourn the sale until after their plan of reorganization can be presented to the Public Service Commission and by it considered. It appears that such plan can be so submitted by July 11th.

The petition states quite accurately that the railway system can only be operated by a corporation, and that any new corporation which might be organized to take it over would have to secure the approval of the Public Service Commission to the issue of its securities. A sale of the property, therefore, would not by itself relieve receivers of the burden of operating it. Some one, of course, must keep the cars moving, and there is no one else who can lawfully do so until a qualified corporation appears to undertake the task. It makes no difference to the receivers or to the court whether the time required for the consideration of the plan by the Commission is consumed before or after sale. No doubt the "elements and factors entering into a consideration of the matter are exceedingly numerous and com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plex"; but it must be remembered that for over two years the Public Service Commission has been gathering voluminous statistics from the records of the old company and from those of the receivers. Consideration of the proposed plan may not take so many months as petitioners anticipate. September 27th would seem an appropriate date to which the sale may be adjourned. The receivership will then be three years old.

This application particularly commends itself to the court, because of the statement it contains as to provision for personal injury claims against the New York City Railway Company. From the very inception of the receivership the situation of this group of creditors has been a matter of much concern. It is well settled under the authorities that they are not preferred creditors. 165 Fed. 457. Moreover, they are not creditors at all of the Metropolitan Street Railway Company, which owned the property, but only of the impecunious lessee which operated the road. These mortgage creditors of the Metropolitan are under no legal obligation to give them any interest in the property covered by the mortgage. That they are willing to treat them as if they were not only creditors of the Metropolitan, but also as if they were creditors holding a first mortgage on its property, is most commendable. It shows an appreciation of fairness and equity which speaks well for the plan, whatever it be, which they are about to submit.

KRAEMER & FOSTER v. UNITED STATES.

(Circuit Court, S. D. New York. June 28, 1910.)

No. 5,511.

1. CUSTOMS DUTIES (§ 38*)—CLASSIFICATION—SAWED TALC—"ADVANCED IN VALUE OR CONDITION."

Talc sawed into cubes for use in making gas burners and insulators, the sawing being not merely to remove foreign matter and to put the material in shape for transportation, but to give it certain desired dimensions, has been "advanced in value or condition" within the meaning of Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 614, 30 Stat. 198 (U. S. Comp. St. 1901, p. 1685).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 38.*]

2. CUSTOMS DUTIES (§ 24*)—SIMILITUDE—FRENCH CHALK.

Talc in the form of cubes, which is used in making gas burners and insulators, is dutiable as French chalk by similitude, under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 13, 30 Stat. 152 (U. S. Comp. St. 1901, p. 1627).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 24.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The Board of General Appraisers affirmed the assessment of duty by the collector of customs at the port of New York. The Board's opinion reads in part as follows:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HAY, General Appraiser. The merchandise here under consideration * * * was assessed for duty by the collector as French chalk, * * * apparently on the authority of the decision of this Board in Doggett's Case, G. A. 6665 (T. D. 28,425). From the testimony and an examination of the samples it is quite clear that the merchandise in the two cases is substantially identical. French chalk is defined as a variety of talc, and, while the testimony in this case tends to show that the merchandise imported is not the variety of talc which is generally known as French chalk, it is not in our judgment sufficiently strong to warrant a change in the classification indicated as the correct one in Doggett's Case, supra, and the reasons therein given for the conclusion reached we think apply to the case at bar. An article so nearly identical with one specifically provided for ought not in our judgment to be relegated to some general provision of the law. * * *

Brown & Gerry (Allan R. Brown, of counsel), for importers.

D. Frank Lloyd, Asst. Atty. Gen. (Thomas M. Lane, Special Atty., of counsel), for the United States.

HAZEL, District Judge. The merchandise in question was invoiced as crude talc, and the claim of the petitioners is that under Tariff Act July 24, 1897, c. 11, § 2, Free List, pars. 519, 614, 30 Stat. 197, 198 (U. S. Comp. St. 1901, pp. 1682, 1685), it is entitled to free entry. The indicated paragraphs include:

"519. Chalk, crude, not ground, precipitated, or otherwise manufactured."

"614. Minerals, crude, or not advanced in value or condition by refining or grinding or by other process of manufacture not specially provided for."

The article is imported in the form of cubes, it having been finished by sawing and is chiefly used in gas burners and electric insulation. The sawing of the talc prior to its importation is not merely to remove foreign matter and to put in shape for transportation; for the witness Steward testified that there is a demand in the trade for "finished pieces" of certain dimensions, and the material is ordered by the importer accordingly. Such sawing of the talc advanced its value and condition. Hence the case presented is different from *Schoenemann v. U. S.*, 119 Fed. 584, 56 C. C. A. 104, where the mere cleansing of shells was held by the court not to be a change from their natural state.

I quite agree with the Board of Appraisers that the article is properly classified by similitude as French chalk, and is assessable for duty under the provisions of section 1, Schedule A, par. 13, 30 Stat. 152 (U. S. Comp. St. 1901, p. 1627), of the tariff act of 1897.

The decision of the Board of General Appraisers is affirmed.

GORHAM MFG. CO. v. WEINTRAUB et al.

(Circuit Court, S. D. New York. June 16, 1910.)

1. EQUITY (§ 252*)—PLEADING—EXCEPTIONS TO ANSWER.

Allegations of an answer, constituting new matter and set up by way of defense, are not subject to exception.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 523, 524; Dec. Dig. § 252.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

2. TRADE-MARKS AND TRADE-NAMES (§ 92*)—INFRINGEMENT—PLEADING.

While, in a certain sense, there is analogy between infringement of a patent and trade-mark cases, in the absence of a statute, the court will not, in a trade-mark case, require defendant to embody in his pleading the evidence as to prior use on which he relies to establish his defense.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 102, 103; Dec. Dig. § 92.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 94*)—IN EQUITY—WHEN LIES.

When a bill to restrain infringement of a trade-mark waives the oath of defendant, discovery will not lie.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 94.*]

In Equity. Action by the Gorham Manufacturing Company against Frederick Weintraub and another. Heard on exceptions to answer. Exceptions overruled.

See, also, 176 Fed. 1024.

Hugo Mock (E. T. Fenwick and L. L. Morrell, of counsel), for complainant.

Benno Loewy, for defendants.

HAZEL, District Judge. The single question presented by the exceptions is whether the answer is insufficient and impertinent for failure to state the names of prior users of the alleged trade-mark, and who used the design of a lion and an anchor on silverware before the complainant, and what dealers, if any, had so used it. The exceptions must be overruled. These allegations contained in the answer are new matter, and are set up by way of defense, and hence, according to the decisions, are not subject to exception. *Bower Barff Rustless Iron Co. v. Wells Rustless Iron Co.* (C. C.) 43 Fed. 391. And, moreover, such failure to particularize, assuming the bill demurrable, can only be taken by demurrer. *Barrett v. Twin City Power Co.* (C. C.) 111 Fed. 45; *Penna. Co. v. Bay* (C. C.) 138 Fed. 203.

In a certain sense there is analogy between infringement of a patent and trade-mark cases, yet in the absence of a statute (as in a patent case) the court will not require the defendant to embody in his pleading the evidence as to prior use upon which he relies to establish his defense. The bill waives the oath of the defendant, and in such case discovery will not lie.

The exceptions are overruled.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PEOPLE OF PORTO RICO v. TITLE GUARANTEE & SURETY CO.

(Circuit Court of Appeals, Third Circuit. August 4, 1910.)

No. 56.

PRINCIPAL AND SURETY (§ 119*)—BONDS—CONDITION SUBSEQUENT—ACTS OF OBTIGEE.

Where plaintiff granted an electric railway franchise to the V. Company authorizing and requiring it to construct a railway between certain points within three years, subject to plaintiff's right to amend, alter, or repeal the rights so granted, and before the expiration of such term the rights were repealed, and the construction of the railway without a franchise would have been illegal, the continued existence of the franchise was a condition subsequent, the failure of which discharged the V. Company's sureties from liability on a bond executed to secure the construction of the road within such time.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 119.*]

In Error to the Circuit Court of the United States for the Middle District of Pennsylvania.

Action by the People of Porto Rico against the Title Guarantee & Surety Company. Judgment for defendant, and plaintiff brings error. Affirmed.

At the trial of the cause, the plaintiff having rested, a motion was made by the defendant for a compulsory nonsuit, which the court (Archbald, District Judge) disposed of in the following oral opinion:

ARCHBALD, District Judge. The disposition of this motion depends in the first instance upon the question whether the case is to be governed by the law of Porto Rico or by that which is familiar to us here in the United States, and known as the common or English law. There can be no question that the place where the contract is to be performed is the governing thing in determining the law with regard to it. And that of course depends in its turn upon the character of the contract, and where the contract is to do a certain thing the place where that is to be done is the place that we look to for the law governing it. For instance, there can be no doubt here that the contract with the Vandegrift Construction Company, in accordance with which this bond was exacted and furnished, was to be performed in Porto Rico. But that is one thing, and the bond is another. The bond is an obligation to pay money. It is not an obligation to do a thing. It is conditioned upon a certain thing being done, but that also is exterior to the bond. We look to the contract, which this bond as it were guaranteed, to see the nature of the things that were required of the principal in the bond. But the surety had nothing to do with that. This was not a guaranty that the work should be carried out; it was not an undertaking by the defendant company here to do anything of that kind. It had no opportunity to see that that contract was carried out. It had to rely entirely for that upon the party for whom it became surety. Pure and simple, the contract here is a contract to pay money; \$100,000 is the obligation of the defendant company according to the terms of the bond, conditioned upon certain things. When those conditions are broken, liability attaches. That has got to be kept constantly in mind. Now, ordinarily, where a person gives a money obligation, it is to be paid where he is; where his domicile is or his place of business. If it is a note, and is not made payable at bank or a specific place, demand upon him would be made at his business place, or his residence. If he had no business place, he would be sought out personally. There he would be required to pay, and if he did not pay, his note would be dishonored. I can see no difference with regard to a bond or other money obligation. And a policy of insurance is somewhat similar. And so here. We have, and we must keep that constantly in mind, an obligation to pay money.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 180 F.—41

The cases that have been cited and relied upon to show that the obligation of a surety is to be determined by the place where the contract is to be performed, those cases also being cases as you might say to a certain extent of a money contract, have this distinction: Take the cases where there is a bond for the accounting for moneys to the government, there unquestionably it is at the seat of the government that the money is to be accounted for. Therefore the surety, in undertaking to make good what the principal was to do, binds himself to account there, or to pay if the accounting is not properly done. The government is not called upon to seek him out where he is. It seems to me that in those decisions it is recognized, not only that the principle prevails, but that to a certain extent the cases form an exception, or at least they exemplify the rule and do not depart from it. So with regard to the undertaking by a surety to indemnify a person who had gone onto a bond on appeal; the appeal being taken in the courts of Louisiana and the bond to indemnify being executed in New York. There the solution of the undertaking to make good or indemnify or save harmless the surety in the appeal bond was necessarily to be performed where the damage to the surety accrued, which was in Louisiana, and that also is to be written into that case, and is a distinguishing feature of it. So, as to a guaranty or letter of credit which is given to a person who goes abroad, the obligation or the liability accrues to the extent that the letter of credit is used, and it grows out of the very circumstance that the party to whom it is given draws upon it in that way, and obtains credit and money abroad, that the guaranty is to be there met and performed.

Now in this case, as I have already said, the defendant company did not undertake to carry out the contract in Porto Rico—the construction contract under the franchise that was given to the Vandegrift Construction Company—in case the Vandegrift Construction Company did not. Neither did it undertake to indemnify or save harmless the People of Porto Rico for the failure of that company to so comply. It simply agreed to pay a definite, specific sum of money, which is now demanded of it, in case the conditions were not complied with—in case the company failed to perform that agreement. To illustrate the difficulty that would accrue if it were the case that an obligation of this character is to be governed by the place of performance of the contract which it assumed or became surety for: Suppose the construction company, the principal in the bond, was to build a railroad in the Sahara Desert, an example which I suggested to counsel in the course of the argument, what would be the law that would govern then? Are we to seek out and find the law that prevails there, where possibly there is no law? Or suppose it was to build a pipe line in the Madagascar oil fields; is the law of Madagascar, whatever it may be, if there is any, to be the contract? It is true we have possibly a little different situation here, and these no doubt are extreme cases; but at the same time we have got to square ourselves and see where we are before we lay down a principle which is to be of general application.

Looking to the character of this, which, as I repeatedly have said, is simply an undertaking to pay money, its solution is here demanded of the defendant company and is to be made here. The defendant is not called upon to go with the money to the island of Porto Rico and there tender solution of its bond. If it was a note, the dishonor of it would occur here. The party who held the note would come and demand payment here. Payment is now being demanded here. It is peculiarly true, also, as I might say, although possibly I am insisting too much upon this, but it comes to me, that the defendant here is a corporation, not an individual. I do not know on principle that that makes any difference, except simply to emphasize the circumstance. A corporation is domiciled where it has its corporate existence, and the defendant company is a corporation and citizen of the state of Pennsylvania. It does business here. It sends out its agents elsewhere, and it must become responsible, of course, according to what its agents do in different parts of the world; but at the same time, when it gives an obligation, or a bond, agreeing to pay a certain amount of money, the presumption is, without something else governs it, that it is to pay here—that its liability is to be according to the law by which it is governed here, not abroad, unless there is something that should control it. It is true in this case that the undertaking was with the People of Porto

Rico, a municipality on a distant island, and also that there was to be an approval of this bond there. That is a circumstance that is not to be lost sight of, but it seems to me that it is not controlling. The approval of the bond was merely a signification by the proper officers that the bond was acceptable to them in form and substance—that the sureties were accepted. But that did not alter the circumstance that the defendant company as surety had already become obligated. The surety could not withdraw from that, having once signed and sealed it and parted with it. It was not as though this surety company was making a commercial proposition, as we might say, by letter or in any other form, that was only to become binding upon it in case it received the acceptance and approval of the party to whom it was addressed. This was a perfect obligation when it left the hands of the corporation, and the action of the officials in Porto Rico was merely an indication, a formal indication, called for by the franchise ordinance, that they were satisfied with the responsibility of the surety and with the character of the bond as it read, and that it complied sufficiently with the ordinance to warrant their approval. All these things, and possibly others that might be suggested, it seems to me are controlling in this case, and determine that the place of solution of this bond, of this contract, is here, the payment to be made here, and that, therefore, the law here is the law which, in entering into the bond, it must be assumed that both parties understood was to govern the People of Porto Rico as well as the sureties. In going abroad, if you please, to get security for this work, or, putting it a little more favorably to the plaintiff, the People of Porto Rico, in accepting as a surety on the bond of the Vandegrift Construction Company a corporation of another country, must be assumed to have been satisfied to accept liability upon that bond in accordance with the ordinary rule which prevails that the law of the place of solution—that is to say, the place of performance of that particular obligation—was to be the guiding law in determining responsibility. If I am correct in this view, and that the law of this country rather than the law of Porto Rico governs the liability upon this bond, then it follows naturally that the plaintiff has made out no case.

I do not rest this upon the circumstance that no actual damage has been shown. If that were all, there would be this to be said: That, in the first place, the plaintiff would be entitled to recover nominal damages, which would save a nonsuit possibly, and, on the other hand, I would certainly open the case and give the plaintiff an opportunity to prove substantial damages, if it was in a position to do so. But when we come to determine the responsibility of the defendant on this bond by the law which prevails here, it seems to me that there can be no doubt in the mind of counsel as to what the result must be. The effort has been to escape from that as to which I think there is no escape. Under our law an agreement between the principal and the party to whom the obligation of suretyship is given cannot be materially modified without releasing the surety. That is to say, the surety undertakes to become responsible upon a certain contract, or in accordance with the terms of that contract; that is the full extent of its undertaking. It does not undertake to become responsible for another contract which may be made between the parties; and that virtually is the case when there is a material modification in the existing contract at the time the obligation of suretyship was entered into.

In this case by the two ordinances which were subsequently passed there were very material changes made in the existing contract between the People of Porto Rico and the Vandegrift Construction Company. That it seems to me is as clear as need be. The amending ordinance of the 7th of July introduced new and different provisions, perhaps the most serious one of which was that upon the failure to comply with the particular terms and conditions introduced by the amendment of the fifteenth section of the original ordinance there would be a right of forfeiture, which did not exist under the original contract. Further than that, we have the subsequent ordinance by which all rights under the original were wiped out. I do not doubt that there are some cases where, notwithstanding what may be called the abrogation of an agreement, there may be some responsibility still remaining against the surety upon it; but I do not need to go into that at length, because, if there are any such cases, I do not see that the one we have here comes within any such exception. Here, while the three-year term under which the parties possibly

had a chance to make good was still running, the whole thing was wiped out. They had no chance or possibility after that to do anything. It may be that the delays which had been encountered deserved action on the part of the People of Porto Rico; but that does not enter into the case. When we come to consider the obligation of the surety, all rights, franchises, and privileges under the original ordinance were gone. The People of Porto Rico evidently desired, as they subsequently did, to look to somebody else and get rid of those with whom they had entered into an arrangement by the original ordinance. They reserved the right in the provision of the thirtieth section to annul and abrogate the rights, privileges, and concessions granted, or to amend and alter them.

It has been contended that that justified what was done under the two ordinances to which I have referred. But it does not seem to me that that is a proper construction of that privilege. It reserved the right to recall, as was eventually done; that is to say, to cancel the concessions which had been given. But in doing that they could not take back, and at the same time hold the parties to the performance. They might do one or the other. They might even get new parties to take up the burden that they compelled the other party to lay down; but they could not absolutely wipe out the relations between themselves and the principal in the bond, and then hold the surety because the principal had not performed.

These considerations seem to me to result in simply one thing, and that is that the plaintiff here has no case under the facts which have been proven, and that, therefore, it becomes my duty, which I cannot avoid, to so declare, and to enter the compulsory nonsuit which is asked.

William Jessup Hand, for plaintiff in error.

Severo Mallet-Prevost, John G. Johnson, Williard, Warren & Knapp, and O'Brien & Kelly, for defendant in error.

Before BUFFINGTON and LANNING, Circuit Judges, and BRADFORD, District Judge.

BUFFINGTON, Circuit Judge. In the court below the People of Porto Rico brought suit against the Title Guarantee & Surety Company on an indemnity bond in \$100,000, conditioned as noted below. At the close of plaintiff's testimony that court granted a compulsory nonsuit, and on its refusal to take it off plaintiff sued out this writ. The subject-matter of the controversy, the possibility of the contract being governed by foreign laws, and the variety of questions suggested have resulted in briefs of scholarly and unusually interesting character. But to our mind the crucial point of the case falls within such narrow limits and is ruled by such plain and well-established principles that, without entering into the tempting field of questions suggested, we confine ourselves to the precise one involved.

By ordinance of March 2, 1903, the People of Porto Rico, duly acting by the executive council, granted to the Vandergrift Construction Company, a corporation, and the latter accepted, a franchise to construct a certain electric railway and electric works in the Island of Porto Rico. The ordinance was conditioned on the full completion of the railway and works within three years thereafter, and provided, by section 30, that:

"The rights, privileges and concessions herein granted shall be subject to amendment, alteration or repeal by the executive council."

After certain amendments not here material, as the surety company neither knew of nor assented thereto, the executive council, on Febru-

ary 24, 1905, averring therein that "by the terms and conditions of said grant as the same was passed * * * and accepted by the said grantee, the said franchise, privilege or concession, and all of the rights, grants, or privileges thereunder or appertaining thereto, have been and now are, at the option of the executive council of Porto Rico, subject to revocation, forfeiture or repeal," by ordinance enacted that the ordinance of March 2, 1903, and "all the rights and privileges appertaining or appurtenant thereto, are hereby revoked and forfeited to the People of Porto Rico * * * under the general provisions of section 30 of said ordinance." Whether such repeal was valid or otherwise is a question not before us. That it was valid was and is the position of the People of Porto Rico. That the right of repeal is "not limited as to occasion in any manner" is the language of its counsel, and all parties have seemingly acquiesced in that view. The grantee of the franchise surrendered it, and the latter has reacquired the grant. There is no proof in the case that it has suffered any damage from the nonexercise of the franchise by the Vandergrift Company, and it was stated at bar the railway was subsequently built by another grantee. As we have seen, the reacquiring of it by the island was more than a year before the three years expired which were given to build the works requisite to the use of the franchise. In this state of facts, the plaintiff sought by this suit to recover the penalty on this bond of the defendant, viz.:

"Know all men by these presents that we, the Vandergrift Construction Company, a corporation duly organized under the laws of the state of New Jersey, hereinafter called the principal, as principal, and the Union Surety & Guarantee Company, of Philadelphia, a corporation duly organized under the laws of the state of Pennsylvania, and the Title Guarantee & Trust Company, of Scranton, Pennsylvania, a corporation duly organized under the laws of the state of Pennsylvania, hereinafter called the sureties, as sureties, are held and firmly bound unto the People of Porto Rico, hereinafter called the obligee, in the sum of one hundred thousand dollars, good and lawful money of the United States, for the payment whereof said principal binds itself and its successors, and said sureties bind themselves and their successors jointly and severally firmly by these presents.

"Whereas, by virtue of a certain ordinance enacted by the executive council of Porto Rico, on the 2d day of March, 1903, and approved by the Governor of Porto Rico on the 3d day of March, 1903, granting to said principal the right to build and operate a line of railway between the municipality of San Juan and the Playa of Ponce in the Island of Porto Rico, and to develop electric energy by water or other power for distribution and sale for railway, lighting and industrial purposes, a copy of which ordinance is hereto annexed, the said principal has undertaken and agreed to build and put in operation a line of railway between the municipality of San Juan and the Playa of Ponce, in the Island of Porto Rico, and to build and equip power plants to develop electric energy for the operation of said railway and for other purposes within the period of three years from the date of the acceptance of the said ordinance by the said principal:

"Now, therefore, the condition of this obligation is such that if the said principal shall within three years from the date of the acceptance by it of said ordinance fully complete the work therein authorized in accordance with the conditions therein contained and in accordance with the plans and specifications therefor approved as therein provided; and within the said period of three (3) years from the date of the acceptance by it of the said ordinance shall build, complete and have in operation the entire line of railway authorized therein for such terminal in the municipality of San Juan as may be de-

terminated by the said executive council to its terminal on the Playa of Ponce on a route from Ponce to be determined by the said executive council in accordance with the conditions in said ordinance contained, and in accordance with the plans and specifications therefor approved, as in said ordinance provided, and within the said period of three (3) years from the date of the acceptance by it of the said ordinance, shall also complete and have in operation the entire power plant and transmission lines necessary for operating the said entire line of railway, in accordance with the conditions therein contained, and in accordance with the plans and specifications therefor approved as therein provided; and shall duly perform within the said period of three (3) years, all other terms and conditions in said ordinance required to be performed by the principal within the same period; and shall pay to the obligee any loss or damage accruing against the said obligee by reason of the construction of the works in said ordinance authorized at any time during the period of construction therein limited and before the completion of said work shall have been certified by the Commissioner of the Interior, as in section 35 of said ordinance provided—then this obligation shall be void, otherwise to remain in full force and effect."

Such being the condition of its undertaking, can the obligee in the bond, who has without the knowledge or consent of the surety repealed the franchise, still hold the surety in damages for the noncompletion of a railway which possession of the franchise alone enabled the principal to lawfully build? We think the statement of the question is its own answer. This bond was given for the performance of work which could only be done under the franchise. The continuance of the franchise by the plaintiff was therefore an implied prerequisite to its calling on the surety to perform. To hold otherwise would be to say that if the obligee a year, a month, or a day after the franchise was granted, repealed it, it could still hold the surety to build the disfranchised road. It would in effect be demanding bricks without furnishing straw and be contrary to the common sense of right and wholly at variance with the uniform holdings of courts.

In the *United States v. Arredondo*, 31 U. S. 744, 8 L. Ed. 547, there came in question, after the cession of Florida to the United States, the validity of a land grant made while Florida was owned by Spain. Such grant was coupled with the condition of the grantees settling 200 Spanish families on the land. It was contended by the United States, as successor to the title of Spain, that the grant was forfeited because "the grantee failed to perform the condition of the grant, which required them to commence the establishment of the 200 Spanish families on the land within three years from the date of the grant." In answer to this the court said:

"The condition of settling 200 families on the land has not been complied with in fact. The question is: Has it been complied with in law, or has such matter been presented to the court as dispenses with the performance, and divests the grant of that condition? It is an acknowledged rule of law that if a grant be made on a condition subsequent, and its performance become impossible by the act of the grantor, the grant becomes single. We are not prepared to say that the condition of settling 200 Spanish families in an American territory has been, or is, possible. The condition was not unreasonable or unjust at the time it was imposed. Its performance would probably have been deemed a very fair and adequate consideration for the grant, had Florida remained a Spanish province. But to exact its performance, after its cession to the United States, would be demanding the 'summum jus' indeed, and enforcing a forfeiture, on principles which, if not forbidden by the com-

mon law, would be utterly inconsistent with its spirit. the case required it, we might feel ourselves, at all events, justified, if not compelled, to declare that the performance of this condition had become impossible by the act of the grantors—the transfer of the territory, the change of territory, the change of government, manners, habits, customs, laws, religion, and all the social and political relations of society and of life.”

Indeed, the statement in 4 Ency. 687 that, “whenever by the act of the obligee performance of the condition is rendered impossible, the obligee will be excused from liability for nonperformance,” summarizes the law on the subject.

In *Dwellely v. Dwellely*, 143 Mass. 509, 10 N. E. 468, it was held that where an obligee sought to sell real property under a bond and mortgage, conditioned for maintenance of the obligee, as the contract contemplated such maintenance should be furnished on the land in question, the obligee, who had left the land, was not entitled to foreclose for nonmaintenance. To the same effect are *McKillip v. McKillip*, 8 Barb. (N. Y.) 552, and *Howe v. Hose*, 10 N. H. 89.

In *Stewart v. Cuyler*, 17 Barb. (N. Y.) 482, a bond was given which provided in case of a dispute as to the amounts to be periodically paid for support, for a reference to a county judge for determination. The obligee having requested the judge not to act, it was held he could not recover for breach of the bond.

And in *Pindar v. Upton*, 44 N. H. 358, it was said:

“It is a settled principle that whenever, by the terms or nature of a condition, it cannot be performed without the precedent or concurrent act of the obligee, and he neglects or refuses to perform such act, the condition is saved.”

So, also, in *People v. Bartlett*, 3 Hill (N. Y.) 570, it was said:

“Baron Comyn lays down the rule that the performance of a condition shall be excused by an obstruction of the obligee or by an interruption of the performance by him”—citing *Com. Dig. Title Condition* (L. 6).

Moreover, performance by the surety company became impossible not only by the hindrance of the obligee, but also by the act of law, which, as it is sometimes expressed, “repeals the covenant.” “When a party,” holds *Bradford v. Jenkins*, 41 Miss. 334, “agrees to do a particular thing which is lawful at the time, and the Legislature comes in and makes it unlawful, here the law absolves from the obligation, or, as sometimes expressed, ‘repeals the covenant.’” This has the support of authority:

“If the condition be possible at the time of making it and afterwards becomes impossible by the act of God, the act of law, or the act of the obligee himself, then the penalty of the obligation is saved; for no prudence or foresight of the obligor could guard against such a contingency.” *Blackstone’s Commentaries*, 341; *Irion v. Hume*, 50 Miss. 426, and *Bain v. Lyle*, 68 Pa. 60, where it was held:

“If by act of law the performance of the condition becomes impossible, upon every principle the bond is saved. *Co. Litt*, 206a.”

Applying these principles to the case in hand, it is clear there can be no recovery on this bond. Both by the act of obligee and by act of law it became impossible, before the three years leeway of the bond, for either principal or surety to lawfully build this road. The

power to repeal was reserved and exercised. By that repeal the right of the construction company to, within the three years' term of the bond, complete this road, was taken away. Possibly, for there is no proof to the contrary, the surety could have constructed the road within the three years, and the prevention thereof by the repeal of this ordinance presumably injuriously affected the rights of the surety. "A surety may be discharged by the doing of an act which is legally injurious to the surety, or which impairs his legal rights." *Dwelling-House Co. v. Johnston*, 90 Mich. 170, 51 N. W. 200. Such, being the law, and the island having seen fit to repeal this ordinance and thereby materially and adversely affect the legal rights of the surety without its consent, it follows the surety was released. The repeal of the franchise put an end to the undertaking of the construction company and rendered it impossible for it or its surety to thereafter lawfully construct the work for which this bond was conditioned. The general rule, supported by the best elementary writers, is that:

"When an act of the Legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed." *Ex parte McCardle*, 7 Wall. 510, 19 L. Ed. 264.

These authorities conclusively settle this case if the bond in suit, which was executed, acknowledged, and delivered by the surety company in Pennsylvania, is a Pennsylvania contract. If it be deemed a Porto Rican contract, we have been referred to no Spanish or other authorities which hold to the contrary.

The judgment is therefore affirmed.

BARBER ASPHALT PAVING CO. v. FORTY-SECOND ST., M. & ST. N.
AVE. RY. CO. et al.

(Circuit Court of Appeals, Second Circuit. March 28, 1910. On Rehearing,
June 9, 1910.)

No. 250.

1. EVIDENCE (§ 354*)—BOOKS OF ACCOUNT—ACCOUNTS BETWEEN CONTROLLED
AND CONTROLLING CORPORATIONS.

The facts that the lessee of the property of a street railroad company, which it operated as a part of a consolidated system, also owned a controlling interest in the stock of the lessor and caused its books to be kept with those of other constituent companies at a central office, do not prevent the entries in such books from being prima facie evidence against the lessor in respect to accounts between the two companies, where the books were kept in an orderly way, the transactions were usual and such as would naturally take place between the parties, and no fraud was indicated or charged.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1483; Dec. Dig. § 354.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. STREET RAILROADS (§ 49*)—LEASES—DEALINGS BETWEEN CONTROLLED AND CONTROLLING CORPORATIONS—VALIDITY OF NOTES.

Notes given by the lessor to the lessee company in settlement of advances made for improvements on its property in accordance with the provisions of the lease are also prima facie valid.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 49.*]

3. STREET RAILROADS (§ 49*)—LEASE FOR LONG TERM—CONTRACT RIGHTS PASSING TO LESSEE.

Under a lease for 999 years, given by a street railroad company, conveying all of its property and funds, subject to the incumbrances thereon, also all the benefits and rights arising from all or any contracts, agreements, or leases held by it, in consideration of the payment of dividends on its stock, where the lessee, in pursuance of a contract made by the lessor with another company whose line it held under lease, advanced money for the betterment and equipment of such line, for which the owner gave its note, such lessee was entitled to the same rights in said note its lessor would have had under the contract.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 49.*]

4. STREET RAILROADS (§ 54*)—MORTGAGE—RIGHT TO USE AND INCOME OF PROPERTY.

Under a provision of a street railroad mortgage, giving the mortgagor, until default, the right to the income from the mortgaged or pledged property, the interest on the note of a controlled company which, although made payable to the mortgage trustee, was in fact for an indebtedness to the mortgagor, and held by the trustee in pledge under the terms of the mortgage, belonged to the mortgagor or its successor in interest.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 54.*]

5. STREET RAILROADS (§ 54*)—MORTGAGE—CONSTRUCTION—OPERATION OF PROPERTY BY RECEIVERS.

A mortgage to secure bonds running 100 years, given by a street railroad company which owned a controlling interest in constituent companies, required the mortgagor's stock in such companies to be pledged with the mortgage trustee, and provided that the controlled companies should create no liens on their properties, and incur no indebtedness other than for current operating expenses for a period not exceeding six months, except to the mortgagor, and that all claims against the controlled companies then held or thereafter acquired by the mortgagor should be held in trust for the mortgage trustee as further security for the bonds and be assigned to it on demand. *Held* that, under such provisions, a lessee of the mortgagor, succeeding to all of its property and rights subject to the mortgage, held any indebtedness accruing to it from the controlled companies, however incurred, for operating expenses or otherwise, subject to the trust created by the mortgage, the six months provision being intended only to give that length of time for payment of such expenses by the controlled companies or by the mortgagor, its successor or assigns, but that indebtedness so incurred by them to receivers for the lessee, operating the system, was not subject to such trust.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 54.*]

6. STREET RAILROADS (§ 58*)—RECEIVERS—RIGHT TO USE INCOME FOR OPERATING EXPENSES.

Receivers for the lessee of a street railroad system comprising lines owned by different companies are entitled to use the income from the entire system for the purpose of operating and maintaining the same as a unitary system, notwithstanding the provisions of mortgages on the property or parts thereof.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by the Barber Asphalt Paving Company against the Forty-Second Street, Manhattanville & St. Nicholas Avenue Railway Company and others. On appeal from interlocutory decrees (175 Fed. 154) settling claims by William W. Ladd, receiver of the New York City Railway Company, Frederick W. Whitridge, receiver of the Third Avenue Railway Company, and the Central Trust Company of New York. Reversed.

Dexter, Osborn & Fleming (Matthew C. Fleming and George N. Whittlesey, of counsel), for appellant.

Bowers & Sands (John M. Bowers and Middleton S. Borland, of counsel), for appellee Barber Asphalt Paving Co.

Evarts, Choate & Sherman (Herbert J. Bickford, of counsel), for Whitridge, receiver.

Merrill & Rogers (Alfred H. Holbrook, of counsel), for receiver of Forty-Second St. Ry. Co.

Arthur H. Masten, William M. Coleman, and William M. Chadbourne, for receivers of Metropolitan St. Ry. Co.

Before WARD, Circuit Judge, and HOLT and HAND, District Judges.

WARD, Circuit Judge. When a corporation mortgages its property to secure payment of bonds not due for 100 years, it is reasonable to suppose that it will stipulate for the use of the income of the mortgaged property until default. Likewise, when it leases the mortgaged property for 999 years in consideration of a dividend on its capital stock to be paid by the lessee, it is fair to assume that the lessee will stipulate for the enjoyment of the income of the property until default. And where part of the mortgaged premises consists of a controlling interest in the stock of independent corporations whose property is not affected by the lien of the mortgage, the mortgagee will find it necessary to protect the pledged stock by covenants which will prevent its value from being impaired.

In the case under consideration we have this situation, and default having occurred in payment of rent October 13, 1907, and of interest January 1, 1908, different and inconsistent arguments are made as to the meaning of the covenants in the mortgage. In 1900 the Third Avenue Railroad Company, the mortgagor, pledged a controlling interest in the stock of the Forty-Second Street Railway Company with the Morton Trust Company, afterwards succeeded by the Central Trust Company, trustee under its mortgage to secure the payment of bonds in the year 2000. At the same time it leased all its property to the Metropolitan Street Railway Company, succeeded by the present lessee, the New York City Railway Company, for 999 years.

A settlement of accounts was made, as of April 30, 1907, whereby the Forty-Second Street Railway Company, admitting its indebtedness to the Third Avenue Railroad Company for construction and equipment in the sum of \$6,491,967.44, delivered its note for that amount, with interest at 4 per cent. to avoid unnecessary circuitry, to the trustee of the mortgage, and its note to the New York City Railway Company for a balance of operating indebtedness of \$893,433.30 at

4 per cent. This balance was arrived at by charging the Forty-Second Street Railway Company with interest on said advances for construction amounting to \$980,254.92, which appears to be entirely reasonable.

September 24, 1907, the New York City Railway Company was put into the hands of receivers, who were succeeded by the present receiver, W. W. Ladd.

January 6, 1908, F. W. Whitridge was appointed receiver of the Third Avenue Railroad Company.

February 1, 1908, he was appointed receiver of the Forty-Second Street Railway Company.

May 26, 1908, the receivers of the City Railway Company filed a claim against the Forty-Second Street Railway Company on the above-mentioned note and for a balance of open account of \$107,-830.54. This balance was arrived at by charging the Forty-Second Street Railway Company with interest from April 30, 1907, on the note given the Central Trust Company to the amount of \$181,053.73.

The receiver of the Forty-Second Street Railway Company denies the validity of these claims on the ground that the New York City Railway Company was entitled to no interest at all.

The receiver of the Third Avenue Railroad Company and the Central Trust Company, as trustee, also deny their validity and contend that if valid the New York City Railway Company holds them in trust for the Central Trust Company, trustee of the mortgage of the Third Avenue Railroad Company.

The whole case has been made to turn upon this question of interest. The master and the court below have dismissed the claim of the New York City Railway Company on the ground that, not being entitled to interest, the account between it and the Forty-Second Street Railway Company, with charges for interest struck out, will show the latter to be the creditor instead of the debtor.

The court below has held that because the Forty-Second Street Railway Company was controlled by the New York City Railway Company entries in its books and its giving of notes do not constitute a *prima facie* case against it. This would be true if the transactions themselves were unusual or indicated fraud or imposition. But the books were kept in an orderly way, and everything that was done was consistent with the operation of all the companies as one system. It was natural and proper that the majority stockholders of the Forty-Second Street Railway Company should elect its board of directors; that the books of all the companies should be kept in the office of the New York City Railway Company; that the New York City Railway Company should make advances to the Forty-Second Street Railway Company to maintain its premises, as the lease required it to do. No error or fraud is alleged. Under these circumstances, we think notes given by the Forty-Second Street Railway Company and entries in its books do make a *prima facie* case against it. Moreover that company is no longer controlled by the New York City Railway Company, but is in the hands of the court, and we assume that the

receiver will faithfully discharge his duty by making any proper defense.

The Third Avenue Railroad Company, as lessor, gave to the Metropolitan Street Railway Company, lessee:

"Also all the benefits and rights arising from all or any contracts, leases or agreements which the party of the first part now has or may hereafter be entitled to; also all the lands and tenements, above described, and all easements, fixtures, personalty and property of every description of the party of the first part, which franchises, rights and property so leased and demised are subject to the various burdens and conditions by which they are held by the party of the first part."

And the habendum clause provided:

"And subject to the provisions of this agreement the said party of the first part doth also hereby grant to the party of the second part the control of the expenditure of the moneys belonging to the party of the first part at the time of the taking effect of this lease, which are in the treasury of the party of the first part, whether on deposit or otherwise, and of all rights of action for the collection of money, and also all rights of action for the enforcement of rights or privileges for the construction, maintenance or operation of a railroad which are proper or essential to such construction, maintenance or operation."

We think that these provisions made the New York City Railway Company, lessee, successor of the Metropolitan Street Railway Company, owner of the note for \$6,491,967.44, subject to the lien of the mortgage. It is entitled to the interest on the note under the provision of the mortgage giving the Third Avenue Railroad Company, its successors and assigns, the income of the whole mortgaged premises until default.

"Article seventeenth. Until default shall have been made in the due and punctual payment of the principal or interest of the bonds hereby secured, or of some part thereof, or in the due and punctual performance and observance of some covenant or condition hereof obligatory upon the railroad company, and until such default shall have continued beyond the period of grace, if any, herein provided in respect thereof, the railroad company, its successors and assigns, shall be suffered and permitted to retain actual possession of all the railroads, franchises and property hereby mortgaged, except the shares of stock and bonds hereinbefore mortgaged and pledged, and to manage, operate and use the same and every part thereof, with the rights and franchises appertaining thereto, and the business thereof, and to collect, receive and take the tolls, fares, earnings, rents, issues, profits and other income thereof; but the railroad company agrees and covenants that such income, after paying the expenses of operating said railroads, the taxes and rentals thereon, and the interest lawfully due and to become due upon said existing first mortgage, shall be first applied to the payment of the interest accruing and maturing upon the bonds issued hereunder and secured hereby."

As all the interest in question has been charged in the account of the Forty-Second Street Railway Company, it must be regarded (if that circumstance is important) as having been collected and paid, except so much as constitutes a part of the debit balance expressed by the note for \$893,433.30 and of the open account of \$107,830.54.

Other clauses of the mortgage provided that the indebtedness of the controlled companies should not be increased, and that, if it were, the Third Avenue Railroad Company and its successors were to pay whatever amount was owed to third parties and to hold what-

ever amount was owed to it as trustee for the trustee under the Third Avenue Railroad Company's mortgage.

"Article third. The railroad company further agrees, covenants and guarantees that no indebtedness of any of said controlled companies (except the current operating debt incurred in the ordinary course of business) shall be created, and that no additional bonds or funded obligations of said companies shall be issued, and no additional mortgage or other liens shall be created upon the railroads, properties, rights, privileges or franchises of said controlled companies or any of them, unless effective provision be made that the evidences of such indebtedness and all such bonds or funded obligations and any such mortgage or lien, shall, immediately upon their creation and issue, be received and delivered by the railroad company, and pledged with the trustee, to be held by said trustee subject to all the trusts of this indenture, and with the same effect as if such delivery and pledge had been made at the date hereof and hereby, or unless in some other manner effective provision shall be made to secure and continue the priority of the lien of this mortgage. And the railroad company further agrees, covenants and guarantees that no further bonds shall be issued or reissued under said existing mortgages or any of them unless the same shall be also forthwith delivered to the trustee hereunder to be likewise held by it.

"And if any company of whose capital stock a majority is now pledged hereunder, or pursuant to this indenture, shall hereafter be pledged hereunder, shall (otherwise than as herein provided) create or suffer to be created any lien or charge upon its property or income, or create or suffer to be created any indebtedness other than indebtedness to the railroad company or for the current operating expenses of such company for a period not exceeding six months, then the railroad company will pay and discharge the same.

"All claims against controlled companies now held or hereafter acquired by the railroad company, shall be, and shall be held by the railroad company as security for the payment of the bonds hereby secured, and the railroad company shall at any time, upon the written demand of the trustee, assign such claims, or deliver the evidences thereof to the trustee."

Under these clauses of the third article of the mortgage the note and the balance of the open account constitute an indebtedness of the Forty-Second Street Railway Company to the New York City Railway Company, however incurred, which the latter was bound to hold in trust for the trustee of the Third Avenue Railroad Company's mortgage as a further security for the payment of the bonds. We are not convinced by the argument that, under the mortgage, the Third Avenue Railroad Company, its successors and assigns, can hold for its own use indebtedness of the controlled companies incurred for their current operating expenses. We think the exception as to the current operating expenses for a period of not exceeding six months was merely intended to fix a time within which such indebtedness need not be actually paid either by the controlled companies or by the mortgagor, its successors and assigns.

The receivers of the New York City Railway Company operating the system as officers of the court are not bound by the lease and so stand in a different position from the company itself. They are entitled to use the income of the mortgaged premises in operating and maintaining the same. Any indebtedness incurred to them by the Forty-Second Street Railway Company they are not bound to hold in trust for the trustee of the Third Avenue Railroad Company's mortgage. This may make proper a separation of the open account as of September 24, 1907, the date of their appointment. The decrees

of June 15 and December 29, 1909, appealed from, are reversed, with instructions to the court below to enter a decree referring the cause to the special master for further proceedings in accordance with this opinion.

HAND, District Judge. I concur in the disposition of the points raised, except that I regard as income a part of the interest to February 1, 1908, payable upon the notes for construction advances. That part is the proportion of such interest which will be borne by the shares of stock not pledged under the mortgage. I would direct the transfer of the note and open account to the trustee with directions to collect in hotchpot any dividends in distribution upon the total indebtedness of the Forty-Second Street Railway. I would further direct the trustee so to marshal the dividends received as first to retain, subject to the lien of the mortgage, enough to pay in full the principal of all construction notes of the Forty-Second Street Railway Company and thereafter to pay over to the appellant such proportion of the remainder—which would represent interest on these construction notes—as the number of shares in the Forty-Second Street Railway, not pledged under the mortgage, bears to the total stock issue outstanding. This proportion of the interest representing in my judgment true income of the mortgagor, as it must have been understood in the mortgage, the covenants, though verbally applicable, do not cover it, and it goes to the mortgagor even though uncollected. *New York Security & Trust Co. v. Saratoga Gas & Electric Co.*, 159 N. Y. 137, 53 N. E. 758, 45 L. R. A. 132. In view of the fact that these views do not prevail with my brethren, I shall forbear giving my reasons at length.

On Rehearing.

WARD, Circuit Judge. We decided this case on the record before us. It is a creditor's action, asking for the marshaling and distribution of the defendant's assets among its creditors, in which a receiver was appointed. The parties before the court were the Central Trust Company, trustee under the mortgage of the Third Avenue Railroad Company, the receiver of the Third Avenue Railroad Company, the receiver of the Forty-Second Street Railway Company, the defendant, and the receiver of the New York City Railway Company, the claimant. The claim under consideration is that of the New York City Railway Company against the Forty-Second Street Railway Company on a note for \$893,433.30 and a balance of open account for \$107,830.-54. All parties appeared and were heard; the trust company and the receivers of the Third Avenue Railroad Company and of the Forty-Second Street Railway Company combining against the claimant.

The special master dismissed the claim on the open account upon the ground that it was not entitled to any interest, and, the items of interest being deducted, the claimant became a debtor instead of a creditor of the Forty-Second Street Railway Company. He dismissed the claim on the note on the ground that the *prima facie* case made by the production of the note was overcome by the fact that the claimant had the stock control of the Forty-Second Street Railway Company.

On exceptions the Circuit Court sustained the master's general conclusions, but sent the case back to him so that the claimant might prove so much of the claim represented by the note as was for "current operating debt incurred in the ordinary course of business."

Thereupon the master after a further hearing reported that no part of the note represented such debt and dismissed the claim on the merits. The Circuit Court having confirmed the report, appeal was taken from both orders to this court.

We did say in our opinion that the note for \$6,491,967.44 covering advances made by the Third Avenue Railroad Company in most part before the lease, the interest on which had always been paid by the Forty-Second Street Railway Company to the lessee of the Third Avenue Railroad Company, belonged to the New York City Railway Company. That question, however, was not necessarily involved, and what we said upon the subject is not to be regarded as binding upon any one, as the parties agree that title to the note is in the Third Avenue Railroad Company.

Upon the record before us the majority of the court are still of opinion: First, that the New York City Railway Company was entitled to interest on the note for \$6,491,967.44 held by the trust company, as income of the leased premises as well as by the practice and agreement of the parties. Second, that it was bound (and its receivers for it, having been called upon to do so) to account to the mortgagee for the note for \$893,433.30 and for the balance of open account down to September 24, 1907, when it went into the hands of receivers, so far as it might be needed to pay the bonded debt, the same being indebtedness of a controlled company. Third, that this indebtedness was not subject to the lien of the mortgage nor mentioned in the decree of foreclosure and did not pass by the sale, although it was mentioned in the notice of sale. The right of the Central Trust Company with reference to it is to enforce the covenant contained in the mortgage as to indebtedness of the controlled companies. Fourth, that between September 24, 1907, and January 12, 1908, when the receiver of the Third Avenue Railroad Company took possession of the leased premises, the receivers of the New York City Railway Company were entitled as officers of the court to claim any balance of open account in their own right. They could not be obliged to account therefor to the mortgagee because they were not bound by the covenant of the mortgagor.

The mortgage contemplated that the Third Avenue Railroad system, the mortgaged premises, should be operated together with the Metropolitan Railway system as a single system, and they have been so operated by the Circuit Court. The first consideration in the case of public service corporations is performance of the duties due the public. For this reason the court's officers are entitled to use the whole income of the whole system, however derived, in operating and maintaining it. *Barton v. Barbour*, 104 U. S. 126, 135, 26 L. Ed. 672; *International Trust Co. v. Decker Bros.*, 152 Fed. 78, 83, 81 C. C. A. 302, 11 L. R. A. (N. S.) 152.

This complicated and confusing case was remanded for further proceedings in order that any defense not set up because of the special master's ruling as to the claimant's prima facie case might be availed of. The record is very loose, even for a dependent proceeding in an equity cause. The only thing in the nature of a pleading is the statement of claim by the receivers of the New York City Railway Company and the objection to it by the Central Trust Company. Still, the rights of the trust company in respect to the claim have with the consent of all parties been considered, and we think they may be disposed of without the necessity of another independent proceeding. If further testimony is needed for the final disposition of the cause, it can be taken before the special master.

DULUTH S. S. CO. v. PITTSBURG S. S. CO.

(Circuit Court of Appeals, Sixth Circuit. July 13, 1910.)

No. 2,027.

COLLISION (§ 40*)—STEAM VESSELS MEETING—MUTUAL FAULT.

A collision occurred at night on Lake Superior between the steamer Sylvania, going down, and the steamer Bessemer, going up. The vessels saw each other when three-fourths of a mile apart, each having the other about one-half point on her starboard bow and showing her green light. At that time they exchanged a passing signal of one whistle, but the Sylvania proceeded on her course or under a starboard wheel and continued to show her green light to the Bessemer until just before collision, and too late to avoid it, while the Bessemer proceeded under a port wheel. *Held*, that the Sylvania was in fault for navigating contrary to the agreement; that the Bessemer was also in fault for not stopping and giving alarm signals when it became apparent that the Sylvania was so navigating; and that it involved at least danger of collision, which was shortly after the first exchange of signals.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 40.*]

Appeal from the District Court of the United States for the Northern District of Ohio.

Suit in admiralty by the Pittsburgh Steamship Company against the Duluth Steamship Company, and cross-libel. Decree for libellant, and respondent appeals. Decree modified.

This is a libel in admiralty of the Pittsburgh Steamship Company against the Duluth Steamship Company in the United States District Court for the Northern District of Ohio, growing out of a collision of two vessels.

The libel, the answer thereto, and a cross-libel were filed. Much evidence was taken in the form of depositions, and the case was heard before the district judge. Final decree was entered in favor of the libellant, holding that the steamer Sir Henry Bessemer was without fault, and that the steamer Sylvania was solely at fault for the collision, and judgment accordingly, and dismissing the cross-libel. From this decree an appeal was taken by the libelee and cross-libellant, and the case is now heard upon this appeal.

Stated generally, the facts are that about 1 o'clock, on the morning of June 13, 1905, a collision occurred in Lake Superior between the steamer Sylvania, the property of the appellant, and the steamer Sir Henry Bessemer, the property of the appellee, resulting in damage to both vessels, as alleged in their respective libels. The Sylvania was down bound, steaming in a south-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

erly direction, and heavily laden. The Bessemer was up bound, steaming in a northerly direction, without cargo. In the early part of the night, and up to a short time before the collision, both vessels had been navigating in a thick fog, necessitating the sounding of their fog signals regularly. Some 30 minutes prior to the collision, the fog lightened, so that it was possible to see about three-quarters of a mile ahead, when the crew of the Bessemer sighted a steamer going in the same direction, and slightly on her starboard bow. This steamer proved to be the John B. Trevor, which was also the property of the appellee. The Trevor and Sylvania reached a passing agreement, which was to pass port to port. To execute this agreement, the Trevor changed her course $2\frac{1}{2}$ points to starboard, which course was maintained until a point was reached, when she with safety could straighten up and pass the downbound Sylvania. This latter vessel, when sighted by the Trevor, was heading diagonally across the bow of the Trevor, passing from her starboard to her port side, and apparently she did not change her course until she was crossing the Trevor's bow, when she straightened up, passing the Trevor in opposite directions, on substantially parallel lines, from 500 to 800 feet apart. It was when the Sylvania was crossing, or had just crossed, the bow of the Trevor that the Sylvania and Bessemer sighted each other. The colliding vessels were then three-quarters of a mile apart. The Sylvania was 504 feet keel, and the Bessemer 413 feet keel. They were navigating from 7 to 12 miles per hour, approaching each other almost head on.

The range lights are white and situated above the boat, one higher than the other; the lower one being near and above the bow, and the higher one further astern. When approaching the vessel head on, these two lights are closed; that is, in line. As the vessel turns from this position, these lights open, and their relation each to the other aids the navigator in determining her position and course. There are also a red light and a green light. They are situated on the opposite sides of the bow of the vessel. The red light is on the left or port side. The green light on the right or starboard side. A correct understanding of the relative positions of these lights will materially aid in the proper understanding of the case.

Frank S. Masten and Harvey D. Goulder, for appellant.

Hermon A. Kelley, for appellee.

Before WARRINGTON and KNAPPEN, Circuit Judges, and McCALL, District Judge.

McCALL, District Judge (after stating the facts as above). When these colliding vessels became factors in their proper navigation in relation to each other, it was their plain duty to have reached a passing agreement by the exchange of signals for that purpose. But this they failed to do. The Sylvania introduces evidence tending to show that she attempted to establish an agreement with the Bessemer to pass starboard to starboard from the time that she picked up the lights of the Bessemer until the collision became imminent, and had sounded a two-blast signal for that purpose three times, but received no response from the Bessemer. This evidence is contradicted by the crews of the Bessemer and Trevor. The Bessemer introduces evidence tending to show that she had reached a passing agreement with the Sylvania to pass port to port by exchanging one-blast signals with the Sylvania as often as four times, but that the Sylvania continued to steer her course contrary to this agreement. The court below took the view insisted upon by the appellee, and held that the collision was occasioned solely by the fault of the Sylvania. We agree with the trial court to the extent only that the fault of the Sylvania contributed in part to the collision.

A more difficult question arises, however, as to the trial court's action in holding that the Bessemer was not guilty of any negligence that contributed to the collision. The testimony of the crew of the Trevor throws but little light on the situation. Their testimony is that the two colliding vessels exchanged only one single blast signal, and that occurred when the Sylvania was abreast of the Trevor.

The crew of the Bessemer testify that she and the Sylvania exchanged four single blast signals, while the crew of the Sylvania testify that she sounded three two-blast signals, and exchanged only one single blast signal with the Bessemer, and this was just a few moments before the collision. We shall not further notice the evidence of the crew of the Trevor, nor that of the Sylvania in determining the question of negligence on the part of the Bessemer, but base the decision of that question alone on the testimony of the Bessemer's crew, and it shows substantially the following facts: These vessels were three-quarters of a mile distant from each other when first sighted. They were approaching nearly head on, perhaps each was slightly on the starboard quarter of the other. The Sylvania was passing, or had just passed, the stern of the Trevor, showing her green light to the Bessemer, and continued showing her green light until within two lengths from the Bessemer. During this time the two vessels were exchanging one-blast passing signals, and yet the master of the Bessemer saw that the Sylvania was being managed as if under a two-blast signal; that is, steering her course to her left or port side contrary to the signals which the crew of the Bessemer say were exchanged.

The Sylvania had proceeded from a point three-fourths of a mile away to within a length and a half or two lengths of the Bessemer, under an agreement to pass port to port, while all the time she was moving in a direction contrary to the passing agreement, and across the bow of the Bessemer, which had begun to change her course to starboard on exchange of the first passing signal, and up to a few moments before the collision she had swung four points to starboard. The Sylvania was not steered in accordance with the agreement until within a length or two lengths away, when she changed her course, in an attempt to pass port to port. It was then too late, and the collision occurred. When the Sylvania was opposite the stern of the Trevor, she showed her green light to the Bessemer. She was moving as if under a two-blast passing signal, down across the bow of the Bessemer, but exchanging one-blast signals, according to the testimony of the Bessemer crew.

It must have been clear to the Bessemer that something was radically wrong with the Sylvania, or that there was a grave misunderstanding as to the passing agreement, and yet the Bessemer did not stop or blow an alarm signal. "In order to determine where the fault lies, it usually becomes necessary to examine with care the conduct and orders of those in charge of the respective vessels from the time the vessels came in sight of each other to the time they came together." The *Wenona*, 19 Wall. 41, 22 L. Ed. 52. This rule is important here. When the colliding vessels became factors in their proper navigation with relation to each other, they were three-quarters of a mile

apart. Each of them had the other on her starboard quarter about one-half point. Had this relation continued, the vessels would have passed starboard to starboard in safety. The Sylvania was abreast of the Trevor when the second one-blast signals were exchanged, showing her green light to the Bessemer, when on the Trevor's stern, according to the witness, Capt. Hoag, of the Bessemer. He was then asked as follows:

"Q. If the Sylvania was making the course that you have described, would not that indicate danger to you? A. It did when she showed her green light; not before that.

"Q. You could see that she (Sylvania) was swinging by her lights, couldn't you? A. Yes, sir.

"Q. Quite contrary to her signals? A. Yes, sir.

"Q. And then she proceeded in that course from the time she was abreast of the Trevor, at least until just before the collision, when you say you saw her swing slightly, as if under a port helm? A. Yes, sir.

"Q. Where was she when she showed her red light? A. About a length and a half off, a length anyway."

Under these conditions, the Bessemer did not stop nor blow the danger signal.

Witness Bugge, mate of the Bessemer, says that he exchanged one-blast signals with the Sylvania the second time when she was abreast of the Trevor. The third time a little past the Trevor, when she was swinging on her starboard wheel.

He then said to the master:

"There is something wrong with that fellow. He is swinging on his starboard wheel, instead of on his port wheel. I believe.

"Captain: Yes; I believe he is, we will have to stop and back.

"Mate: Yes; we will."

But he did not stop, for the mate says about that time he blew the fourth signal, and then said to the master:

"We will have to back. He is swinging and we will never clear him.

"Captain: All right, back her."

The master and mate of the Bessemer substantially corroborate each other in their testimony, which clearly shows that danger was apparent all this time, and yet the Bessemer was not stopped, nor danger signals given. "The lesson that steam vessels must stop their engines in the presence of danger, or even of anticipated danger, is a hard one to learn, but the failure to do so has been the cause of the condemnation of so many vessels that it would seem that these repeated admonitions must, ultimately, have some effect." The New York, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126.

What was the Bessemer's duty under her own testimony? The master of the Bessemer saw that the Sylvania was not doing her duty under the passing agreement which he says had been reached, and that, if her course was kept up, a collision was inevitable, yet he relied upon the Sylvania to change her course so as to pass according to the agreement as the Bessemer understood it, and he continued to rely upon the Sylvania to avert the accident, until it was too late for either to do so.

To the Bessemer it was a clear case of apparent danger of collision,

with time to avoid it. She could have stopped or blown the danger signal when it was first apparent that the Sylvania was less than three-quarters of a mile away, moving rapidly, and in violation of the passing agreement. *U. S. v. Erie R. R. Co.*, 172 Fed. 50, 96 C. C. A. 538; *Hall v. Chisholm*, 117 Fed. 807, 55 C. C. A. 31; *Lake Transportation Co. v. Gilchrist Transportation Company*, 142 Fed. 89, 73 C. C. A. 313; *The Elphicke*, 123 Fed. 405, 59 C. C. A. 286. As has been seen, it appears that the crew of the Bessemer heard the signal of one blast from the Sylvania when three-quarters of a mile away, which was twice repeated. She was showing her green light, when she should have taken the opposite course and shown her red light. The Bessemer was apprised of the fact that the Sylvania was violating a rule of navigation, and prompt action was required to avoid a collision. "Nothing is better settled than that if a steamer be approaching another vessel which has disregarded her signals, or whose position or movements are uncertain, she is bound to stop until her course be ascertained with certainty." *The New York*, supra.

And again:

"And if the vessels shall have approached within half a mile of each other, both shall reduce their speed to bare steerageway, and, if necessary, stop and reverse." Rule 26 of the White Law.

If it were permissible for those responsible for the navigation of a great vessel having in their care human life as well as property to speculate as to whether they should adopt the safest course or one less safe, when both are equally open to them in the face of real or apparent danger, perhaps the Bessemer under all the facts should escape liability in this case. But such speculation should not be tolerated nor excused. Navigation is fraught with such great danger both to life and property that it would be most hazardous if the courts should approve a rule of action less exacting than that which requires of the officers of vessels when in the face of danger, real or apparent, in all cases, if within the range of possibility, to promptly adopt that course that is the safest and which offers the greatest assurance of avoiding such danger.

A careful examination of the evidence in this case leads to the conclusion that the Bessemer was also guilty of negligence, which contributed to the collision in not stopping and reversing her engines before the vessels came so close together that it was impossible to avoid the accident, and in not blowing the alarm signal. Both vessels were guilty of faults which were concurrent in causing the collision.

The decree below, in so far as it holds that the Bessemer was without fault, will be reversed. In so far as it decrees that the collision was occasioned solely by the negligence of the Sylvania, it will be modified in accordance with the views expressed in this opinion, and the case remanded with directions to ascertain the damage sustained by the Sylvania, and the total amount of damage to both vessels will be divided equally between them.

In other respects the decree below is affirmed. The costs of this appeal will be equally divided.

NOTE.—The following is the opinion of Tayler, District Judge, in the court below:

TAYLER, District Judge. This is a case of collision between libellant's steamer Sir Henry Bessemer and respondent's steamer Sylvania. The respondent has also filed a cross-libel against the Bessemer. The collision occurred about 1 o'clock on the morning of June 13, 1903, on Lake Superior, a short distance south of Whitefish Point. For some time before and some time after the accident the weather was thick and foggy, but at the time immediately related to the accident itself it had somewhat cleared up. While I do not doubt that there was some fog interfering with perfect vision, yet all of the witnesses agree that the lights of the vessels could be distinguished at least a mile away. Both are large vessels, the Bessemer being 413 feet on her keel, with a beam of 48 feet, and the Sylvania 504 feet on her keel, with a beam of 54 feet. The Bessemer was going north, light, and the Sylvania was coming south with a cargo of over 3,000 tons of ore. The whaleback steamer, J. B. Trevor, also belonging to the libellant, was about three-quarters of a mile north of the Bessemer, and consequently passed the Sylvania a very few moments before the collision. It thus appears that those of the Trevor's crew who were on deck had an opportunity to see the movements of the vessels up to the time of the collision.

It seems that practically everybody, on all three of the vessels, who saw the collision and had knowledge of the conditions just preceding the collision, testified. The master and crew of the Trevor, being in the employ of the libellant, may be said to be interested, or at least not wholly disinterested, witnesses, and of course that circumstance must have some weight in determining their credibility. They are more likely to testify in favor of the side which employs them than in favor of the side which does not employ them; but they are less likely, it seems to me, to be interested, and hence to be untruthful or mistaken, than those employed on board a vessel the propriety of whose movements is challenged. In the latter case there is not only the same employer, but a question of propriety of conduct on the part of the very persons who are testifying, or of their immediate associates on board the vessel. So far, therefore, as the mere matter of interest or prejudice is concerned, it seems to me that the testimony of the witnesses on the Trevor is entitled to more weight than that of the officers and crews of the Sylvania and of the Bessemer.

The testimony is irreconcilably conflicting, both as to the signals which passed between the Sylvania and the Bessemer and as to their relative locations as affecting the natural movement which each one was likely to expect the other to make. The Bessemer claims that she and the Sylvania four times exchanged one-blast signals for the vessels to pass port to port, the last exchange occurring immediately before the collision. The Sylvania, on the other hand, claims that she twice gave the signal of two blasts for the vessels to pass starboard to starboard; that the Bessemer did not answer either; that she then gave another signal of two blasts, to which the Bessemer responded with one blast, to which the Sylvania replied with one; and then in endeavoring to make what the captain said was impossible to do, but was the best he could do, the effort to pass port to port, the collision occurred. The Bessemer claims that when the Sylvania was passing the Trevor on the Trevor's port side, and some 600 feet away, she showed her red light to the Bessemer, which would mean that the course of the Bessemer was on the port side of the Sylvania.

The crew of the Bessemer claim that she was on her course in a northerly direction a little on the port side (from a quarter to half a point) of the Trevor's course, and gradually crowding in toward the Trevor's course, so that when she should reach Whitefish Point she would be about in the Trevor's wake. The crew of the Trevor who saw the Bessemer say that she was so near to the Trevor's course that she showed both her red and green lights and her range lights were about closed; that if the Sylvania had continued on her course as she was going when passing the Trevor, and the Bessemer had continued on her course as she was going at that moment, the two vessels would have passed each other a considerable distance apart port to port. The crew

of the Sylvania claim that as she passed the Trevor she picked up the Bessemer's green light, which would imply that the natural course of passage, if she and the Bessemer did not change their course, would be starboard to starboard.

It seems to me that the weight of the testimony is overwhelmingly in favor of the claim that the relative positions of the vessels prior to the movement when a dangerous situation arose were as claimed by the crew of the Bessemer and of the Trevor. The wheelman of the Sylvania, while passing, or just after having passed, the Trevor, according to his own testimony and that of his master and mate, starboarded his helm and thus gave his heavy vessel a swing to port. I am inclined to the opinion that this movement was not carefully watched in relation to the movement of the Bessemer; that her speed was not checked to less than seven or eight miles an hour; that, while not foggy, it was yet somewhat murky, and a careful watch was not kept of the situation of the lights of the Bessemer; that he swung too much to port, more than he intended, and he continued to swing too long; and that, before it was discovered that a situation of danger had come about, an effort was made by both vessels to avoid a collision without success. It is possible that neither the Sylvania nor the Bessemer acted with the best judgment at the moment when serious danger of collision was apparent; but I think that both parties were then in extremis, and that neither ought to be held responsible for that which occurred in the way of seamanship after the Sylvania gave the last single blast.

The master of the Sylvania testifies that when the Sylvania blew her two-blast signal the third time, and the Bessemer responded with one blast, the two vessels were from 1,200 to 1,500 feet apart, and the latter vessel was $2\frac{1}{2}$ points to the starboard of the Sylvania's course; that if neither had changed her course the vessels would have passed each other starboard to starboard about 1,100 feet apart. Then it was, so this witness says, that the Bessemer changed her course and the Sylvania gave her one-blast signal. I would not pretend to say that, if these relative positions of the two boats when the Bessemer blew this one-blast signal are given by the master of the Sylvania with substantial accuracy, the results which followed could not occur. If they are, then the movements of the Bessemer must have been so erratic as to challenge the sanity of her wheelman or suggest a purpose on her part to ram the Sylvania; and if of course follows that if, at the time the Sylvania was passing the Trevor, the Bessemer was $2\frac{1}{2}$ points to the starboard of the Sylvania's course, the witnesses from the Trevor are manifestly fabricating their testimony. Nor do I see how it is possible, under all the other apparent circumstances in the case, that the Bessemer could have been in the position which the Sylvania placed her in, at the time when the Sylvania was passing the Trevor, and a collision occur practically exactly astern of the Trevor.

If I were not as well satisfied as I am with the general truthfulness of the account given by the crew of the Bessemer and of the Trevor as to the signals and as to the relative positions of the boats, I would still have to resolve the questions in this case against the Sylvania, because of the failure of her master to act with due care, under the circumstances, when, if it be true, as claimed by the Sylvania's crew, the Sylvania, having twice blown for a starboard to starboard passing without any response from the Bessemer, still continued on her way; her master claiming that he did not apprehend any danger and that he had no doubt that the Bessemer understood the movement of the Sylvania. In a word, I conclude that the Sylvania proceeded on her course under such circumstances as imperatively demanded that she should wholly check her headway, or give the danger signal, or both. I cannot see how the conduct of the master of the Sylvania can be excused, in view of the fact that her signals were not responded to and that the collision occurred. The only excuse given for the failure of the Sylvania to apprehend that the situation was dangerous is that vessels often fail to respond to passing signals. That may be admitted. It proves nothing more than that carelessness does not always result disastrously.

As to what this situation was as respects the point that I have just made, the following reference to the testimony of the chief mate of the Sylvania will show us how that vessel was at fault, in view of the Bessemer's failure to

respond, and in view of the crossed signals. This witness says that he thinks they were about a mile and a half from the Bessemer when he saw her green light and then her open range lights. Quoting from his testimony, we find this: "When we saw her green light and her range light, and the way they headed, we blew her two blasts of our whistle, didn't get any answer and blew two more, waited a short time and didn't get any answer and blew two more. At that time she answered us with one." He then goes on to say that when the Bessemer, with one blast, answered the Sylvania's third signal of two blasts, she was about three-quarters of a mile away. It seems to me that the failure twice to answer the Sylvania's two-blast signal, and then the answer of one blast to her third two-blast signal, imposed a duty of care which the Sylvania conspicuously failed to regard.

Nor can we accept, apart from the considerations which I have already presented, the theory of the Sylvania's crew as to the general conduct of the Bessemer, except upon the theory that the Bessemer deliberately ran out of her course, upon discovering the location of the Sylvania, and ran into her. Certainly the conduct of the Bessemer, under the circumstances of the case as claimed by the libellant, can be otherwise reconciled with no consistent theory of human conduct.

I therefore am clearly of the opinion that the libellant has made out its case and that the cross-libel should be dismissed.

PRESSED STEEL CAR CO. v. WEISSER.

(Circuit Court of Appeals, Third Circuit. July 12, 1910.)

No. 1,339.

1. JUDGMENT (§ 199*)—TRIAL (§ 139*)—TAKING CASE FROM JURY—SUFFICIENCY OF EVIDENCE.

If the evidence in a case is such that a verdict for the plaintiff reasonably could be found by the jury in the honest discharge of their duty, the court cannot properly give a binding instruction for defendant, nor render judgment for him non obstante veredicto.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 367; Dec. Dig. § 199; * Trial, Cent. Dig. § 338; Dec. Dig. § 139.*]

2. MASTER AND SERVANT (§ 286*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.

Evidence considered in an action by an employé in a steel car manufacturing plant to recover for an injury, and held sufficient to warrant the submission to the jury of the questions of defendant's negligence in permitting an electric crane to become and remain out of repair, and whether the injury was due to such defective condition of the crane.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 286.*]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Action by Charles Weisser against the Pressed Steel Car Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. S. Dalzell, for plaintiff in error.

Rody P. Marshall, for defendant in error.

Before LANNING, Circuit Judge, and BRADFORD and ARCHBALD, District Judges.

BRADFORD, District Judge. The Pressed Steel Car Company, a corporation of New Jersey, has taken this writ of error to reverse a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

judgment recovered against it for \$1,000 in the Circuit Court of the United States for the Western District of Pennsylvania in an action of trespass brought by Charles Weissner, a citizen and resident of Pennsylvania.

There are three assignments, of which the third has been abandoned. The other two are to the effect that the court below erred, first, in denying a motion for a judgment non obstante veredicto; and, second, in refusing to give an instruction to the jury that under all the evidence in the case the verdict must be for the defendant. These two assignments present the question whether there was evidence in the case from which the jury in the due exercise of its proper function could find a verdict for the plaintiff. The general rule that in civil causes before a jury a verdict should be rendered in accordance with the preponderance of the evidence cannot by reason of the infirmities of human judgment always be enforced. Reasonable and honest men often widely differ in the conclusion to be drawn from a given state of evidence. If the evidence was such that a verdict for the plaintiff reasonably could be found by the jury in the honest discharge of their duty, the court below properly refused to give a binding instruction for the defendant, and properly denied the motion for judgment non obstante veredicto.

The action was brought to recover damages for personal injuries sustained by the plaintiff while in the employ of the company at its steel car works in Allegheny county, Pa., February 1, 1907. The plaintiff had been so employed for a period of about six months prior to the occurrence of the accident. On entering the service of the company, his employment was checking materials brought into the works for manufacture. He served in that capacity for a month, and then became assistant foreman of the shearing department of the forge plant. In carrying on the operations of the company an electric overhead traveling crane from 20 to 30 feet above the floor was used to unload from cars steel in pieces or slabs from 12 to 18 feet long, 3 to 4 inches wide, and 1 inch thick. The crane load consisted of about 20 such pieces, and was raised by means of chains looped around each end of the load and attached to a hook suspended from the crane. Having been raised to a proper height, the crane carried the load until it was over the desired place of deposit, and then lowered it to the ground or floor. Where it was intended to place one crane load of steel upon another, it was customary to lay two pieces of scantling on the top of the load first lowered in order that the second load when placed on it might be supported without causing any spreading, and also to permit the ready removal of the chains from under the second load. On the day of the accident, and shortly before its occurrence, the plaintiff was directed by the general foreman of the forge plant, owing to the absence of the regular checker, to unload, place, and check a car load of such steel pieces which had just arrived. Before the accident one crane load had been taken from the car, carried to the proper point and lowered to the floor, and the plaintiff had placed scantling on the top of the load. By reason of the proximity of some buggies or tram cars containing steel only a very narrow space was

left to be occupied by the plaintiff in the discharge of his duty, and, when the second crane load came in contact with the first, the steel pieces "kicked out," striking the plaintiff, and causing the injuries for which the jury awarded damages. The operation of the crane at the time of the accident was in charge of one Morrison. In his statement of claim the plaintiff alleges, among other things, that his injuries were sustained through the negligence of the company in failing to have a crane and its appliances in a proper and safe condition, and in failing to make proper inspection of the same. The plaintiff testified:

"I had to get between these two buggies of iron that I had cut during the day—between these buggies of iron and this pile that was hanging in the chains and also the pile on the ground. When pulled in, the crane commenced to slip, and, before I could get out, the weight had gone to the bottom of the pile of iron, and it spread and fell on both my legs. * * *

"Q. Had you ever worked at that crane before? A. When I first started to work there. Only worked a week.

"Q. How long before? A. Over five months.

"Q. When you worked on that crane five months before, was it in good condition? A. Yes, sir. * * *

"Q. Would it slip when it was in good condition? A. No, sir.

"Q. Do you know what would cause it to slip? A. I would imagine that the brake was out of order. * * *

"Q. Did you know that this crane would slip before it hurt you? A. No, sir."

The witness Clark, who was the regular checker and had been working at the crane for some weeks next before the accident, testified:

"Q. Did you work at that crane before the day that he was hurt? A. Yes, sir.

Q. For how long? A. Well, I don't just recall how long. It was for a couple of months before that, may be more. * * *

"Q. For the couple of months that you were at the crane, what did you have to do with the crane? A. When the cars would come in, I had to check the material and take the crane, and lift it where I thought it ought to be placed.

"Q. What did you do with reference to placing it? A. Directed the hook-
ons whereabouts to put it. * * *

"Q. What was the condition of that crane on the day that Mr. Weisser was hurt? A. Well, before and after Charlie got hurt the crane was in no condition to work. The crane would slip when we would have a heavy load.

"Q. For how long before Charlie was hurt would the crane slip? A. That I couldn't say positive. * * *

"Q. Could you tell from the way the crane slipped what was the matter with it? A. Yes, sir.

"Q. What was the matter with it? A. Well, the brake band was loose, and, when we would have a heavy load, they would have to use the power to hold it, and, if you were to shove the lever back into center, the load would go down.

"Q. If the crane was in good working order and you would shove the lever to the center would the load go down? A. It oughtn't to. I don't think it should.

"Q. When this crane was in good order, would it? A. No, sir."

The witness W. G. Weisser, a brother of the plaintiff, who had been employed at the works of the company for a year and a half before the accident, testified:

"Q. Did you know this crane that he was injured at? A. Yes, sir. * * *

"Q. Do you know the condition that crane was in before your brother was injured? A. Yes, sir.

"Q. For how long before? A. Two—possibly three weeks.

"Q. What condition was it in? A. I considered it in very poor condition.

"Q. Explain wherein it was in poor condition? A. When they had a load on—a rather heavy load—it would slip.

"Q. If it was in good condition would it slip with a load on? A. No, sir; it shouldn't. I wouldn't think so. * * *

"Q. How long before this accident do you suppose it was that you had even passed around in this forge department? A. Several times two or three weeks before.

"Q. The last time was probably two or three weeks before this accident?

A. The last time was about a week before.

"Q. Was the crane in the condition that you describe—slipping, the week before? A. It was."

Morrison, a witness for the company, who operated the crane at the time of the accident and had been working in the forge department a considerable time prior to its occurrence, testified:

"Q. What was the condition that crane was in at the time of this accident?

A. It was in perfect condition. * * *

"Q. Did you have any difficulty for a week before this accident, or at any time before this accident, with regard to not being able to hold a load on this crane? A. No, sir. * * *

"Q. Hadn't it been slipping when you had a heavy load on for three weeks before that? A. It never did. * * *

"Q. At the time Mr. Weissner was injured, will you just state what you were doing? A. We were unloading a car of steel, and we had taken one lift out of the car and placed it in the mill, and was taking another lift out and was placing it down on top of the other pile. The steel was all over snow and ice, and, when I lowered, I seen the chain was going to foul, and I held the load until he got some sticks to put under it. He motioned to lower, and I didn't lower because I saw he was in a dangerous position. He motioned a second time and still I didn't lower. He motioned a third time and I lowered, and the bottom pile kicked out and caught his leg.

"Q. You had control of the crane all that time? A. Yes, sir.

"Q. How long do you suppose you held that load there? A. I held it afterwards until they came back from the office and the hook-ons came back, and we lowered it on the same pile.

"Q. The same load? A. Yes, sir.

"Q. Was it the load that injured Mr. Weissner's leg, or was it the kicking out of the material you had already dumped? A. The kicking out of the material already dumped."

There was thus a direct conflict between Morrison and the plaintiff and his witnesses touching the condition of the crane at and before the time of the accident. We do not think that the fact that just after the accident the second crane load was raised and held suspended for some time necessarily excludes the idea that a slipping occurred immediately before the accident. Morrison is the only witness who testified that there was no slipping at the time of the accident. The evidence on the part of the company as to the condition of the crane for some time previous to the accident is by no means conclusive or even satisfactory. Aside from Morrison and the physician who attended the plaintiff, there were only three witnesses examined, Neylon, Antes, and Corcoran. Neylon was the general foreman of the forge department of the company. He testified:

"Q. What do you have jurisdiction over? What are your duties? Just state them generally as general foreman of the department. A. My duties are general supervision of all the work within my department.

"Q. Would you have anything to do with the operation and maintenance of the cranes in your department? A. That's under another department, but they put men in there to handle my work for me. * * *

"Q. Do you know what the condition of this crane was with reference to being in proper repair? A. I couldn't answer that, as I didn't go into the details of the repairs. I have heard it was in first-class condition. That would come under the electrical department."

Antes, who was the foreman of the electrical department of the company, testified:

"Q. You were foreman at the time Mr. Weissner was injured? A. Yes, sir.

"Q. What is your system down there with reference to the repair and maintenance of the cranes? A. The crane operator, coming on duty there morning or night, is to examine his crane thoroughly, and see that it is well oiled, and, in case everything is not as it should be, he is to report it to the repairman before he moves it.

"Q. If there is a report of that kind, does the repairman go to work right away on it? A. Yes, sir. * * *

"Q. If that crane had been out of order, would you or would you not have known it? A. Yes, sir.

"Q. You would have known it because the crane man would have reported it? A. Yes, sir.

"Q. Your inspection of the cranes was done by the crane men? A. Yes, sir; he usually inspected the cranes moved and reported to the repairmen.

"Q. The crane men were the inspectors? A. Not altogether. We have inspectors that have nothing else to do but go around and inspect the cranes, and require them to thoroughly inspect all our cranes at least once a week.

"Q. If this crane had been out of order, and it had been slipping with a heavy load on, it was the duty of that crane man to ascertain that fact by an examination and report it to you? A. To the repairman.

"Q. He is supposed to report to the repairman who has somebody have it done? A. Yes, sir.

"Q. Wouldn't you be the man he would report to? A. If he couldn't get the repairman—called the chief repairman. All reports went to him.

"Q. You said you would have known it if it was out of order? A. I would.

"Q. It might have been out of order and you not know of it? A. The repairman kept reporting to me.

"Q. If the repairman wouldn't report it to you, you would not know it? A. No; I wouldn't.

"Q. You made no examination of it yourself? A. If it was a bad case, I did.

"Q. You don't know anything about this particular crane that Morrison was running that day? A. I didn't hear of it directly that day; no, sir."

Corcoran, who was chain inspector of the company, testified:

"Q. Were you acting in that capacity in February, 1907? No, sir; I had an assistant at that time and I was doing the office work in connection with helping him. He done all the inspecting himself.

"Q. Do you mean inspecting the chains that are attached to the cranes? A. The hook-on chains and the drum chains.

"Q. Did you personally know anything with regard to the condition of this crane in which Mr. Weissner was injured? A. No, sir; nothing more than our reports. I would like to state in that connection with my office work I took all the crane delays—

"Q. That is not in answer to my question. A. Well, as far as I know, nothing."

No crane inspector was produced by the company to testify as to the actual condition of the crane at and before the time of the accident. There was evidence strong enough to be submitted to the jury that the

crane was in an improper and defective condition at that time and that by reason of such condition a slipping occurred which permitted the second crane load to come in contact with the first in such manner as to cause the injuries complained of, and, further, that such defective condition of the crane had continued for such a length of time as to warrant the jury in charging the company with notice thereof and with responsibility for failure to repair it before the time of the accident. While it must be conceded that the case made by the plaintiff was not a strong one, we think, for the reasons above given, that there was no error in refusing a binding instruction for the defendant and in denying the motion for judgment non obstante veredicto.

The judgment below must be affirmed, with costs, and it is so ordered.

PATTERSON et al. v. ROBINSON BROS. & CO.

(Circuit Court of Appeals, Third Circuit. July 6, 1910.)

No. 49 (1,179).

1. TRIAL (§§ 329, 331*)—SUFFICIENCY OF VERDICT—RESPONSIVENESS TO ISSUES.

Plaintiffs sold a clay works plant on leased land to defendants, and gave possession, also contracting to sell defendants the sewer pipe and fittings on hand at a stated price for each grade; the contract providing that, in the event of a disagreement as to the grade, each party should select an arbitrator and the two should fix the grades, but before acting should also select a third arbitrator, who in the event of their disagreement should make a decision, which should be final. Plaintiffs brought an action to recover for the pipe and fittings, which it was alleged defendants had taken and disposed of without any agreement as to the grades, and also the value of other property and materials left on the premises, valued at over \$200, which it was alleged defendants had converted to their own use. *Held*, that a verdict finding "for the defendants on the ground that in the opinion of the jury the plaintiffs did not make proper effort to agree upon a third arbitrator to appraise and value the sewer pipe sued for, as provided in the agreement on which suit is brought," was insufficient to support a judgment, since it made no disposition of the issues as to the other property sued for, upon which evidence was introduced, and was inconclusive and indefinite and ineffectual as to the issue passed on; there being no provision of the contract requiring the parties to take any action toward selecting a third arbitrator, which was the only ground on which it was based.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 774-783; Dec. Dig. §§ 329, 331.*]

2. APPEAL AND ERROR (§ 264*)—RECORD—PRESENTATION OF GROUNDS OF REVIEW—VERDICT.

A verdict is a part of the record, and no exception is necessary to support an assignment of error raising the question of its sufficiency.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1533-1535; Dec. Dig. § 264.*]

In Error to the Circuit Court of the United States for the Middle District of Pennsylvania.

Action by Luther M. Patterson, Joseph C. Lukens, Emily I. Yerkes, and Thomas Robinson, doing business as L. M. Patterson & Co.,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

against Robinson Bros. & Co. Judgment for defendant (159 Fed. 303), and plaintiffs bring error. Reversed.

T. C. Hipple and A. H. Coggins, for plaintiffs in error.

C. La Rue Munson, for defendant in error.

Before BUFFINGTON and LANNING, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. Luther M. Patterson, Joseph C. Lukens, Emily I. Yerkes and Thomas Robinson, doing business as L. M. Patterson & Company, the plaintiffs in error, brought an action of assumpsit in the court of common pleas of Clinton County, Pennsylvania, against The Robinson Brothers and Company, a corporation of Ohio. The suit was duly removed to the court below and there tried before a jury, which after the delivery of the charge of the court returned the following verdict:

"Now, to wit: June 19, 1907, the jury find a verdict for the defendants on the ground that in the opinion of the jury the plaintiffs did not make proper effort to agree upon a third arbitrator to appraise and value the sewer pipe sued for, as provided in the agreement on which suit is brought."

Motions for a new trial and in arrest of judgment were denied and judgment on the verdict was entered for the defendant. There are many assignments of error, of which it is necessary to consider only the last two, as follows:

"The court also erred in receiving and taking from the jury their written verdict in the form it was rendered and in discharging the jury thereafter from further consideration of the cause; said verdict being inconclusive, indefinite and ineffectual and not covering or disposing of all the issues or questions involved in the case, and submitted to the jury. This verdict as rendered by the jury, received by the court and filed in this case is as follows: 'Now, to wit: June 19, 1907, the jury find a verdict for the defendants on the ground that in the opinion of the jury the plaintiffs did not make proper effort to agree upon a third arbitrator to appraise and value the sewer pipe sued for as provided in the agreement on which suit is brought.'"

"The court also erred in directing judgment to be entered and in entering judgment for defendants on said verdict; after overruling plaintiffs' motion for a new trial."

The plaintiffs on and for some time prior to December 16, 1901, were engaged in manufacturing and selling clay sewer pipe, fittings and other clay products in Lock Haven, Pennsylvania, and in the conduct of their business occupied certain premises leased to them by the Lock Haven Clay Works, and at the above mentioned date had on the premises a large quantity of manufactured clay sewer pipe and fittings and other stock for the purposes of their business. It being the intention of the plaintiffs and defendant that the latter should acquire the right to occupy under lease the premises and also the ownership of the manufactured pipe and fittings, an agreement in writing was entered into December 16, 1901, between the plaintiffs as parties of the first part and the defendant as party of the second part in which, among other things, it was provided as follows:

"Party of the second part further agrees to pay, and the party of the first part agrees to accept for all of the manufactured goods now on hand at the

works in Lock Haven, Pa., the following rates and prices. No. 1 pipe and fittings at 87½ per cent. discount, No. 2 pipe and fittings at 92½ per cent. discount. Terms of payment of the above shall be, note of party of the second part, at three months without interest, said note to be dated January 1st, 1902. In the event of any disagreement arising between the parties of this contract as to the grade of pipe and fittings now on hand at works of party of the first part, the same shall be settled by arbitration in the following manner. Each of the parties shall select an arbitrator and these two arbitrators shall adjust and fix the grade of the pipe and fittings between themselves and render their award in writing, and at the time of their appointment, the two arbitrators shall, however, before examining said pipe and fittings select a third arbitrator, who in the event of a disagreement between the two arbitrators first selected shall then be called in and the decision of the third arbitrator shall then be final between the two parties hereto."

A day or two after the execution of this agreement possession of the premises and the manufactured pipe and fittings was delivered to and accepted by the defendant, who it is alleged in the plaintiffs' statement of claim thereafter controlled and disposed of the pipe and fittings as its own property without reference to the provision in the agreement touching arbitration in case of disagreement as to the grade of such pipe and fittings, whereby the defendant waived any such arbitration and became liable to pay to the plaintiffs the full contract price of the pipe and fittings at the time and in the manner specified in the agreement. The plaintiffs in their statement of claim set forth that at the time the defendant took possession of the premises in question there were thereon certain articles and supplies belonging to the plaintiffs, consisting of a car load of salt worth \$90, a car load of lumber worth \$70, two barrels of oil worth \$30, and a typewriter worth \$50, which the defendant thereafter used in its business and for which it promised but failed to pay the plaintiffs. The plaintiffs adduced evidence in support of these various items with the exception, possibly, of their claim to be paid for the typewriter. The seventh point presented by the defendant for instructions was, "The defendant is not liable for the oil, lumber and salt claimed for in the plaintiffs' declaration," but the court below said, "The seventh point I refuse without reading." The sale of this personal property was not effected under the agreement of December 16, 1901, and no provision for arbitration was applicable to it. The arbitration clause did not provide that the parties to the agreement or either of them should choose or agree upon or have anything to do with the choice of a third arbitrator. On the contrary, it expressly directed that, in the event of disagreement between the parties as to the grade of pipe and fittings:

"Each of the parties hereto shall select an arbitrator and these two arbitrators shall adjust and fix the grade of the pipe and fittings between themselves and render their award in writing, and at the time of their appointment, the two arbitrators shall, however, before examining said pipe and fittings select a third arbitrator, who in the event of a disagreement between the two arbitrators first selected, shall then be called in and the decision of the third arbitrator shall then be final between the two parties hereto."

The third arbitrator was to be chosen solely and exclusively by the two original arbitrators and not by the parties to the agreement or either of them. The verdict for several reasons cannot support a

judgment for the defendant. It appears from the verdict itself that so far as it was intended to relate to the agreement of December 16, 1901, the only ground on which it was rendered was that:

"In the opinion of the jury the plaintiffs did not make proper effort to agree upon a third arbitrator to appraise and value the sewer pipe sued for, as provided in the agreement on which suit is brought."

The jury restricted itself to that ground. But the agreement contained no such provision, and consequently the verdict was erroneous and without justification, and could not support a valid judgment. We lay no special stress upon the fact that, while the agreement provided for arbitration to "adjust and fix the grade of the pipe and fittings," the jury regarded the clause as applying to arbitration "to appraise and value the sewer pipe," as the former possibly may include the latter. But there is another ground fatal to the judgment. It is impossible definitely to gather from the verdict in its peculiar form whether the jury took into consideration the claim made by the plaintiffs for the salt, lumber and oil, not furnished under any agreement providing for arbitration. It fairly may be assumed that the jury did not. The verdict is properly characterized in the next to the last assignment as "inconclusive, indefinite and ineffectual and not covering or disposing of all the issues or questions involved in the case, and submitted to the jury." Under these circumstances both principle and authority exclude all doubt of the invalidity of the judgment in question. It is contended, however, that neither of the two assignments under consideration can be sustained owing to the fact that no exception was taken in the court below to the verdict. It was not necessary to except to it. It was and is part of the record, and an exception cannot be essential where it can add nothing to what appears on the face of the record. *F. L. Grant Shoe Co. v. Laird*, 212 U. S. 445, 29 Sup. Ct. 332, 53 L. Ed. 591. Consequently any infirmities in the judgment arising from the nature and form of the verdict on which it is based can be reached by an assignment of error.

For the above reasons the last two assignments must be sustained and the judgment below reversed, with costs, and with a direction for a venire facias de novo; and it is so ordered.

In re VULCAN FOUNDRY & MACHINE CO.

Appeal of STRASBURGER et al.

(Circuit Court of Appeals, Third Circuit. June 18, 1910.)

. No. 1,321.

1. BANKRUPTCY (§ 474*)—EXPENSES OF ADMINISTRATION—CARE OF MORTGAGED PROPERTY.

Expense incurred by a trustee in bankruptcy in caring for real estate which is subject to valid mortgages is presumed to be for the protection of the supposed interest of general creditors, and unless the mortgagees

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

expressly or by necessary implication assent to such expenditures they cannot, in general, be charged with them.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 474.*]

2. BANKRUPTCY (§ 474*)—EXPENSES OF ADMINISTRATION—LIABILITY OF MORTGAGEES.

The real estate of a bankrupt corporation was subject to two valid mortgages. By an order of the referee it was directed to be sold subject to the first mortgage, and a further order provided that, in case it was purchased by the second mortgagee, the latter should pay \$500 in cash, to be subject to the further orders of the court as to expenses and charges, and might use its mortgage as a credit on the remainder of the purchase price. Under such orders it purchased the property and paid in the \$500. *Held*, that it should not in equity be subjected to the payment of a further large sum to cover expenditures previously made by the trustee in employing a watchman for the property and for insurance, and interest paid on the first mortgage, all of which expenses were incurred without its consent.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 474.*]

Appeal from the District Court of the United States for the Western District of Pennsylvania.

In the matter of the Vulcan Foundry & Machine Company, bankrupt. From an order of the District Court, S. B. Strasburger and others appeal. Reversed.

Thomas Patterson, for appellants.

J. Norman Martin, for appellee.

Before LANNING, Circuit Judge, and BRADFORD and McPHERSON, District Judges.

J. B. McPHERSON, District Judge. The Vulcan Foundry & Machine Company was adjudged bankrupt in April, 1907, and in the following June a trustee was elected, who took possession of the real and personal property belonging to the estate. A large part of the personalty had already been sold by a receiver appointed by the Circuit Court, and about \$4,000 derived from such sale was paid to the trustee by the receiver. Afterwards the trustee realized about \$700 more from his own sale of other articles. This sum of \$4,700 was, and is, available for the payment of whatever costs and expenses incident to the administration of the estate should be charged against it. The real estate consisted of a manufacturing plant in the city of Newcastle, Lawrence county, Pa. When the adjudication was entered there were several liens against the realty, but only two need special notice. These were both mortgages—the first, for \$50,000, bearing interest at 5.4 per cent., which was held by a trustee for the bondholders, and the second, for \$30,000, held and owned by the appellants as collateral security for indorsements. This amount was afterwards reduced to \$18,000, with interest from March 16, 1907, and the two liens may therefore be taken as representing \$68,000 at the time the company became a bankrupt. For the respective sums named these two mortgages were valid liens, and by the express provision of section 67, cl. "d," of the bankruptcy act, such liens are not to be affected by proceedings under the statute. Lienholders are therefore the vir-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tual owners of the property pro tanto, and (as a general proposition) this substantial ownership is not to be disturbed without their consent. The Pennsylvania cases also regard the holders of liens as owners of a real, although an equitable, interest in the property, and their rights in that character are carefully guarded. *Bausman's Appeal*, 90 Pa. 178; *Burkholder's Appeal*, 94 Pa. 522; *Wolf's Appeal*, 106 Pa. 545 (where lien creditors of an assignor are spoken of as "substantial owners of his real estate").

It is no doubt true that the federal tribunals support the power of the District Court to sell a bankrupt's real estate discharged of liens—and to that extent the position of a lien is undoubtedly affected—but care is always taken to protect the liens by transferring them to the fund produced by the sale, and their virtual ownership of the property is thus effectively admitted. It is also true that in some cases certain expenses have been charged against lienholders, for example, the expense of selling the incumbered property, and such a charge may no doubt be warranted under some conditions. It would certainly be warranted if the lienholders came into the District Court (as they did in several reported cases) and asked that the sale might be made by that tribunal, for otherwise they would themselves be put to a similar expense in proceeding upon their liens in another forum. But where it is sought to charge a lienholder with the cost of preserving and administering the incumbered property, as distinguished from the cost of its sale, it becomes necessary to consider the particular situation with great care, paying due regard to the rights of those who are in equity part owners of the property, for they cannot be deprived of their valuable interest except in strict accordance with legal or equitable rules. Especially is this true when a lienholder stands upon his lawful rights, and does not assent, expressly or by necessary implication, to the acts for which he is afterwards asked to pay. To make such charges a prior lien upon the fund produced by a sale in effect compels an owner to pay for what he has never ordered—may, indeed, have strenuously opposed—and, under the guise of protecting his interests, may perhaps impair them seriously.

Bankruptcy proceedings take place in a court of equity, and it should always be remembered that holders of valid liens have a statutory right to preferred treatment. If the receiver or trustee has a reasonable belief that the property is worth substantially more than the liens, it may no doubt be his duty to preserve this equity for the general creditors. But—speaking generally—since such steps as may be taken for this purpose are in the interest of these creditors, the cost should be paid by them and not by the lienholders, whose debts, indeed, are often perfectly secure, and receive no benefit from such effort as may be made to turn the equity into cash. We do not attempt to lay down a general rule to cover all cases. This would obviously be impracticable, but we think it is safe to say that the holders of liens are ordinarily entitled to judge for themselves what their interests may require, and that these interests cannot be affected without their consent in the effort to benefit persons whose rights are inferior to their own. We agree with the appellants' counsel that there is a plain analogy between

a situation like this and the cases in which it has been held that mortgage creditors of a private corporation should not have their security displaced by receiver's certificates, unless, perhaps, under extraordinary circumstances. *Farmers' Loan & Trust Co. v. Coal Co.* (C. C.) 50 Fed. 481, 16 L. R. A. 603; *Newton v. Eagle Co.* (C. C.) 76 Fed. 418; *Doe v. Coal, etc., Co.* (C. C.) 78 Fed. 73.

Let us apply these general principles to the particular, and in one respect the unusual, facts of the case in hand. Apparently acting upon a belief, which may have been fully justified, that the general creditors might realize something from the equity in the bankrupt's real estate, certain expenses were incurred by the trustee in administering the property. But the effort was not successful, and the principal question to be decided is how far the lienholder who is chiefly affected may be charged with the cost of the experiment. An order of sale was made by the referee, which preserved the lien of the first mortgage, but discharged the liens of the other incumbrances, transferring all divested rights to the proceeds of sale. But before the property was offered the referee made a further order that, if the second mortgagees should become the purchasers, they should pay only \$500 in cash, and should then be "allowed to use their mortgage to the extent of \$17,500 to apply on the purchase price." And it was further ordered:

"That the \$500 cash payment as aforesaid be held by the trustee subject to the payment of any expenses or commissions that it may hereafter be determined are a proper charge against the mortgage."

But before this order was made the second mortgagees had protested against any sale at which they could not use the mortgage in discharge of their bid, and denied the power of the court to charge any part of the costs or expenses of sale or of the trustee's commissions, so as to reduce in any way the amount of the mortgage. And they appeared before the referee only for the purpose of protesting, declaring that neither the protest nor their appearance "(should) be construed as submitting the question of our rights as lien creditors to the jurisdiction of the referee for determination." Upon the terms referred to a sale was made in March, 1908, to the second mortgagees, who complied with the order and paid \$500 in cash to the trustee. Afterwards, however, a demand was made that they should be charged with the whole expense of preserving and administering the property, and, without going into the details of the subsequent procedure it is enough to add that in the end the court ordered them to pay an additional sum of \$4,454.11, mainly upon this account. From this decree the present appeal is taken, and in our opinion the principal objections must be sustained.

It is unnecessary to decide whether in any event the cost of preserving and administering the estate could be charged against the appellants, who, so far as appears, did not agree, expressly or by necessary implication, that these expenses should be incurred. We need only say that no such charge can be made in fairness under the facts in proof. The appellants accepted and acted upon the referee's order requiring them to pay \$500 of their bid in cash, and permitting them to use their mortgage as a credit upon the remainder of the purchase

money, and we think they acquired a right thereby of which they should not in equity and good conscience be afterwards deprived against their will. The property was bought under distinct and positive terms, which contained no reference to the possibility of such charges as were afterwards made, and we think the District Court should not in effect have substituted other terms for those which had thus been offered and accepted. Here was the order of a competent tribunal—the referee—unmodified and unappealed from, under which the second mortgagees acted in good faith, thereby waiving whatever right they may have had to object to it in toto. Relying upon the order, they bought the property; and, when they ask that the terms in their favor be carried out as well as the terms that affect them adversely, they are met with the statement that a further modification is now to be made. We do not assert that any contract existed between the court and the second mortgagees, but we are clearly of opinion that under the circumstances referred to the decree appealed from should not have been made.

The referee and the court seem to have been misled by supposing that the trustee was acting in the interest of the lienholders when he employed a watchman, paid for insurance, and incurred similar expenses. But he had no authority from the lienholders to spend any money on their behalf, and it is abundantly evident that he was solely considering the contingent interest of the general creditors, and was hoping to realize something for them. The experiment was to be for their benefit, and it is only just that they should pay for it. No doubt much of the money paid out by the trustee was of advantage to both mortgagees, but we do not see upon what ground these virtual owners can properly be asked to pay for what they did not authorize expressly or by necessary implication. No doubt they would have been obliged to protect the property at their own expense if it had been abandoned by the trustee, but this situation did not arise and need not be considered. Moreover, it may be remarked in passing that the expenditure benefited both mortgagees, while only one is now being asked to repay the whole amount. The second mortgagees are also charged with the commissions of the referee and the trustee upon the total amount of their bid, as if it had all been paid in cash, and under the facts of this case these fees must be disallowed.

There are two items that may need a few further words. Part of the charge against the appellants consists of city and county taxes for 1907 and 1908 upon this plant. They have not been paid by the trustee, and we are at a loss to understand upon what theory the charge can be sustained. If it be contended that by virtue of the Pennsylvania statutes these taxes continue to be liens upon the real estate in spite of the sale under the referee's order, obviously the existence and validity of the liens cannot be determined in this proceeding. If they are still liens, they have no claim upon the fund which the District Court is distributing, but must be questioned or enforced by some other proceeding, perhaps in a state tribunal. But, if the liens were discharged by the sale, and were thereby transferred to the fund, it is the fund to which the taxing authorities must in the first instance look for

satisfaction. The appellants have contributed \$500 to the proceeds of the real estate, and in our opinion they were not bound to contribute any further sum. Whether this is to be applied to the specific purpose of paying the taxes in question will be for the District Court to decide in entering a corrected decree.

The remaining item is the interest upon the first mortgage. When the trustee took possession, the interest upon the mortgage had been paid to June 1, 1907. He afterwards obtained leave from the referee to pay the interest falling due upon December 1st of the same year, and this was paid out of the funds in his hands derived from the sale of the personalty. Why it was thought necessary to make this payment does not clearly appear; but no doubt it was believed to be a judicious act, or it would not have been done. The effect of it was to relieve the subsequent purchaser to that extent; for, as the sale was subject to the first mortgage, it was subject also to the arrears of interest, and the price paid by the purchaser may have been influenced by the fact that this semiannual installment had been paid. But the difficulty is that the payment of the interest was part of the same experiment that the trustee was making on behalf of the general creditors. When he asked for permission to pay the December interest, he put it expressly on the ground:

"* * * That it is for the best interest of the estate and the creditors thereof that the said interest be paid and the mortgage be kept valid and extended, and that the trustee therein, the Lawrence Savings & Trust Company, shall not have the right to take advantage of the forfeiture clause in the said mortgage and foreclose the same, to the detriment of the creditors and stockholders of the said company."

He was not thinking of the mortgagees, but of what was probably best for the general creditors and stockholders. If the payment was injudicious, it cannot now be remedied. As it seems to us, there is nothing to be said about it, except that the expectations of the trustee and the general creditors have been disappointed. But this gives them no right to be reimbursed for what has turned out to be a superfluous outlay.

The decree is therefore reversed, with costs, and the court below is directed to distribute the fund in accordance with this opinion.

BRADFORD, District Judge. While I do not dissent from the the conclusion that the decree below must be reversed I do not concur in the reasoning adopted by the court, nor do I assent to the view that there were not some items of expense properly chargeable against the purchase price of the real estate bought by the appellants. The theory that appellants by accepting and acting upon the referee's order requiring a payment of \$500 of their bid in cash, and permitting them to use their mortgage as a credit upon the remainder of the purchase money, acquired a right of which they could not in equity or good conscience be afterwards deprived against their will, I consider utterly unsound. Although not so expressed in terms it is practically the assertion of the doctrine that the court below became contractually bound to the appellants, or was estopped in their favor, with respect to the collection of the actual and necessary cost of preserving the

mortgaged real estate subsequent to the filing of the petition in bankruptcy, and other items of expense properly chargeable against the real estate and transferred to its proceeds upon its sale. This doctrine, in my judgment, is not only unsound but dangerous. Nor is there any principle of equity which can justify its assertion in this case; for the court below, it must be assumed, would have set aside the sale upon the ground of mistake or surprise on the application of the appellants. They, however, did not see fit to make such application. I think that entirely too much weight has been given to the idea that a mortgagee is to be treated as the owner of the mortgaged property. If some person other than the appellants had bought the property in question and the purchase money had been paid into court all proper charges and expenses would undoubtedly have been paid out of the proceeds of sale, and I can perceive no reason why the same result should not obtain here with possibly the exception of the costs of sale. But the decree of the court below appealed from was erroneous in requiring the payment by the appellants of a sum of money covering and including certain items which, in whole or in part, should not properly fall upon the appellants, and therefore should be reversed, with a proper direction by this court as to what items should be allowed as against the appellants out of the purchase price.

J. M. GUFFEY PETROLEUM CO. v. COASTWISE TRANSP. CO.

COASTWISE TRANSP. CO. v. J. M. GUFFEY PETROLEUM CO.

(Circuit Court of Appeals, Second Circuit. June 14, 1910.)

Nos. 208, 209.

SHIPPING (§ 58*)—BREACH OF CHARTER—LIABILITIES.

The owner of a schooner chartered her for six months, with an option of renewal for four years, and the option was exercised by the charterer's assignee, which became, and was treated as, the charterer. The vessel was employed in carrying petroleum in bulk, and the charter provided that the charterer should fit her with wooden bulkheads and make other alterations necessary to fit her for the service. Such fittings were put in, but the bulkheads and expansion trunks which were placed above the main tanks to feed and keep them full were never sufficiently tight, and leaked more and more with use, until a survey showed that the vessel was unseaworthy to carry oil in her then condition, and in accordance with the report of the surveyors the owner demanded her equipment with steel bulkheads and expansion trunks. A day or two later it modified this demand by requiring that the wooden fittings be made tight, and on the refusal of the charterer to comply withdrew the vessel from the charter. *Held*, that such action was justified, and that the owner was entitled to recover damages for breach of the charter, including loss of earnings for the unexpired term.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 58.*]

Appeals from the District Court of the United States for the Southern District of New York.

Suit in admiralty by the J. M. Guffey Petroleum Company against the Coastwise Transportation Company, and cross-suit by the latter

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

against the former company. Decree for respondent in the first suit, and libelant appeals. Decree for libelant in second suit, and both parties appeal. Decree in first suit affirmed, and in second suit modified. For opinion below, see 168 Fed. 379.

Wing, Putnam & Burlingham (Charles C. Burlingham, of counsel), for libelant.

Edward E. Blodgett and J. Parker Kirlin, for respondent.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. May 16, 1906, by a charter party binding the parties, their successors and assigns, the Coastwise Transportation Company agreed to let and Unique Shipping Company agreed to hire the schooner William L. Douglas for the term of six months beginning at noon on April 30th for the hire of \$5,000 per calendar month. The charter party was not a demise of the vessel. The other material provisions of the charter were as follows:

"At the expiration of six months the charterer shall have the privilege of renewing this charter for the period of four years, all the terms and conditions to be the same, except that the charterer shall have the right to terminate said charter at any time upon giving thirty days' notice of its intention so to do. The vessel is to be employed in carrying bulk oil from Port Arthur, Texas, or Sabine Pass, Texas, or any other safe port in the Gulf of Mexico, to New York, Philadelphia, Boston, or Baltimore, as charterer may elect. Charterer is to fit out the vessel with wooden bulkheads so as to enable her to carry the cargo, and make any other alterations necessary to fit the vessel for the trade. The owner is to * * * maintain her in a thoroughly efficient state (with the exception of the cargo arrangements) during the service. Payment of the said hire to be made in cash, in New York, at the end of each month, and in default of such payment or payments as herein specified the owner has the privilege of withdrawing the said vessel from the service of the charterer. When the charter has expired the charterer agrees to remove all bulkheads, piping, and other things he has added to the vessel, and properly clean the holds before redelivering her."

The charterer availed himself of the extension to October 30, 1910. December 6, 1906, the Unique Shipping Company assigned the charter to one Phillips. July 1, 1907, Phillips assigned it to the J. M. Guffey Petroleum Company, and from that time forward the Coastwise Transportation Company, owners, dealt with it as charterer. The charterer employed the vessel by towing her, manned by the owner, between New York, Philadelphia, Boston, or Baltimore and Port Arthur or Sabine Pass, Tex., down light and returning with oil.

The vessel was originally constructed with four steel bulkheads, one forward and one aft and two amidships, making what was called the deep tank. The charterer, in fitting the vessel to carry oil, put in a longitudinal wooden bulkhead fore and aft of the deep tank, reaching from the keel to the between-decks, and four transverse wooden bulkheads, thus making six additional tanks on each side of the vessel from the keel to the between-decks. These wooden bulkheads were set in cement in the floor and between the frames on the sides of the vessel. A wooden expansion trunk, also set in cement, was placed in the between-decks over each tank, the purpose of which was to hold oil and

so keep the tank always full, and at the same time allow for any expansion due to change of temperature.

The District Judge found that the wooden bulkheads put in by the charterer were never entirely tight, and notwithstanding occasional repairs leaked more and more, so that the oil escaped from the expansion trunks into the between-decks, and the separate tanks below deck were not kept tight. This he found to exist to such an extent in August, 1907, upon the return of the vessel from Texas to New York, as to make it dangerous to carry liquid cargo in her. It was, as he found, clearly the duty of the charterer to keep the bulkheads in a condition to enable the vessel to carry bulk oil safely. After some correspondence and negotiation, in which the owners insisted upon steel fittings being put in by the charterer, which the charterer refused to do, the owners called a survey August 23, 1907. Three surveyors appointed by them reported that it was unsafe to carry oil in the vessel as she was; that to make her safe and seaworthy for liquid cargo steel bulkheads and expansion trunks should be fitted; and they recommended that the vessel be not allowed to go to sea with liquid cargo until this had been done. On the same day the owners wrote to the charterer as follows:

"Inclosed herewith please find a copy of report made to us by surveyors after the inspection of above-named vessel for the purpose of ascertaining her seaworthiness and fitness to carry liquid cargo in bulk; and, in view of the recommendations contained therein and the fact that the crew refuses to sail in the vessel in her present condition, we cannot allow said Schr. Wm. L. Douglas to proceed to sea until the aforesaid recommendations have been complied with."

The charterer in reply immediately notified the owners that it would be ready to tow the Douglas as usual to Texas at 3 p. m., and would wait 24 hours for her, and that if she did not go then the towing steamer (also an oil carrier) would proceed to sea without her. The owners refused to let the vessel go and the towing steamer proceeded on her voyage. It is quite clear that neither party wished to terminate the charter and that each was trying to hold the other liable for breach of it; the owners on the ground that the charterer had failed to keep the vessel seaworthy in respect to her cargo fittings, and the charterer on the ground that the vessel was seaworthy and the owners had no right to demand steel when the charter called for wooden fittings.

Negotiations with a view to settling these disputes followed for some days, without result. September 7, 1907, the charterer filed a libel against the owners, claiming \$50,000 estimated loss in getting other tonnage for the unexpired term of the charter and \$30,000 damage for conversion of their oil fittings. September 15th the owners began taking out the oil fittings, which they completed October 23d and re-chartered the vessel for coal. It was their duty to reduce the loss as much as possible by getting employment for the vessel, and we do not think they were obliged to go to the expense of refitting her for the oil trade, which is but a limited market. November 29th the owners filed a libel against the charterer for the cost of removing the oil fittings and estimated loss of earnings for the unexpired term of the charter, aggregating \$100,000.

The District Judge dismissed the libel of the charterer and entered a decree in favor of the owners for \$17,370.41, consisting principally of the cost of removing the oil fittings and charter hire down to 30 days from October 3d, less the earnings received under the coal charter. He treated the conduct of the charterer as amounting to a 30 days' notice of an intention to terminate the charter, as provided therein. It would, in our opinion, be just as reasonable to say that the conduct of the owners amounted to a withdrawal of the vessel because of the failure of the charterer to pay hire August 31st, as the charter entitled them to do. The truth is that neither party wished to terminate the charter. Each, as its libel shows, claimed the benefit of the whole term and charged the other for the complete breach of it. If the charterer intended to terminate the charter, it was bound to remove its fittings; but this it refused to do, and, on the contrary, is asking to be made good for the unexpired term, on the ground that the owners had made a complete breach of the whole contract.

We think the charterer's libel was properly dismissed. The only ground for holding the owners liable would be that on August 23d and 24th they demanded a wrong remedy for a rightful claim, viz., that the charterer should make the vessel seaworthy by putting in steel fittings instead of making the wooden fittings reasonably oil-tight. If this prejudiced the charterer, they might be held strictly to the claim as made; but it did not, because the vessel, which had been found to have been unfit for liquid cargo, was rightly detained. Moreover, the next day, August 25th, and in several subsequent conversations, the owners abandoned the claim as made, and said that all they required was that the charterer should make the wooden bulkheads reasonably oil-tight. They were also willing that the charterer should call a survey and have the question of the vessel's seaworthiness further investigated. The substance of their claim was that the vessel had become unfit to carry oil, and we see nothing to estop them from seasonably abandoning the form in which they presented it August 23d and 24th before the situation of any one had substantially changed. The charterer, however, would do nothing, standing firmly on its position that the owners had made a complete breach of the whole contract August 23d and 24th by refusing to let the Douglas go to sea.

We agree with the District Judge that this refusal was rightful. The decree of the court below is correct, except that the owners should have been permitted to prove loss of earnings for the unexpired term of the charter (*Pierce v. R. R. Co.*, 173 U. S. 1, 19 Sup. Ct. 335, 43 L. Ed. 591), and the court below is directed to modify it in this respect.

As so modified, the decree is affirmed, with costs.

THE WM. J. QUILLAN.

(Circuit Court of Appeals, Second Circuit. July 6, 1910.)

No. 313.

1. SHIPPING (§ 190*)—GENERAL AVERAGE—DAMAGE TO CARGO—LIABILITY OF VESSEL TO CONTRIBUTE—DAMAGE RESULTING FROM CONCEALED DEFECT IN CARGO.

A shipper is not deprived by the maritime law of the benefit of contribution in general average when the peril is caused by a concealed defect in his shipment equally unknown to him and to the shipowner.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 602; Dec. Dig. § 190.*]

General average see notes to *Pacific Mail S. S. Co. v. New York, H. & R. Min. Co.*, 20 C. C. A. 357; *The Santa Ana*, 84 C. C. A. 316.]

2. SHIPPING (§ 190*)—GENERAL AVERAGE—LIABILITY OF SHIP TO CONTRIBUTE TO CARGO LOSS—"TANKAGE."

A schooner was chartered to carry a cargo of garbage tankage, which is a dry powder, the result of the boiling, drying, and pressing of street garbage, and is packed in bags. Owing to the failure of the manufacturer to properly cure and dry out the tankage, the cargo took fire from spontaneous combustion, and the hold was flooded to put out the fire causing damage to the remainder of the cargo not burned. The shipper purchased the tankage from the manufacturer, and had nothing to do with its loading or stowage, and no knowledge that it was not in proper condition, but it was a well-known article of commerce and both shipper and shipowner knew its character. *Held*, that the shipper or his insurer which paid the loss was entitled to recover from the vessel its contribution in general average to the loss caused by the water damage.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 602; Dec. Dig. § 190.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by the Atlantic Mutual Insurance Company against the schooner *William J. Quillan*. Decree for respondent (175 Fed. 207), and libellant appeals. Reversed.

C. I. Taylor and Carter, Ledyard & Milburn (Edmund L. Baylies and Edwin D. Bechtel, of counsel), for appellant.

A. D. Foster and H. L. Cheyney, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. November 25, 1905, Heller, Hirsch & Co. chartered the schooner *William J. Quillan* to carry a cargo of tankage from Barren Island, N. Y., to Savannah, Ga. Tankage is a dry powder, the result of the boiling, drying, and pressing of street garbage, and is packed in bags. Heller, Hirsch & Co. bought the tankage from the manufacturer, and had themselves nothing to do with the making, bagging, or stowing of the same. It has been the subject of transportation for 25 or 30 years, and shippers and shipowners must be taken to have knowledge of its character.

Saturday, January 13th, at about 8 a. m., the schooner sailed from Barren Island with a cargo consisting of 14,515 bags. On the morn-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing of January 14th it was discovered that the cargo was on fire. Thereupon the master deviated to Norfolk as a harbor of refuge, arriving there at 7 p. m. Sunday evening. In the course of the next day or two the city fire engines at his request poured water into the hold and extinguished the fire. Nine hundred and fifty-four bags were found to have been damaged by fire and the remainder by the water used to extinguish the fire. The value of the water-damaged bags less the proceeds of sale was \$5,714.07. The Atlantic Insurance Company, which as insurer of the cargo had paid the loss, filed this libel against the vessel, alleging that a statement of general average which it was the duty of the vessel owners to prepare would show the amount payable by the schooner on account of the cargo sacrificed by the water damage to be \$4,750 or thereabouts. The claimant denied that the shipper was entitled to contribution in general average on the ground that the cargo was not in a fit and proper condition for shipment through the neglect and fault of the shippers in failing to have it properly cured and dried out, and that its spontaneous combustion caused the fire.

The actual cause of the fire was not proved, but the district judge assumed that it was due to the nature of the goods, and, following the case of *Pierce v. Winsor*, 2 Cliff. 18, Fed. Cas. No. 11,150, dismissed the libel on the ground that the shipper was liable for shipping dangerous cargo, although neither he nor the carrier knew of its dangerous condition. Many kinds of cargo are liable to spontaneous combustion when confined in the vessel's hold, if they contain too much moisture, e. g., jute, cotton, lime, coal, hay, and grain. We shall consider the case upon the same assumption of facts as did the district judge.

As there is no pretense that the fire was due to the fault either of the shipper or his servants, the question whether a shipowner, constructively negligent can be brought into a general average adjustment in view of the provisions of section 4282, Rev. St. U. S.,¹ limiting the liability of shipowners for damage caused by fire and of the Harter act, does not arise. We are accordingly relieved of the considerations which we lately discussed in the case of the steamship *Jason*, 178 Fed. 414.

The question to be determined is whether by the maritime law the shipper is deprived of the benefit of contribution in general average when the peril is caused by a concealed defect in his shipment equally unknown to him and to the shipowner. There is very little authority upon the subject, but it has been lately considered by the Court of Appeal and the House of Lords in the case of *Greenshields v. Stephens*, 1 King's Bench, 51 (1908), and Appeal Cases, 431 (1908). The fire in that case arose out of spontaneous combustion in a shipment of coal on the *Knight of the Garter*. Both courts affirmed the judgment of Channell, J., allowing contribution on the ground that the shipper could be deprived of the benefit of contribution in general average only when he has been guilty of actionable fault or negligence. Lord Chief Justice Alverstone and Lord Justices Bulkeley and Kennedy in the Court of Appeal and the Earl of Halsbury and Lords Ash-

¹ U. S. Comp. St. 1901, p. 2043.

bourne, Macnaghten, Collins, and James in the House of Lords were unanimously of this opinion. Mr. Justice Kennedy said at pages 61, 62, 1 King's Bench (1908):

"In the present case there is no actionable wrong. The courts of this country have never laid it down that the mere fact that the mischief arose out of the goods shipped by the person claiming general average deprived him of his right so to claim. There is no absolute warranty by the shipper of safety of carriage in cases where the goods shipped may be openly seen and are known by the shipowners to be by their nature possibly productive of danger. See *Brass v. Maitland*, and especially the judgment of Crompton, J. It was contended by Mr. Hill that, even though there be no liability to action on the part of cargo owners in such a case as the present, yet it is on moral grounds unreasonable and unfair that they should be entitled to claim in general average. For myself I cannot see what there is unreasonable or unfair in their so doing. As between themselves and the shipowner, they have merely shipped that which the shipowner knew he was taking on board with its liability to spontaneous combustion. So, too, with the other shippers—they either knew that the cargo other than their own was coal, or they did not choose to inquire, and, in either case, they took upon themselves the risk of damage arising from the coal's natural tendency to heat. The coal in this case was not exceptionally combustible, nor were the shippers guilty of any negligence in the shipping of it. Under those circumstances, it seems to me that there is nothing unfair or unreasonable in the shippers of the coal retaining their rights in common with others to a general average contribution in respect to such of their goods (not having been actually on fire) as have been sacrificed for the safety of the general adventure."

The conclusion arrived at by the highest courts of the greatest commercial nation in the world ought to have weight everywhere. We prefer to follow it, notwithstanding that it may be inconsistent with the views expressed by Justice Clifford at circuit in *Pierce v. Winsor*, supra. In that case mastic, a new article of commerce, had been shipped on a general ship from New York to San Francisco. On the voyage it melted and then solidified so that the shipowners were put to great expense to free it from the other cargo and from the ship. For this they sued the shippers and were allowed to recover. Mr. Justice Clifford said:

"Neither party had any knowledge of the dangerous character of the article, so that it may be said that there was no actual fault on either side, except such, if any, as the law implies from the nature of the transaction. The charterers put up the ship as a general ship, and under the terms of the charter party the ship was at their sole use and disposal to ship such lawful goods as they might think proper; and it was expressly stipulated that their stevedore should be employed by the owner in Boston. The stowage of the mastic was made in the usual way, and it is not disputed it would have been proper, if the article had been what it was supposed to be when it was received and laden on board. Want of greater care in that behalf is not a fault, because the master had no knowledge or means of knowledge that the article required any extra care or attention beyond what is usual in respect to other goods. The proper precautions in respect to loss in the vessel, therefore, had been taken, if the goods had not been of a dangerous character, which was wholly unknown to the master or the owner of the ship, or his agents. But damage was occasioned, and loss and expense were incurred, and the only question is, Who must suffer? Where the owners of a general ship undertook that they would receive the goods and safely carry and deliver them at the destined port, it was held in *Brass v. Maitland*, 6 El. & Bl. 481, that the shippers undertook that they would not deliver to be carried on the voyage packages of goods of a dangerous nature, which those

employed on behalf of the shipowner might not on inspection be reasonably expected to know to be of a dangerous nature, without expressly giving notice that they were of a dangerous nature. Such was the principle laid down in that case, but the reasoning of the court in support of the rule is even more applicable to the present case. Although those employed on behalf of the shipowner have no reasonable means, during the loading of a general ship, to ascertain the quality of the goods offered for shipment, or narrowly to examine the sufficiency of the packing of the goods, the shippers, says Lord Campbell, have such means, and it seems more just and expedient that although they were ignorant of the dangerous quality of the goods, or the insufficiency of the packing, the loss occasioned thereby should fall upon the shippers than upon the shipowner. Accordingly, he held that the shippers, and not the shipowners, must suffer, if, from the ignorance of the former, a notice was not given to the latter, which they were entitled to receive, and from the want of notice a loss had arisen, which must fall on either the shipper or the owner of the vessel."

We think an erroneous view was taken of the case of *Brass v. Maitland*, supra. If Mr. Justice Clifford's construction was right, it is strange that none of the distinguished judges commented on it in the *Greenshields Case* as inconsistent with the view there expressed. But we think the construction was erroneous. The first count in the declaration in *Brass v. Maitland* alleged that the complainants, the shippers, delivered to the defendants, the shipowners, a corrosive substance in casks which were insufficient, whereby the contents escaped and destroyed the cargo. To this the defendants pleaded that they purchased the goods ready packed from a third person, and were not themselves or by their servants guilty of negligence. A demurrer to this plea was sustained, Crompton, J., dissenting. Lord Campbell, C. J., said at page 485:

"The third plea, which is the first demurred to, and which is pleaded to so much of the first count as relates to the casks, I consider insufficient. Waiving the objection that it seeks to divide the dangerous quality of the goods and the insufficiency of the packing into separate and distinct causes of action, I think that it discloses no defense as to the insufficient packing; for it only denies that the defendants personally, or by their servants, packed the casks, and alleges that they employed Burnet & Sons to pack them, and that neither the defendants nor Burnet & Sons knew or believed, or had reason to know or believe, that the casks were not proper or sufficient. The first count is not in deceit, founded on any guilty knowledge. The allegation of the insufficiency of the casks, and of the dangerous nature of the goods, is not denied by the third plea. It follows that the ignorance of the defendants, and those employed by them, can be no excuse for putting on board without notice the dangerous goods insufficiently packed."

This does not show that the defendants would have been held liable if they had not known that the contents of the casks were dangerous. As Lord Justice Brett said in *Acatos v. Burns*, L. R. Exch. Div. (1877 to 1878), 282, 292:

"As to the question of warranty, neither *Brass v. Maitland* nor any other case shows that there is a warranty by the shipper that the goods shipped had no concealed defects at the time of shipment."

Counsel for the shipowner further contend that the obligations of contribution in general average being reciprocal, there must be implied an absolute warranty of the fitness of cargo as an offset to the

implied absolute warranty of the seaworthiness of the ship. But the latter is a well-known warranty constantly mentioned in the books. We think there is no such analogous warranty in the case of cargo. If there is, it has received scant recognition.

The decree is reversed, with costs.

HILLIARD v. LYONS.†

(Circuit Court of Appeals, Third Circuit. August 19, 1910.)

1. BILLS AND NOTES (§ 452*)—DEFENSES—FAILURE OF CONSIDERATION.

Failure of consideration is a defense to a note as between the immediate parties.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1367-1371; Dec. Dig. § 452.*]

2. TRIAL (§ 34*)—ADMISSIONS IN AFFIDAVIT OF DEFENSE—RULE OF COURT MAKING AFFIDAVIT OF DEFENSE A PLEADING.

Where by rule of court an affidavit of defense is made a part of the pleadings, the admissions contained in it are available to the plaintiff at the trial, without having been formally offered in evidence; only disputed facts having to be proved, and these being undisputed. It is not the same as if the affidavit were a mere admission, which might be explained away by the defendant with her attention called to it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 87; Dec. Dig. § 54.*]

3. TRIAL (§ 39*)—ADMISSIONS IN AFFIDAVIT OF DEFENSE—HOW BROUGHT INTO RECORD.

Where an affidavit of defense by rule of court is made a part of the pleadings, and admissions contained in it are twice made the basis of objections by the plaintiff to offers of evidence, this had the effect of bringing these admissions upon the record, as did the affirmance by the court of a point that under the pleadings and evidence the verdict must be in favor of the plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 92-98; Dec. Dig. § 39.*]

4. BANKS AND BANKING (§ 117*)—ACTS OF CASHIER—AGENCY.

The act of a bank cashier in inducing defendant to execute a note to the bank for discount by it, the proceeds to be invested by the cashier for defendant's benefit, and his act in receiving the proceeds, were acts of defendant's agent and not the bank's, and hence defendant cannot assert failure of consideration as a defense to the note, although the cashier appropriated the proceeds to his own use; the bank having discharged its duty to defendant by turning the proceeds over to the cashier as the defendant's accredited agent.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 288; Dec. Dig. § 117.*]

5. BANKS AND BANKING (§ 116*)—IMPUTED NOTICE—FRAUD.

Though generally the knowledge of an agent, acquired in the course of his agency, is imputed to the principal, a bank is not chargeable with notice of its cashier's fraud in inducing defendant to make a note to the bank for discount by it, the proceeds to be invested by the cashier for defendant's benefit, though he intended from the beginning to misappropriate the proceeds, since knowledge of an agent's fraud is not imputable to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied September 29, 1910.

the principal, where actual knowledge of the facts by the principal would defeat the consummation of the fraud.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 282-287; Dec. Dig. § 116.*]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Action by Robert Lyons, receiver of the Allegheny National Bank, against Roberta T. Hilliard. Judgment for plaintiff, and defendant brings error. Affirmed.

Morton Hunter, for plaintiff in error.

John S. Wendt, for defendant in error.

Before BUFFINGTON and LANNING, Circuit Judges, and ARCHBALD, District Judge.

ARCHBALD, District Judge. This action is brought by the receiver of the Allegheny National Bank on a promissory note for \$10,000, executed by the defendant to the order of the bank and discounted by it. The defense set up is the want of consideration. The contention is that the defendant signed the note at the instance of William Montgomery, the cashier of the bank, upon the understanding that he was to invest the proceeds for her, which he failed to do, in consequence of which she got no benefit from it, and therefore is not liable, the bank being affected by the participation of the cashier in the transaction. The production of the note made a prima facie case, the signature being admitted; and, no defense in the opinion of the court having been shown, a verdict was directed.

The action being between the immediate parties to the note, the failure of consideration was available to the defendant, if properly made out, but the difficulty is that it was not. The defendant relies on the fact that she did not herself get the proceeds, or that they were not credited to her, Montgomery testifying that he does not remember who got the money, except that she did not. But the bank was not bound, as it is claimed, to see that she got the money in this way. It is enough that it was put at the disposal of Montgomery, her agent in the transaction; and that he got it there can be no question. It is averred by the defendant, in her affidavit of defense, that having signed and delivered the note to Montgomery in blank, for the purpose of having it filled out and discounted for her, Montgomery negotiated it with the bank, and appropriated the proceeds. The admissions in the affidavit were evidence for the plaintiff, and, while it does not appear that the affidavit was formally offered, these admissions were twice made the basis of objections to offers by the defendant, which had the effect of bringing them upon the record, as did the affirmance by the court of the plaintiff's point that under the pleadings and evidence the verdict must be in favor of the plaintiff. It is not the same as if the affidavit was a mere admission, which, with her attention called to it, the defendant might possibly explain away. By rule of court where the case was tried the affidavit was a pleading, of which the court took notice, and by which the defendant is concluded

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

while it stands. And, in view of the express averment there made by the defendant that Montgomery got the money, it is idle to urge that what became of it was not shown. It is only disputed facts that have to be proved, and, this being undisputed, no proof was required.

It is said, however, that Montgomery was the cashier, and that therefore the bank had notice of the fraud and was affected by it. But that in dealing with the bank with respect to this note he was the agent of the defendant, whatever his official position outside of that, there can be no question. The defendant herself testifies that he was to negotiate the note for her as he did, and in doing so he certainly did not represent the bank, and neither did he in receiving and making away with the proceeds. The bank having accepted the note for discount, which admittedly was done by the express authority of the directors, was not bound to see that the defendant got the money, so long as it was turned over to her accredited agent and so made available to her. The defection came after the bank's participation in the transaction had ended, when Montgomery failed to invest it as he had agreed to—a breach of faith with which the bank had nothing to do, and which the fact that Montgomery was its cashier in no respect qualifies. In *Gunster v. Scranton Illuminating Heat & Power Company*, 181 Pa. 327, 37 Atl. 550, 59 Am. St. Rep. 650, Jessup, who was treasurer of the defendant company, was also vice president of the Scranton City Bank and in charge of it as manager. As treasurer of the heat and power company he executed two promissory notes for \$8,000, which as vice president of the bank he discounted, and gave the company credit for the proceeds, which he thereupon abstracted and appropriated. In a suit against the company on the notes it was sought to charge the bank with knowledge of the fraud and responsibility for it by reason of Jessup's dual capacity. But it was held that his acts in discounting the note being within his authority as treasurer were lawful and regular, and that the bank had no part in what he did after that, the money being then the money of the heat and power company, and embezzled by him as such. So in *Terrell v. Bank*, 12 Ala. 502, a note was executed in blank and delivered by the maker to the director of a bank, to be filled in for a certain sum and used in renewal of one that had been already discounted. The director, however, filled out the note for a larger sum, and had it discounted for his own benefit, and appropriated the proceeds, and it was held that this could not be set up by the maker of the note to avoid responsibility on it. "It cannot be admitted," as it is said, in disposing of the case, "that in receiving the blank of the defendant to be used for his own benefit Scott [the director] acted as agent of the bank; and certainly he did not thus act in abusing the authority conferred on him by the defendant."

It is no doubt true that knowledge of an agent acquired in the course of his agency is generally to be imputed to the principal, who is bound accordingly. But, assuming that this rule applies, and that in obtaining the note from the defendant here and in negotiating it and appropriating the proceeds Montgomery was actuated from the beginning with a dishonest and fraudulent motive, knowledge of it is not to be imputed to the bank, whose cashier he was, it being a well-established

lished exception to the rule that no such imputation is to be indulged, where knowledge of the facts by the principal would defeat the consummation of the fraud which the agent is engaged in perpetrating (*American Surety Company v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977), a doctrine which has been recently recognized and applied in this court in *Lilly v. Hamilton Bank*, 178 Fed. 53.

It is said that the extent and character of Montgomery's agency were involved, and that this necessarily carried the case to the jury. But there was no dispute as to his relation to the defendant in the transaction, it being conceded by her, as we have seen, that he was her agent to negotiate the note and receive and invest the proceeds; the only complaint being that he did not do so. And there being no question as to this, and the money having been intrusted to and appropriated by him in the course of his agency, there is nothing for the defendant to do but to bear the loss of it.

Judgment affirmed.

LIEBIG'S EXTRACT OF MEAT CO. v. LIEBIG EXTRACT CO.

(Circuit Court of Appeals, Second Circuit. May 2, 1910.)

No. 211.

TRADE-MARKS AND TRADE-NAMES (§ 73*)—INFRINGEMENT—EXCLUSIVE RIGHT TO USE THE NAME "LIEBIG" FOR EXTRACT OF MEAT.

Complainant *held* entitled to an injunction restraining defendant from using the word "Liebig" in connection with the sale of extract of meat, on evidence showing without contradiction that Baron Liebig granted to complainant's predecessor in business the exclusive right to use his name in connection with extract of meat made by his process, and that complainant sold its product in the United States under such name for 20 years before the name began to be used in this country by any one else.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. § 73.*]

Assignment of right to use a person's name as a trade-name, see notes to *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.*, 17 C. C. A. 579; *Kathrein-er's Malzkaffee Fabriken Mit Beschraenkter Haftung v. Pastor Kneipp Medicine Co.*, 27 C. C. A. 357.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by the Liebig's Extract of Meat Company, against the Liebig Extract Company. Decree for defendant (172 Fed. 158), and complainant appeals. Reversed.

James L. Steuart (Steuart & Steuart, of counsel), for appellant.
Herbert S. Murphy, for appellee.

Before COXE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. The bill in this case proceeds upon the theory that the complainant has the exclusive right to use the name "Liebig" or "Liebig's" in connection with the manufacture and sale of extract of meat in this country. It avers that in 1863 the Société

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

de Fray Bentos Giebert & Cie was formed under the laws of Belgium for the purpose of manufacturing and selling extract of meat; that in 1865 this Société Anonyme sold out all its business, good will, property and trade-marks to the complainant; that Baron Liebig conferred upon the complainant or its predecessor the exclusive right to use his name in connection with the manufacture and sale of the extract of meat; that the complainant manufactures according to a secret process learned from Baron Liebig; that its business in this country has grown so large that the public understands by the expression "Liebig's Extract" its product.

The bill then avers that the defendant manufactures an extract of meat in packages imitating the complainant's, and prays for a decree enjoining the defendant from using the word "Liebig" in connection with the sale of extract of meat and for an accounting. Appended to the bill are copies of defendant's wrapper, on which the word "Liberty" is printed in obvious imitation of Baron Liebig's signature on the complainant's package. But the use of these labels was abandoned by the defendant before the suit was brought, and the real issue in the case is as to complainant's right to exclusive ownership in the name "Liebig."

The answer avers that the word "Liebig" in any form in connection with extract of meat refers to a formula which, though not invented by Liebig, was brought into prominence by him and generally known under his name before the Fray Bentos Company was in existence and that the word is publici juris.

The complainant began the introduction of its goods into the United States in 1870, and from that time the business grew rapidly and without competition. It was the sole occupant of the field for 20 years or more. Others then began to use the word "Liebig" in connection with their extract of meat, but this has been abandoned almost entirely. The defendant to the knowledge of the complainant had used the name for 6 years before this suit was brought.

The record is very meager on the subject of the real issue. It is shown that in 1847 Liebig in a work called "Chemical Study of Meat" published a formula for extracting meat which had been invented by Proust many years before and that in 1859 in his "Familiar Letters on Chemistry" he recommended this process for use in the manufacture of extract of meat on a large scale. He was evidently the person who commercialized the idea.

The only proof of contracts between Baron Liebig and the complainant or its predecessor is to be found in the testimony of witnesses taken abroad under commissions without cross-interrogatories and read in evidence without objection. Charles Rotter, who was secretary of the complainant from 1865 to 1894, says that Baron Liebig granted it the exclusive right to use his name in connection with extract of meat; Gilligan, the present secretary, says that Baron Liebig gave the complainant the exclusive use of his name in connection with extract of meat manufactured according to his method; Dethioux, one of the managers of complainant from 1895 to 1907, says that Baron Liebig gave it the exclusive right of using his name for the manufacture and

sale of the extract of meat invented by him; Muller, sole manager of the complainant at Antwerp since 1901, says that Baron Liebig gave it the right to use his name in connection with the manufacture and sale of Liebig's Extract of Meat according to his prescription. The contracts were not produced nor called for nor was any objection taken to the testimony. In this state of the case we must find as a fact that Baron Liebig did give the complainant or its predecessor, or both, the exclusive right to use his name in connection with a process of extracting meat invented or promoted by him.

If the complainant is manufacturing under a secret process invented by Baron Liebig, any other person using his name in connection with extract of meat should be enjoined unless he proves that he is using a process open to the public and known as "Liebig's Process." Assuming that the complainant is manufacturing in this way, the defendant should be enjoined, because it has refused to state how it manufactures its extract of meat.

On the other hand, if the complainant is manufacturing according to the process published by Baron Liebig in 1847, but with the exclusive right derived from him to use his name in connection with the manufacture, then the defendant should be enjoined.

We think the important inquiry is as to the situation at the time the Fray Bentos Company was formed. The formula having been published, anybody was free to use it in 1863; but no one was free to use Baron Liebig's name in connection with the product, except by his express permission or by his permission to be implied from the fact of the process becoming generally known as his.

The defendant relies upon certain books offered in evidence, as follows: "Liebig's Chemical Study of Meat" (Heidelberg, 1847) describes a process of extracting meat, but attributes it to Proust; "A Handbook of Dietetics," Moleschott (Darmstadt, 1850); Dick & Fitzgerald's Encyclopedia (1872); Dunglison's Medical Lexicon (Philadelphia, 1874); The National Dispensatory (Philadelphia, 1887); "Chemical Organic Analysis" by Alfred H. Allen (London, 1888); the Scientific American Cyclopedia (New York, 1906); "Life of Justus v. Liebig" by Shenstone (London, 1901). These books simply show that the process in question is known as Liebig's. They throw no light whatever upon any public or private rights in the word "Liebig" at the time he conferred the exclusive right to use his name upon the complainant or its predecessor. If they did they would be incompetent. Stephens on the Law of Evidence, art. 35; Wigmore on Evidence, arts. 1581, 1586.

The very issue in this case was passed upon in England in 1867 by Vice Chancellor Wood in the case of Liebig's Extract of Meat Co., Limited, v. Hanbury, 17 Law Times (N. S.) 298. He erroneously thought that Liebig himself had invented the formula which he published in 1847, but concluded from testimony not in this case that Liebig had allowed his name in connection with extract of meat to become public property before his agreement with the complainant and its predecessor and therefore that anybody could use his name in connection with the product and Liebig could not confer any exclusive

right in it upon the complainant. None of the above-mentioned books shows, what Vice Chancellor Wood found from Baron Liebig's own testimony, that he had given the Royal Pharmacy of Bavaria in 1861 the right to use his name in connection with extract of meat and that no less than five thousand pounds of beef per annum were manufactured at that pharmacy alone.

Judge Seaman, in *Liebig's Extract of Meat Co. v. Libby and Others* (C. C.) 103 Fed. 87, came to the same conclusion because he found no devolution of title to use Liebig's name from the Royal Pharmacy of Bavaria to the complainant. He evidently had before him the contracts with Baron Liebig and other proof not in this case. Judge Hazel, in *Liebig's Extract of Meat Co. v. Walker* (C. C.) 115 Fed. 822, also held that the word "Liebig" had become public property. All these decisions were founded upon the proofs before the respective courts and establish no facts in issue in this case. *City of Carlsbad v. Kutnow*, 71 Fed. 167, 175, 18 C. C. A. 24.

On this record we feel obliged to grant an injunction against the use by the defendant of the word "Liebig" in connection with the sale of extract of meat, but in view of the complainant's acquiescence in the defendant's conduct for six years and of all the circumstances of the case, without an accounting.

Decree reversed, with costs.

TWEEDIE TRADING CO. v. SANGSTAD.

(Circuit Court of Appeals, Second Circuit. June 14, 1910.)

No. 248.

1 SHIPPING (§ 40*)—TIME CHARTER—EXPIRATION.

A steamer was chartered "for a period of about twelve months, charterers guaranteeing to redeliver steamer within three weeks, more or less, of this period." Subsequently the parties agreed that the charter should be "extended for a further period of three calendar months from expiration of period named in original charter." Three weeks before the end of the year the charterer gave notice that it elected to use the steamer for the maximum period of one year and three weeks. *Held*, that it was within its rights, and that the extension began at the expiration of that time.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 40.*]

2 SHIPPING (§ 58*)—CHARTER—WITHDRAWAL OF VESSEL BY OWNER—DAMAGES.

A time charter of a steamer gave the charterer the right to redeliver the vessel at any time during six weeks. Twelve days before the expiration of the time the owner withdrew her from the charter; the charterer being about to send her on another voyage which could not be completed within the time, and the owner having rechartered her, to the charterer's knowledge. *Held*, that while the owner had no right to take the vessel at that time, in view of the fact that the charterer could not employ her during the remaining time, repayment of the hire paid from that time forward and payment for the coal on board was full compensation for its damages; it not being entitled in equity to recover the expenses incurred in contemplation of the intended voyage.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 58.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. SHIPPING (§ 58*)—SUIT FOR DAMAGE TO CARGO—PLEADING—ISSUES—PROOF AND VARIANCE.

Where a libellant rested its claim for damage to cargo on the ground of improper stowage in its libel, it cannot recover on the ground of unseaworthiness of the vessel, an issue which was not tried.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 58.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by the Tweedie Trading Company against Actieselskabet Sangstad. Decree for respondent, and libellant appeals. Affirmed.

Ralph J. M. Bullowa, for appellant.

J. Parker Kirlin and Charles R. Hickox, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This case involves the claim of time charterers for \$3,844 damages claimed because of the owners' withdrawal of the steamer Sangstad and for \$66.70 expenses of reconditioning bags of canary seed stowed in the lower forepeak and stained by oil leaking from the ship's stores in the upper forepeak.

November 21, 1904, the vessel was chartered "for a period of about twelve months, charterers guaranteeing to redeliver steamer within three weeks more or less of this period" at £825 per calendar month and at and after the same rate for any part of a month, payable half-monthly in advance. This six weeks and guaranty provision creates a sort of twilight period which distinguishes this charter from charters for a fixed term or charters for "about" a certain period which we considered in the case of *The Rygja*, 161 Fed. 106, 88 C. C. A. 270.

By the charter the owners agreed to let, and the charterer agreed to hire, the vessel so that if the charter terminated within the twilight period, e. g., when sufficient time was not left to complete any of the voyages authorized, it would seem as if the owners had the same right to withdraw the vessel from the service of the charterer as the charterer had to redeliver her to the owners. But we think the provision was intended for the benefit of the charterer and gave it the right if it chose to do so to take the vessel for eleven months and one week or for twelve months and three weeks with, however, the duty of redelivering at the date fixed. Certainly this was the practical construction which the parties gave to it because on November 1, 1905, the charterer notified the owners that it elected to use the steamer for the maximum period, viz., one year and three weeks. The owners made no objection and after the expiration of that time, viz., December 12, 1905, the charterer paid and the owners accepted hire at the increased rate of £900 provided for in the extension of the charter now to be considered.

October 6, 1905, the parties agreed that the charter should be "extended for a further period of three calendar months from expiration of period named in original charter, charterers agreeing to redeliver steamer within two weeks less or any part thereof or within four weeks

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

more or any part thereof than this period" and to pay hire at the rate of £900 instead £825 per calendar month.

We think the district judge was right in this situation of things in holding that the original charter terminated and the extension began December 12, 1905.

Under this extension the charterer had a right to redeliver within two weeks or any part thereof less or within four weeks or any part thereof more than the period of three calendar months from December 12, 1905, but was bound not to redeliver either earlier or later than those dates. Accordingly it had a right to the use of the vessel to April 9, 1906.

March 21, 1906, the owners billed the charterer for one-half the hire of the month beginning that date—that is, up to April 6th—which it paid. The evidence shows that no voyage authorized by the charter could be performed before April 9th.

March 26th the vessel lay unloaded at Philadelphia; the charterer having the right to redeliver her or to use her for 14 days longer and no more.

The parties were apparently contemplating, though no agreement was made on the subject, a redelivery at a port in the United Kingdom or on the Continent between Bordeaux and Hamburg, which would have been entirely agreeable to the owners, as they had made a new charter for the vessel to be entered on in Europe.

The charterer supplied the vessel with coal and ordered her to Hampton Roads for orders, where she arrived March 28th. It then determined to send the vessel to Cuba for a cargo of sugar to New York, whereupon, March 29th, the owners withdrew her from the service of the charterer and returned the hire paid for the time between March 29th and April 6th.

The owners had no right to do this before April 9th, if the charterer chose to keep the vessel, but as it could not employ her between March 29th and April 9th, the return of the hire for that period and payment for the coal put aboard would be full compensation except for expenses incurred in contemplation of another voyage. It is evident that both parties were contemplating another voyage and liability for expenses incurred because of this by the charterer must depend upon the equities of the case. The owners had made a new engagement to be entered upon by the vessel in Europe; the charterer was fully aware of this fact. It solicited freight for Europe and ordered preparations to be made by the ship for grain, which was a European cargo. The charterer must have known that this was the understanding of the owners and that it was a reasonable understanding. The equities seem to us to be entirely with the owners, and we think the trial judge was right in dismissing the charterer's claim for damages for wrongful withdrawal.

The second cause of action is for the expense of rebagging canary seed carried in the lower forepeak. The only cargo space left when the seed was loaded was the afterpeak and the lower forepeak. The master wished the seed to go in the afterpeak because he thought the forepeak not a fit place for what he called perishable cargo. The

charterer's stevedores, on the other hand, insisted on its going in the forepeak because another consignment of canary seed had been put in the afterpeak and the owners of the two consignments feared they might get mixed. The evidence satisfies us that the forepeak is a proper place for such a cargo, and that it was so on this occasion but for the fact that oil from the ship's stores in the upper forepeak leaked through the deck. The libel rested the claim on bad stowage, but the libellant now puts it on unseaworthiness; that is, the unfitness of the ship to carry the cargo. The claimant has had no opportunity to meet this charge, and for this reason consideration of the claim ought to have been denied.

The decree is affirmed, with costs.

UNITED STATES v. BALSARA.

(Circuit Court of Appeals, Second Circuit. July 1, 1910.)

No. 186.

1. ALIENS (§ 61*)—NATURALIZATION—"FREE WHITE PERSONS."

"Free white persons," within Rev. St. § 2169 (U. S. Comp. St. 1901, p. 1333), limiting the naturalization act (Act June 29, 1906, c. 3592, 34 Stat. 596 [U. S. Comp. St. Supp. 1909, p. 97]) to such persons, includes members of the white, or Caucasian race, as distinct from the black, red, yellow, and brown races; and hence a Parsee is entitled to admission to citizenship.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 119-122; Dec. Dig. § 61.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7446, 7447.]

2. STATUTES (§ 159*)—REPEAL BY IMPLICATION.

A statute inconsistent with or repugnant to a subsequent act is repealed by the latter, though not mentioned therein.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 229, 231; Dec. Dig. § 159.*]

Repeal of statutes by implication, see note to First Nat. Bank v. Weldenbeck, 38 C. C. A. 136.]

3. ALIENS (§ 61*)—NATURALIZATION—STATUTES NOT REPEALED.

Naturalization Act June 29, 1906, c. 3592, 34 Stat. 596 (U. S. Comp. St. Supp. 1909, p. 97), did not impliedly repeal Rev. St. § 2169 (U. S. Comp. St. 1901, p. 1333), limiting the naturalization provisions of such statutes to "free white persons."

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 119-122; Dec. Dig. § 61.*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Application by Bhicaji Franyi Belsara for admission to citizenship. From an order admitting applicant (171 Fed. 294), the United States appeals. Order affirmed.

Henry A. Wise, U. S. Dist. Atty., and A. S. Pratt and Carl E. Whitney, Asst. U. S. Attys.

Rounds & Shurman, for appellee.

Louis Marshall and Max J. Kohler, for Syrian interveners.

Before COXE and WARD, Circuit Judges, and HAZEL, District Judge.

WARD, Circuit Judge. The Parsees emigrated some 1,200 years ago from Persia into India, and now live in the neighborhood of Bombay, to the number of about 100,000. They constitute a settlement by themselves of intelligent and well-to-do persons, principally engaged in commerce, and are as distinct from the Hindus as are the English who dwell in India. Balsara himself is a merchant of this city, entirely qualified for citizenship but for the fact, as the government contends, that he is not within section 2169 of the United States Revised Statutes (U. S. Comp. St. 1901, p. 1333), which provides as to naturalization:

"The provisions of this title shall apply to aliens being free white persons and to aliens of African nativity and to persons of African descent."

Counsel have furnished us with such complete and interesting briefs that detailed consideration of the cases, laws colonial, state and federal and public documents referred to would extend this opinion to inordinate length. Therefore we will state our conclusions only.

The expression "free white persons" is found in all our naturalization acts since 1790, except for the brief period between 1873 and 1875, when they were omitted from the Revised Statutes. The government contends that the words must be construed to mean what the Congress which passed the first naturalization act in 1790 understood them to mean, and, no immigration being then known except from England, Ireland, Scotland, Wales, Germany, Sweden, France, and Holland, Congress must be taken to have intended aliens coming from those countries only. The consequence of this argument, viz., that Russians, Poles, Italians, Greeks, and others, who had not theretofore immigrated, are to be excluded, is so absurd that the government extends the intention of Congress to all Europeans.

On the other hand, counsel for Balsara insist that Congress intended by the words "free white persons" to confer the privilege of naturalization upon members of the white or Caucasian race only. This we think the right conclusion and the one supported by the great weight of authority. In *re Ah Yup*, 5 Sawy. 155, Fed. Cas. No. 104; In *re Saito* (C. C.) 62 Fed. 126; In *re Camille* (C. C.) 6 Fed. 256; *Matter of San C. Po.*, 7 Misc. Rep. 471, 28 N. Y. Supp. 383; In *re Buntaro Kumagai* (D. C.) 163 Fed. 922; In *re Knight* (D. C.) 171 Fed. 297; In *re Najour* (C. C.) 174 Fed. 735; In *re Halladjian* (C. C.) 174 Fed. 834. Doubtless Congressmen in 1790 were not conversant with ethnological distinctions and had never heard of the term "Caucasian race" mentioned in some of the foregoing decisions. They probably had principally in mind the exclusion of Africans, whether slave or free, and Indians, both of which races were and had been objects of serious public consideration. The adjective "free" need not have been used, because the words "white persons" alone would have excluded Africans, whether slave or free, and Indians. Still effect must be given to the words "white persons." The Congressmen certainly knew that there were white, yellow, black, red, and brown races. If a Hebrew, a native of Jerusalem, had applied for naturalization in 1790, we cannot

believe he would have been excluded on the ground that he was not a white person, and, if a Parsee had applied, the court would have had to determine then just as the Circuit Court did in this case, whether the words used in the act did or did not cover him.

We think that the words refer to race and include all persons of the white race, as distinguished from the black, red, yellow, or brown races, which differ in so many respects from it. Whether there is any pure white race and what peoples belong to it may involve nice discriminations, but for practical purposes there is no difficulty in saying that the Chinese, Japanese, and Malays and the American Indians do not belong to the white race. Difficult questions may arise and Congress may have to settle them by more specific legislation, but in our opinion the Parsees do belong to the white race and the Circuit Court properly admitted Balsara to citizenship.

We think this view is confirmed by the legislation enacted between 1870 and 1875. Act July 14, 1870, c. 254, 16 Stat. 254, amending the naturalization laws, provided in section 7:

"That the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent."

As negro immigration from Africa is and was totally unknown, the legislation can only be explained as a result of the sentiment created by the Civil War. The words "free white persons" were left in the law, indicating the intention to exclude other races than the African. The revisers of the laws of the United States, whose revision was adopted at the first session of the Forty-Third Congress, 1873, to 1874, reported (section 2169, title 30), on the subject of naturalization in the following words: "The provisions of this title shall apply to aliens of African nativity and to persons of African descent." As the revisers were not authorized to change the law, the omission of the words "free white persons" was evidently an oversight and it was corrected by Act Feb. 18, 1875, c. 80, 18 Stat. 318, entitled, "An act to correct errors and to supply omissions in the Revised Statutes of the United States" as follows:

"Sec. 2169 is amended by inserting in the first line after the word 'aliens' the words 'being free white persons and to aliens.'"

Of course, between 1873 and 1875, Congress having adopted the Revised Statutes, any alien was eligible to naturalization. In *re Ah Chong* (C. C.) 2 Fed. 733, 739. If in 1875, when they were amended, Congress had intended the privilege of naturalization to be restricted to Europeans and Africans, as contended by the government, it would presumably have inserted a more accurate expression than "free white persons" in the section. On the other hand, if it had intended the law to apply to all aliens except those expressly excluded, it would have repealed the section altogether, leaving section 2165 to apply as it reads to all aliens.

Counsel for certain Syrian interveners as *amici curiæ* contend that the words "free white persons" were used simply to exclude slaves and free negroes. If so, of course, all other aliens were included. This is enforced by the further argument that the act of June 29, 1906 (Act

June 29, 1906, c. 3592, 34 Stat. 596 [U. S. Comp. St. Supp. 1909, p. 97]), repealed section 2169, Rev. St. U. S., by necessary implication, and that all aliens except those expressly excluded, like the Chinese, are now eligible to citizenship. The act of 1906 does provide for a uniform rule for the naturalization of aliens throughout the United States. Section 4, regulating proceedings, like section 2165, Rev. St. U. S., provides "that an alien may be admitted to become a citizen of the United States in the following manner and not otherwise." But section 2169, *supra*, limited the application of the whole title to persons being free white persons or of the African race, and section 26, the repealing clause of the act of 1906, makes no mention of section 2169. Of course, if the latter is inconsistent with or repugnant to the act, it is repealed, though not mentioned. But we do not think it is. Indeed, the form annexed for declaration of intention requires the applicant to state his color as well as his complexion. It seems to us incredible that Congress could have intended to make such a departure from existing law by implication merely.

The order is affirmed.

THE MONTAUK.

(Circuit Court of Appeals, Second Circuit. June 14, 1910.)

No. 231.

COLLISION (§ 93*)—STEAM VESSELS CROSSING—VIOLATION OF RULES.

The ferryboat Montauk on her way across the East river to her Brooklyn slip came into collision with transfer tug 18, which was coming up with a car float on each side. The Montauk three times blew signals of two whistles, which were not answered. The tug kept her course until immediately before collision, when she changed slightly to port, and the Montauk kept her course. Before collision, both vessels reversed full speed astern. *Held*, that the Montauk was clearly in fault for violation of inspectors' rule 2, which required her, having the tug on her starboard side, to keep out of the way, and for persisting in crossing the bows of the tug without agreement and when manifestly dangerous; that the tug was not in fault, inland rules (Act June 7, 1897, c. 4, art. 21, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]) requiring her to keep her course and speed; and, neither such rules nor the inspectors' rules requiring her to answer the Montauk's signals if she did not assent thereto, her slight change of course immediately before collision, if not justified by the "special circumstances" under article 27, was an error in extremis.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 93.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by the New York, New Haven & Hartford Railroad Company against the ferryboat Montauk, the Union Ferry Company, claimant. From the decree, libellant appeals. Modified.

James T. Kilbreth, for appellant.

James J. Macklin and De Lagnel Berier, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WARD, Circuit Judge. April 22, 1907, a little after 1 p. m., the ferryboat Montauk, on her way from her slip at Whitehall, N. Y., to her slip at the foot of Hamilton avenue, Brooklyn, saw the tug Wetherell with two schooners lashed together in tow on a hawser about 125 feet long coming up Buttermilk Channel. At the same time, just overtaking the schooners on their starboard hand was transfer 18 with a loaded car float some 300 feet long on each side, making a flotilla of about 100 feet in width.

The District Judge has hardly discussed the signals exchanged, the movements of the three vessels, or the way in which the Montauk and No. 18 came together, but, adopting substantially the story of the Montauk as to the signals, he finds the Montauk at fault for not keeping out of the way and the transfer for not answering and for changing her course somewhat to port just before the collision. The facts as stated by him are that the Montauk blew a signal of two whistles three times and then reversed full speed astern; that the Wetherell starboarded and went under the Montauk's stern; that the transfer, giving no answer, stopped and changed her course a little to port just before the collision.

He regarded the situation as governed by inspectors' rules 2 and 3, then in force. It must be said that they are not very clear, nor altogether consistent with the inland rules of 1897 (sections 2 and 5):

"Rule 2. When steamers are approaching each other in an oblique direction, as shown in the diagrams of the fourth and fifth situations, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other, which latter vessel shall keep her course and speed; the steam vessel having the other on her starboard side indicating by one blast of her whistle her intention to direct her course to starboard, so as to cross the stern of the other steamer; and two blasts, her intention of directing her course to port, which signals must be promptly answered by the steamer having the right of way, but the giving and answering signals by a vessel requiring to keep her course shall not vary the duties and obligations of the respective vessels.

"Rule 3. If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle; and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerageway until the proper signals are given, answered, and understood, or until the vessels shall have passed each other.

"Vessels approaching each other from opposite directions are forbidden to use what has become technically known among pilots as 'cross signals'—that is, answering one whistle with two, and answering two whistles with one. In all cases, and under all circumstances, a pilot receiving either of the whistle signals provided in the rules, which for any reason he deems injudicious to comply with, instead of answering it with a cross signal, must at once observe the provisions of this rule."

Rule 2 applies to steam vessels meeting each other in oblique directions. It requires the burdened vessel to indicate by whistle her intention either to cross the bow or to go under the stern of the privileged vessel. The privileged vessel is required to answer evidently with the same signals for the purpose of indicating that she understands the intention of the burdened vessel. The legal obligations of

each remain unaffected; that is, the burdened vessel must keep out of the way and the privileged vessel must hold her course and speed.

Rule 3 provides that, when either one of steam vessels approaching each other in any direction fails to understand the course or intention of the other, she shall blow several short, rapid blasts. It then forbids cross-signals to be blown by vessels approaching each other from opposite directions—that is, meeting head and head or nearly so—from which it may be fairly inferred that cross-signals may be blown by vessels approaching in other directions. Then it provides that “in all cases and under all circumstances” a vessel which deems a signal injudicious must instead of answering with a cross-signal observe the provisions of this rule; that is, slow down to a speed barely sufficient for steerageway, etc.

The duties of the privileged vessel to be collected from these two rules are as follows: If she does not understand the intention of the burdened vessel, she must blow several short, sharp blasts. If she does understand and thinks the intention of the burdened vessel judicious, she replies with the same signal. If she does understand, but thinks the intention injudicious, she immediately slows to a speed barely sufficient for steerageway. Two of these requirements plainly conflict with Inland Rules 1897, art. 18, rule 1 (Act June 7, 1897, c. 4, 30 Stat. 100 [U. S. Comp. St. 1901, p. 2881]) of which requires steam vessels to answer signals only when approaching each other head and head, or nearly so, and article 21 of which requires the privileged vessel to keep her course and speed.

The pilot of the transfer thought the signal from the Montauk was injudicious, which it certainly was. Accordingly under the inspectors' rules his duty was not to answer that signal, but immediately to slow down to a speed barely sufficient for steerageway.

At the time of the collision both vessels were reversing full speed astern, and the injuries to the Montauk show that neither could have had much headway. The transfer's starboard float struck the Montauk's forward rudder and the port float went under her starboard guard, inflicting very little damage. The only fault which could be imputed in our opinion to the transfer was her failure to hold her course and speed as required by article 21 of the inland rules. But her failure to do this, if not justified under article 27 to avoid immediate danger in the special circumstances of the case, was not a fault, but an error in extremis, when the collision owing to the gross fault of the Montauk was imminent. The decree is modified with instructions to the District Court to enter a decree in favor of the New York, New Haven & Hartford Railroad Company for its damages against the claimant of the Montauk, with interest and costs of both courts.

THE EDMUND MORAN.

(Circuit Court of Appeals, Second Circuit. June 14, 1910.)

No. 261.

1. COLLISION (§ 123*)—DEFENSES—"INEVITABLE ACCIDENT"—BURDEN OF PROOF.

To sustain the defense of inevitable accident in a suit for collision, the defendant has the burden of proof, and must show either what was the cause of the accident, and that the result of that cause was inevitable, or he must show all the possible causes and with regard to every one of such possible causes that the result could not have been avoided.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 259-261; Dec. Dig. § 123.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3571-3573.]

2. COLLISION (§ 22*)—DEFENSES—INEVITABLE ACCIDENT.

A tug came into collision with a canal boat in tow of another tug on a crossing course by reason of the breaking of her steering cable when she attempted to change her course at a distance of 60 to 70 feet from the tow. There was testimony that, even if the cable were sound, it might have been broken by a sudden porting such as was required at that short distance to clear the canal boat. *Held* that such evidence did not sustain the defense of inevitable accident; it not appearing that the tug's course could not have been changed sooner without subjecting the cable to such strain.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 19; Dec. Dig. § 22.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by John Newman and others against the steam tug Edmund Moran, the Moran Towing & Transportation Company, claimant. Decree for libelants (173 Fed. 109), and claimant appeals. Affirmed.

Carpenter & Park, for appellant.

James J. Macklin and De Lagnel Berier, for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. May 15, 1908, at about 6:15 p. m., the tide being flood in the North and ebb in the East River, with little or no wind and a clear atmosphere, the tug Edmund Moran left the Battery landing bound down the Upper Bay. At the same time the tug Glen Cove towing two canal boats side by side on a hawser about 125 feet long, with a third canal boat, The Bronx, astern of the port boat of the first tier, was proceeding from the North into the East River. A Pennsylvania tug bound from the East River into the North River with a barge alongside passed between the vessels. In this situation the courses of the Glen Cove and Moran were crossing and it was the duty of the Moran to keep out of the way. When heading for the Bronx and not more than 70 feet away, she undertook to swing some

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

six points to starboard to clear the canal boat's stern. Seeing that the tug did not answer her helm, the pilot rang to reverse full speed astern, notwithstanding which he struck the boat loaded with coal violently enough to cut off her stern. His report to the inspectors, made the day after the collision, shows how close the tug must have been to the canal boat, and how fast she must have been going when he discovered that the steering gear would not work. He says:

"I had scarcely reached a point 500 feet abreast of the landing when my steering wire parted. I immediately sounded my alarm whistles and rang for full speed astern; but, before my tug could reverse, I struck a coal boat which was the stern boat in a tow of three in charge of the tug Glen Cove. The coal boat sank almost immediately, and I was unable to secure her name."

The cable which parted was made of iron wire around a core of hemp consisting of 6 strands, each strand composed of 6 strands of 7 wires each of 252 in all. All the wires were parted at the break.

The district judge overruled the defense because of testimony offered by the libellant to the effect that the wire cable showed signs of wear. The claimant contends that this finding is so contrary to the evidence that the decree should be reversed. But, adopting the claimant's story, we come to the same conclusion. Its witnesses testified that the cable was of the usual kind and size for the purpose, bought of a first-class manufacturer, inspected twice a week, and now showing no signs of a defect; in other words, the claimant proves no cause for the parting. In the case of the *Merchant Prince*, Prob. Div. (1892) 179, the Court of Appeals reversed the Admiralty Judge, Sir Charles Butt, and held a collision was not due to inevitable accident. Lord Justice Fry said:

"The burden rests on the defendants to show inevitable accident. To sustain that, the defendants must do one or other of two things. They must either show what was the cause of the accident, and show that the result of that cause was inevitable, or they must show all the possible causes, one or other of which produced the effect, and must further show with regard to every one of these possible causes that the result could not have been avoided. Unless they do one or other of these two things, it does not appear to me that they have shown inevitable accident."

This language was cited with approval by the Circuit Court of Appeals for the Sixth Circuit in *The Olympia*, 61 Fed. 120, 9 C. C. A. 393, although in that case the court found the collision was due to inevitable accident.

There is testimony in this case that a sudden porting would cause a shock upon the steering cable likely to break it if a little slack, even if it were strong enough for ordinary use. The witnesses of the claimant exactly describe a situation in which a sudden porting was necessary. They admit that in order to clear the canal boat the tug, when within 60 or 70 feet, had to change her course to starboard 6 points. The claimant not having shown any affirmative cause why the cable parted, has it disposed of this possible cause? The pilot says that when 125 feet (a length and a half) away from the canal boat he started to port, and, finding that the tug did not answer, when within 50 to 60 feet he put the helm over hard aport and rang to go full speed astern. We do not believe that the steering rope parted under a gentle porting.

It was because the pilot allowed himself to get so close to the canal boat that a sudden hard-aporting was necessary to clear her. By the exercise of reasonable care the accident could have been avoided and therefore it was not inevitable.

Decree affirmed, with interest and costs.

NORTHWESTERN TOWNSITE CO. v. FIDELITY & DEPOSIT CO. OF MARYLAND.

(Circuit Court of Appeals, Eighth Circuit. July 26, 1910.)

No. 3,295.

(Syllabus by the Court.)

PRINCIPAL AND SURETY (§ 79*)—EXTENT OF LIABILITY—DIFFERENT CAPACITIES.
No liability of surety for acts of employé as the officer or servant of a third party.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 125; Dec. Dig. § 79.*]

In Error to the Circuit Court of the United States for the Western District of Oklahoma.

Action by the Northwestern Townsite Company against the Fidelity & Deposit Company of Maryland. Judgment for defendant, and plaintiff brings error. Affirmed.

Charles L. Moore (John C. Moore and John A. Remy, on the brief), for plaintiff in error.

Frank Dale (A. G. C. Bierer and Benj. F. Hegler, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. Henry H. Watkins was the treasurer of the Northwestern Townsite Company, and the cashier of the Citizens' Bank of Enid, Okl. On warranties of the townsite company that Watkins would be permitted to pay out moneys of the company only on check, that he would be required to deposit all the company's funds coming to his possession in the bank upon their receipt, that he would have no authority to indorse checks drawn to the order of the company nor to sign checks on its behalf, the Fidelity & Deposit Company of Maryland agreed with the townsite company to reimburse it for such pecuniary loss as it should sustain during the term of one year by any act of larceny or embezzlement upon the part of Watkins in the rendition of his service as treasurer of the company. One Chambers had purchased lots of this company, and he and the company had agreed that the deeds for these lots should be deposited with the bank to be delivered by the latter to Chambers as he should pay for them. Chambers had a general deposit account with the bank, and he took the deeds from it and paid for them by giving to the company his checks on his credit in the bank for \$15,500, and the bank charged Chambers and credited the townsite company on its books with this

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

amount. The townsite company accepted this credit and checked out all but \$10,694.40 of it before the bank failed. It failed indebted to the townsite company in the latter amount. At the times when Chambers' checks were received and the credits were transferred thereon from Chambers to the townsite company the bank was insolvent, and Watkins knew it. He, however, took no part whatever in the making of the sales of the lots to Chambers, in the deposit of the deeds with the bank, and in the receipt of the checks in payment for them, except that in one instance he sent a deposit slip showing a credit of the amount of one of Chambers' checks to the townsite company. The insolvency of the bank was caused by the use of its funds by Watkins as its cashier for some purpose other than the payment of the rightful obligations of the bank. After the failure of the bank the townsite company sued the fidelity company on its indemnity contract for the \$10,694.40, and it is assigned as error that upon the facts which have been recited the court below rendered judgment for the defendant.

The argument is that as Watkins knew that the bank was insolvent when the checks of Chambers were passed to the credit of the townsite company, the title to the money which these checks represented never vested in the bank, but the money was held by it for the townsite company as a trustee *ex maleficio* and Watkins, by his unlawful use of this money as cashier of the bank, was guilty of larceny or embezzlement as treasurer of the townsite company. This contention is unsound because no money was ever deposited with the bank by or for the townsite company by means of the use of the checks of Chambers. The actual transaction was that the credit of \$15,500 which Chambers had with the insolvent bank was transferred by means of his checks to the townsite company, so that after the transfer the bank owed to the townsite company the debt of \$15,500, which it previously owed to Chambers. There is neither finding nor evidence that Chambers was aware of the insolvency of the bank, or that he participated in any way in any fraud upon the townsite company, and therefore there is no basis for the contention that the bank was a trustee for or other than the debtor of the townsite company.

Again, it is for the acts of larceny or embezzlement of Watkins in the performance of his duties as treasurer of the townsite company and for these only that the fidelity company undertook to indemnify the townsite company and his acts of appropriation were of the funds of the bank and were committed by virtue of his office of cashier of the bank and not in the performance of any of his duties as treasurer of the townsite company. A surety company which indemnifies a corporation against the acts of larceny or embezzlement of its officer or servant in the discharge of the duties of his position is not liable for his acts of larceny or embezzlement in the discharge of the duties of his position as an officer or servant of a third party.

The judgment below was right, and it must be affirmed.

It is so ordered.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.

(Circuit Court of Appeals, Second Circuit. May 2, 1910.)

No. 317.

STREET RAILROADS (§ 55*)—FORECLOSURE OF MORTGAGES—RECEIVERSHIP—IMPROVEMENT OF PROPERTY.

A court of equity, which through its receivers is operating an extensive system of street railroads pending the foreclosure of mortgages and liens on its various parts, has power in its discretion to authorize the expenditure of money by the receivers in the completion of car houses, which were being rebuilt or enlarged on certain of the lines, where in its judgment such expenditure is necessary to meet the requirements of the system and render adequate service to the public, leaving the question of the distribution of the expense as between the different mortgagees to be determined on a final accounting.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 134; Dec. Dig. § 55.*]

Appeals from the District Court of the United States for the Southern District of New York.

Suit in equity by the Pennsylvania Steel Company and another against the New York City Railway Company and others. With this case were heard suits in equity by the Morton Trust Company, by the Guaranty Trust Company of New York, and by the Morton Trust Company against the Metropolitan Street Railway Company and others. From an interlocutory order of the Circuit Court (171 Fed. 1019) the Morton Trust Company and the Guaranty Trust Company appeal. Affirmed.

Bronson Winthrop, Charles T. Payne, and George Roberts, for Morton Trust Company.

Julien T. Davies and Brainard Folles, for Guaranty Trust Company.

Arthur H. Masten, William M. Chadbourne, and Ellis W. Leavenworth, for Joline and Robinson, receivers.

Before COXE and WARD, Circuit Judges, and HOLT, District Judge.

WARD, Circuit Judge. These are appeals from an order of the Circuit Court authorizing the receivers of the Metropolitan Street Railway Company to expend some \$400,000 out of income for the completion of three certain car houses, one of which had been destroyed by fire, all three of which were being reconstructed on a larger scale. The appellants are respectively the trustee under the general mortgage of the Metropolitan Street Railway Company to the Guaranty Trust Company and the trustee under the refunding mortgage to the Morton Trust Company. Both mortgages are being foreclosed. The car houses are being erected on ground covered by the latter mortgage only. Both trustees object that there is no sufficient proof that such extensive construction is necessary. The necessity of car houses is quite clear; also that they should be erected on the ground

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

on which they originally stood; and also that, when erected, they should be sufficient for the requirements of the system which the receivers were operating. We think that it was within the sound discretion of the Circuit Court, in view of all the circumstances, to say how extensive the improvements should be, and are not disposed to interfere with its conclusion on this point.

The other objections arise out of the competition between the two mortgages. The trustee of the general mortgage insists that these car houses directly benefit the refunding mortgage, which alone covers the premises, and therefore the receivers should be reimbursed for the expense of construction out of the property covered by it. On the other hand, the trustee of the refunding mortgage says that it is a first lien only upon real estate, which, instead of being improved in value, is injured by the erection of the car houses, especially if it be sold to a person not purchasing the railroad system, upon which the general mortgage is a first and the refunding mortgage a second lien. Therefore it is contended that the expense of construction should be imposed upon the property of the Metropolitan Street Railway Company, for whose benefit, as a railway system, it is incurred.

Each appellant contends that the order should be amended to cover its contention. The Circuit Court and this court have persistently held that the disposition of all competing equities is to be reserved until the final distribution of the whole fund. Judge Lacombe's memorandum, handed down with the order appealed from, shows plainly that this was his intention. An application to him for a resettlement would certainly have resulted in the insertion of a provision that payment out of income in the first instance should not prejudice the claims of any one upon final distribution.

The order is affirmed, but, as some of the parties think that, as drawn, it will finally conclude the matter, with instructions to the Circuit Court to resettle it in this particular, if application to that end be made.

THE CHRISTIANIA BAIRD.

(Circuit Court of Appeals, Second Circuit. May 2, 1910.)

No. 215.

TOWAGE (§ 11*)—COLLISION BETWEEN TOWS—FAULT OF TUG.

A tug passing down the Passaic river with a scow on one side and a schooner in tow on a hawser, held liable for a collision between the tows while passing through the draw of a railroad bridge, on the ground that the master failed to signal the bridge in time and while waiting for the opening of the draw after the passing of trains permitted the tug to drift too near the bridge and too close to one side, by reason of which the scow struck the trestle on that side, breaking the lines and causing the collision with the following schooner.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 19; Dec. Dig. § 11.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 180 F.—45

Appeal from the District Court of the United States for the Eastern District of New York.

Suit in admiralty by Mary F. Schultz against the steam tug *Christiana Baird*; the Passaic River Towing Line, claimant. Decree for libellant (169 Fed. 217), and claimant appeals. Affirmed.

Martin A. Ryan, for appellant.

Peter Alexander, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. February 14, 1907, the tug *Christiana Baird*, bound down the Passaic river from Newark to Hoboken with the light barge *Brimstone* on her port side and the light schooner *Annie E. Webb* astern on a hawser about 125 feet long, approached the trestle bridge of the Central Railroad of New Jersey which spans Newark Bay between Bayonne and Elizabethport. There is an abutment in the center of the channel dividing the bridge into two draws, the floor over either of which can be lifted after the manner of bascule bridges by machinery on the abutment. The tide was running strong ebb with a set to the westward. The semaphore on the abutment indicated that vessels bound down should go through the eastern draw. The regulations of the Secretary of War require vessels wishing the draw opened to blow a signal of three blasts, and the bridge tender to answer with a signal of three blasts, if it can be done, or two blasts if it cannot. When about a quarter of a mile away and proceeding with the tide about six miles an hour, the tug blew three blasts. Receiving no answer, and seeing two trains about to cross the bridge in opposite directions, she slowed down. When they had passed she started up and blew a second signal of three blasts, to which she received no answer. Seeing another train approaching from the west, the tug when about 600 feet above the bridge slowed down again and drifted. The draw was opened when she was about 150 to 200 feet off and a little to the eastward of the center of the draw in order to counteract the set of the tide. It being impossible to stop and round to, the tug started up under a jingle bell with her helm hard aport, but having no steerageway. The barge struck the trestle on the eastern side, parting the lines to the tug, swung around into the draw while the schooner, the tug having cast off her hawser, ran into the barge and swung around under the influence of the tide against the trestle to the east of the draw, sustaining the damage complained of.

The trial judge found that the draw was open in time and that the tow would have passed through safely, but for the fact that the tug had kept too far to the eastward, as the result of over estimating the set of the tide. We think she was more at fault for not signaling sooner and stopping. If negligent in both or either of these respects, it is no defense to her that the bridge tender was also at fault. The claimant defends as it is said principally that a rule may be laid down whether tugs which get no reply from a bridge tender have a right to proceed on the assumption that the draw will be open. It would be impossible to lay down an absolute rule that a

tug discharges its duty to its tow if it proceeds upon this assumption. Every case must depend upon its own circumstances. The best way to arrive at complete justice in such cases will be for the tugs, either as bailees of the tow, to sue the bridge owners, or, if they are sued alone to bring the bridge owners in under rule 59.

Decree affirmed, with interest and costs.

THE FRED RICHARDS.

(Circuit Court of Appeals, Second Circuit. May 2, 1910.)

No. 191.

1. COLLISION (§ 66*)—TUG WITH TOW AND SAILING VESSEL MEETING—FAULT OF TUG.

Evidence considered, and *held* to show that a tug with a tow on a long hawser was solely in fault for a collision at sea in the night between her tow and a sailing yacht which met on nearly parallel courses.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 84; Dec. Dig. § 66.*]

Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

2. COLLISION (§ 77*)—FAULT—LOOKOUT.

The fact that the lookout on a yacht was a Central American Indian incapable of speaking English did not impair his efficiency as a lookout, nor in itself constitute a contributing fault on the part of the yacht for a collision brought about by improper navigation by the other vessel.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 140-149; Dec. Dig. § 77.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by Margaret S. Brandreth, as owner of the yacht Taormina, against the steam tug Fred Richards. Decree for libellant, and claimant appeals. Affirmed.

Wing, Putnam & Burlingham (James Forrester, of counsel), for appellant.

James J. Macklin (De Lagnel Berier, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. February 3, 1907, about 9:40 p. m., the yawl-rigged yacht Taormina, bound from New York to Newport News, came into collision with a barge towing astern of the tug Fred E. Richards on a hawser 200 fathoms long. The tug and barge belonged to the claimant, and were bound from Philadelphia to Boston. The jibboom and headsails of the yacht were carried away, and she began to leak considerably. Under these circumstances it was perfectly natural that signals of distress should have been displayed on the yacht, as her witnesses testify they were. The witnesses from the tug say that they stood by half an hour (although they did not know there had been a collision until they arrived next morning at White-stone, Long Island), and saw no distress signals. We do not credit

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

their testimony on this point, and are satisfied that they did not lay by at all, and failed to see the distress signals because of gross negligence, or willfully disregarded them. The trial judge held that the tug's failure to stand by raised a presumption under the act of September 4, 1890, that the collision was caused by her fault, and we think he was right in so doing. But we arrive at the same conclusion on the testimony.

There is, as usual, great contradiction between the witnesses; but certain significant facts are admitted, viz.: The wind was northwesterly; the yacht was proceeding down the coast upon a course S. by W. $\frac{1}{4}$ W.; the tug and tow were proceeding up the coast on a course of N. N. E.; the vessels were going at about the same speed, and there was but a difference of three-quarters of a point between their courses. The yacht passed the tug close to, port to port, and struck the starboard side of the barge an angling blow, without fouling the towing hawser. As she drew with her fin keel some 12 feet, it is obvious that the towing hawser must have been slack, and that this must have been caused by the stopping of the tug. As the barge was considerably on the port quarter of the tug and the wind was from the westward, the tug must either have ported or the barge starboarded.

We believe the vessels were approaching each other nearly head on at about the same rate of speed, so that their courses would cross at a point where they would be very near each other. It was for this reason that the tug stopped to let the yacht cross her bow, and that the yacht, seeing herself in such close proximity to the tug, put her helm down, so as to come up into the wind several points and give the tug and tow safe clearance. When, however, she discovered the barge on her starboard hand, she at once put her helm up rather than take the risk of crossing the bow of the barge, and scraped along her starboard side. The yacht did not change her course until the tug was in such close proximity to her that any change was an act in extremis, for which she is not chargeable with fault.

We do not attach much importance to the fact that the second officer, who was in charge of the yacht at the time of the collision, and the lookout, were not examined. The former was drowned before the trial, and the latter was a Central American Indian, quite incapable of speaking English. This would not prevent him from being an effective lookout.

The claimant relies upon *The City of Rio de Janeiro*, 130 Fed. 76, 64 C. C. A. 410, 69 L. R. A. 71, which does not seem to us applicable. In that case the owners were denied the benefit of the law limiting liability, because they had manned their vessel with a Chinese crew, who had been given no training in launching boats, and, because of their inability to understand orders after the stranding, the loss of life and baggage was greatly increased.

Decree affirmed, with interest and costs.

WILLIAMS v. MOLTHER et al.

(Circuit Court of Appeals, Second Circuit. July 1, 1910.)

No. 332.

COURTS (§ 424*)—FEDERAL COURTS—JURISDICTION—NAVIGATION INSPECTORS—EXAMINATION FOR PILOT'S LICENSE.

The federal District Court has no jurisdiction of an application to compel local inspectors of steam vessels to examine an applicant for a pilot's license, as authorized by Rev. St. § 4442 (U. S. Comp. St. 1901, p. 3037), without having complied with rule 5, § 46, of the board of supervising inspectors, making it a condition precedent to the applicant's right to examination that he shall have served a three years' apprenticeship in the deck department of a steamer, sailing vessel, or barge consort.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 424.*]

Appeal from the District Court of the United States for the Northern District of New York.

Petition by Frank R. Williams against John Molther and another, as local inspectors of steam vessels, to compel defendants to examine him as an applicant for a pilot's license. From an order denying the application, petitioner appeals. Affirmed.

Frank R. Williams, pro se.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. The petitioner applied in his own proper person and in the most informal manner to the District Court of the United States for the Northern District of New York for an order directing the United States local inspectors of steam vessels for the district of Oswego, N. Y., to examine him as an applicant for a license to act as pilot, master, or mate on steam vessels under 100 gross tons from Ogdensburg to Detroit, on the St. Lawrence river, Lake Ontario, Niagara river, Lake Erie, and Detroit river, in accordance with section 4442, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3037), which reads as follows:

"Sec. 4442. Whenever any person claiming to be a skillful pilot of steam vessels offers himself for a license, the inspectors shall make diligent inquiry as to his character and merits, and if satisfied from personal examination of the applicant, with the proof that he offers that he possesses the requisite knowledge and skill, and is trustworthy and faithful, they shall grant him a license for the term of one year to pilot any such vessel within the limits prescribed in the license; but such license shall be suspended or revoked upon satisfactory evidence of negligence, unskillfulness, inattention to the duties of his station, or intemperance, or the wilful violation of any provision of this title."

The inspectors refused to examine the petitioner, because his application did not show that he had the experience in the deck department of vessels required by rule 5, § 46, of the board of supervising inspectors, which provides:

"46. No original license for pilot of any route shall be issued to any person, except for special license for steamers of 10 gross tons and under, who has

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

not served at least three years in the deck department of a steamer, sail vessel, or barge consort, one year of which experience must have been obtained within the three years next preceding the date of application for license, which fact the inspectors may require, when practicable, to be verified by the certificate, in writing, of the licensed master or pilot under whom the applicant has served, such certificate to be filed with the application of the candidate."

Section 24 of the same rule contains a similar provision as to engineers. The question sought to be raised is whether the inspectors' rule has the force of law under section 4405, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3017), the material portion of which is as follows:

"Sec. 4405. The supervising inspectors and the supervising inspector general shall assemble as a board once in each year, at the city of Washington, District of Columbia, on the third Wednesday in January, and at such other times as the Secretary of the Treasury shall prescribe, for joint consultation, and shall assign to each of the supervising inspectors the limits of territory within which he shall perform his duties. The board shall establish all necessary regulations required to carry out in the most effective manner the provisions of this title, and such regulation when approved by the Secretary of the Treasury, shall have the force of law. * * *

The petitioner insists that the rule in question is not required to "carry out in the most effective manner the provisions of this title," in that it restricts applicants, not in respect to their competency, which section 4442 was designed to insure, but to a smaller class of persons having had a particular kind of experience for a fixed length of time. Such or similar restrictions might easily be used to create a dangerous monopoly of the business of pilots and marine engineers. The question is therefore not deserving of serious consideration, but we are quite clear that the District Court of the United States has no jurisdiction in the premises. We do not feel called upon to express any opinion as to whether the Circuit Court in an equity proceeding could pass upon the petitioner's claim as a right founded on a federal statute, or whether the only remedy, if one is needed, is by application to Congress.

Order affirmed, without costs.

CENTRAL TRUST CO. OF NEW YORK v. THIRD AVE. R. CO. et al.

(Circuit Court of Appeals, Second Circuit. May 2, 1910.)

No. 315.

SUBROGATION (§ 33*)—FORECLOSURE OF MORTGAGES—DEBTS ENTITLED TO PRIORITY.

The surety on an appeal bond given by a street railroad company on appeal from a judgment recovered by the city of New York for car license fees, which has paid the judgment and taken an assignment thereof, is subrogated only to the rights given by the judgment; and, there being no statute giving such judgment any lien or preference, it is not entitled to priority of payment over a prior mortgage on a sale of the company's property in foreclosure proceedings.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 96-98; Dec. Dig. § 33.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by the Central Trust Company of New York against the Third Avenue Railroad Company and others; the American Surety Company of New York, intervener. From an order of the Circuit Court, intervener appeals. Affirmed.

Louis Marshall, for appellant.

Bowers & Sands (John M. Bowers and Middleton S. Borland, of counsel), for appellee.

Evarts, Choate & Sherman (H. J. Bickford, of counsel), for receiver Whitridge.

Before COXE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. The Central Trust Company, trustee under the mortgage of the Third Avenue Railroad Company, brought an action to foreclose. The appellant, the American Surety Company, intervened and presented its claim to be first paid the sum of \$44,561.32 out of the proceeds of the mortgaged property. The claim for preference is rested upon the fact that the appellant, as surety of the railroad company upon an appeal from a judgment in favor of the city of New York for car license fees incurred before, but for which suit was brought and judgment recovered after, the date of the mortgage, has paid the judgment. The special master and the court below denied the petition, and we concur in their conclusion.

The appellant paid the judgment in the ordinary course of its business, in consideration of premiums received from the railroad company, without any purpose of benefiting the mortgagee. It is by subrogation clothed only with the rights of the city, and these are expressed in the judgment which has been assigned to it, and which it may enforce by execution in the usual way. Assuming, in accordance with the appellant's contention, that the license fees are to be regarded as taxes, still neither they nor the judgment for them are entitled to any lien or preference because none is given by statute. This would be so even if the claim belonged to the state. *Wise v. Wise Co.*, 153 N. Y. 507, 510, 47 N. E. 788.

The appellant also relies on broad principles of equity derived from the maxim that he who asks equity must do equity. Conceding, as it contends, that payment of the license fees is such a condition of the grant from the state that the state may forfeit the franchise or enjoin the operation of the road for nonpayment, still it does not follow that the appellant is entitled to a preference for this reason. By payment it became in no way connected with the state, which alone can assert these rights. *City v. Bryan*, 196 N. Y. 158, 89 N. E. 467. And we cannot assume, for the purpose of displacing the mortgagee's contract lien, that if the license fees had not been paid the city would have moved the state to assert these rights against the railroad company and that the state would have done so.

The order is affirmed.

AMERICAN PNEUMATIC SERVICE CO. et al. v. SNYDER et al.

(Circuit Court of Appeals, Third Circuit. July 29, 1910.)

No. 1,317.

1. PATENTS (§ 328*)—ANTICIPATION—VALIDITY—PNEUMATIC DESPATCH SYSTEM.
The Bavier & Hawkes patent, No. 658,102, for improvements in pneumatic despatch systems, *held* not anticipated and valid.

2. PATENTS (§ 173*)—CONSTRUCTION OF CLAIMS—PIONEER INVENTION—DOCTRINE OF EQUIVALENTS.

The claims of a patent of a pioneer invention are entitled to some liberality in the application of the doctrine of equivalents.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 248; Dec. Dig. § 173.*]

3. PATENTS (§ 328*)—INFRINGEMENT.

The Bavler & Hawkes patent, No. 658,102, for improvements in pneumatic despatch systems, *held* infringed.

McPherson, District Judge, dissenting.

Appeal from the Circuit Court of the United States for the District of New Jersey.

Action by the American Pneumatic Service Company and another against William V. Snyder and others. Decree of dismissal (174 Fed. 152), and complainants appeal. Reversed, with directions.

M. B. Philipp, for appellants.

Henry P. Simonton, for appellees.

Before BUFFINGTON, Circuit Judge, and BRADFORD and McPHERSON, District Judges.

BRADFORD, District Judge. This is an appeal by the American Pneumatic Service Company and the Pearsall Pneumatic Tube and Power Company from a final decree of the circuit court of the United States for the district of New Jersey, in a suit in equity brought by the appellants against William V. Snyder, William V. Snyder, Jr., and Watson B. Snyder, trading as W. V. Snyder & Company, the appellees, dismissing a bill of complaint for an injunction and an accounting because of alleged infringement by the defendants of letters patent of the United States No. 658,102, dated September 18, 1900, granted to Bavier & Hawkes for improvements in pneumatic despatch systems. No question of title to the patent is raised, and the suit was brought by the Pearsall Pneumatic Tube and Power Company, as owner, and the American Pneumatic Service Company, as exclusive licensee for the United States and the territories thereof. The patent in suit has two claims, both of which are alleged to have been infringed. They are as follows:

"1. A vacuo despatch system characterized by the combination of a line of tubing, an exhauster operatively connected therewith, and a terminal air-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

inlet having a closure which automatically shuts the air-inlet when no carrier is being despatched and automatically opens same when a carrier is being despatched, substantially as described.

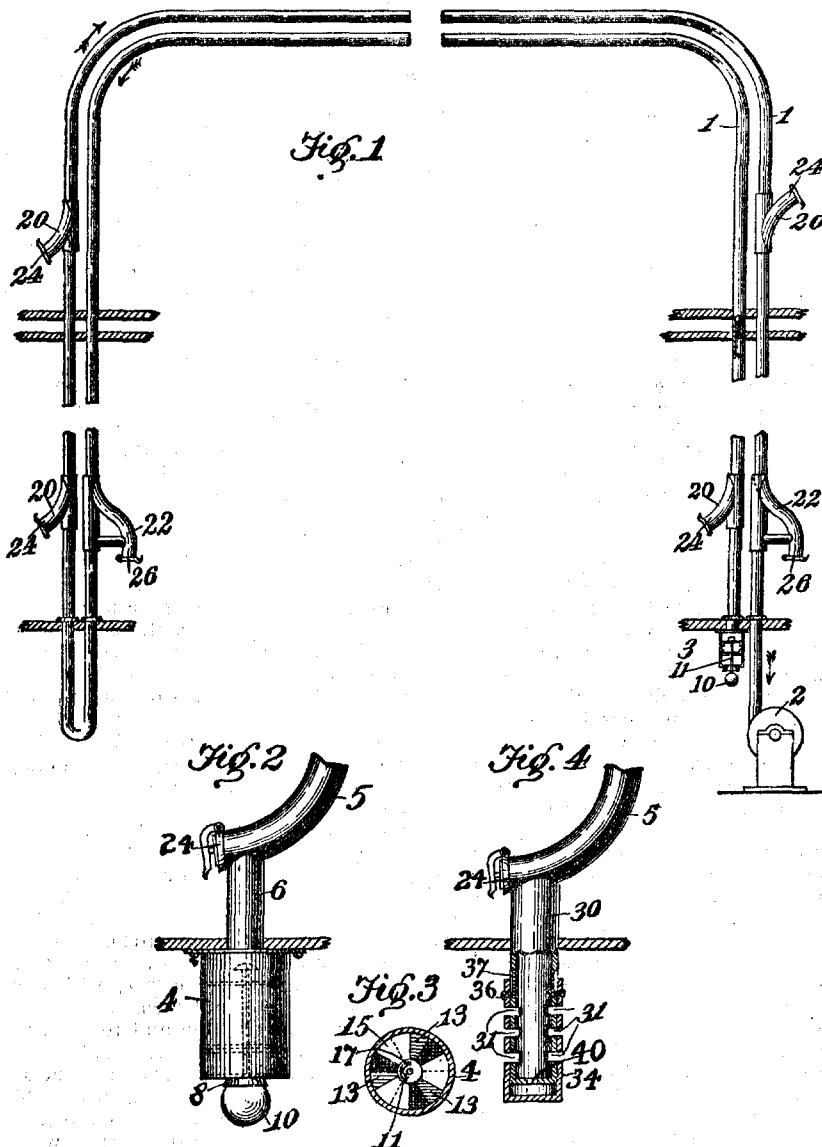
"2. The combination in a vacuo despatch system of a line of tubing, an exhaustor operatively connected therewith despatch-inlets and discharge-outlets normally closed, and a terminal air-inlet on said line remote from said exhaustor provided with a closure which is arranged to automatically shut the said terminal air-inlet when no carrier is being despatched, and automatically open it when a carrier is being despatched, substantially as described."

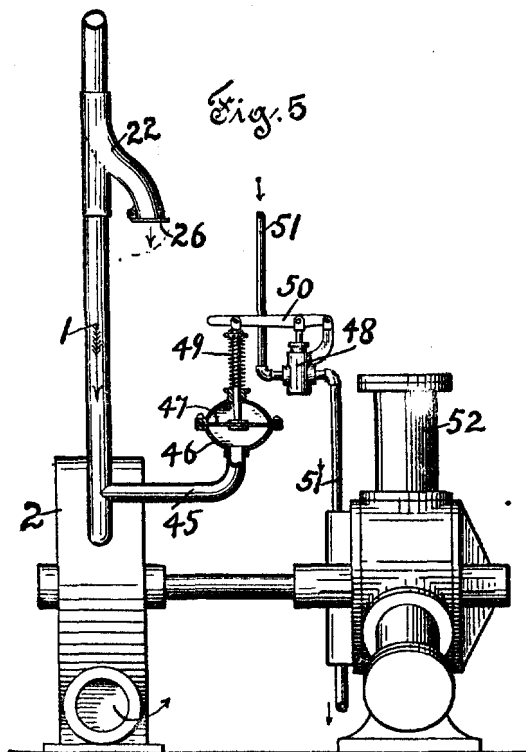
In the description the patentees say:

"Our invention relates to improvements in pneumatic-despatch systems, especially such as are used for the transmission of cash-carriers in mercantile houses. In particular the invention relates to improvements in that class of systems wherein a partial vacuum is maintained in the line by an exhausting-engine, as a pump, and which systems are known as 'vacuo' systems. The object of our invention is to attain the highest practicable economy in the operation of vacuo systems by reducing the duty of the exhausting-engine, which is hereinafter termed the 'exhauster,' to the minimum required for the service actually performed when moving the carriers through the line, and our invention effects this result by providing a system wherein the line is closed when no service is being performed—that is, when no carrier is being despatched—so that then all the duty put on the exhauster is to maintain the requisite slight vacuum in the closed line; but which system is also such that a terminal air-inlet opens to the necessary degree to maintain the requisite movement of air through the line when one or more carriers are being despatched. In the common vacuo system the extremity of the line farthest from the exhauster is always open and the exhauster is always required to do at least the work of moving the calculated volume of air through the line in the calculated time even if no carrier is in the line. Thus as in practice there are often considerable periods of time when no carriers are being despatched the work thrown on the exhauster is far in excess of what is needed to operate the line at those times when carriers are being despatched, and this unnecessary expenditure of energy renders such a system very wasteful of power. In our system, however, the air-inlet at the extremity of the line, called the 'terminal' air-inlet, is normally—that is, when no carrier is being despatched—closed, as are also the valves or flaps at each of the despatching-inlets and at the discharge-outlets of the carriers. Normally, then, ours is a closed system, wherein all the work required of the exhauster is to merely maintain the requisite slight vacuum in the line, and the closure at the terminal air-inlet is such, whatever may be its details of construction, as to automatically open, when a carrier is in the line, to such an extent that the exhauster will develop the requisite current in the line to move the carrier to its destination and will automatically close when all the carriers that were in the line have passed out of the line at their discharge-outlets. The invention, therefore, is not limited to any special closing device, but equally covers all such devices which, in combination with the line and the exhauster, close the line when no carrier is being despatched, and open it when one or more carriers is or are being despatched, thereby producing the economy of energy, at which our invention aims. * * * In our invention said terminal air-inlet is provided with a closure, which operates automatically in such a manner as to close the said terminal air-inlet when the exhauster is running but no carrier is in the line and to open the said terminal air-inlet when one or more carriers are in the line. Said closure can be constructed and arranged in many ways without departing from our invention, and we show two modifications thereof which work well in practice. * * * A very important result of the operation of the closure of the terminal air-inlet is that the speed of the carrier can never exceed that which attends upon the incoming of the air at such velocity as will close the ter-

minal air-inlet, for should the carrier reach or exceed this speed the terminal air-inlet will be closed, producing a vacuum behind the carrier which will immediately reduce its speed to such degree as to permit the air-inlet to open again, and we can regulate this speed by adjusting the valve at the terminal air-inlet, so as to obviate the danger of accidents when the carrier reaches the despatch outlets, which is a defect in present vacuo systems."

The drawings illustrating the patented apparatus are as follows:





With respect to them the patentees say:

"Figure 1 is a representation, partly broken and sectioned, of a vacuo system equipped with our invention. Fig. 2 is an elevation of one form of terminal air-inlet and closure, and Fig. 3 a view of the valve thereof from below. Fig. 4 is a vertical section of another modification of the terminal air-inlet and closure. Fig. 5 is an end elevation, on large scale, of the exhaustor and engine which drives the same. Said figure also illustrates a convenient form of governor for controlling the exhaustor according to the varying needs of the line. Referring to Figs. 1 to 3, inclusive, 1 is the line or circuit of tubing, connected in any usual manner with the exhaustor 2. For convenience said circuit 1 is arranged as a loop, with the terminal air-inlet 3 near said exhaustor 2. * * * Referring to Figs. 2 and 3, which illustrate one of said modifications, the terminal air-inlet consists of a cylinder 4, connected with a curved branch 5 of the line 1 by a depending tube 6. In the lower head of said cylinder 4 is an air-inlet opening with a conical valve-seat 8, on which seats a light ball-valve 10 of any suitable material, as a thin rubber globe. The valve-stem 11 is guided through spiders fixed in said cylinder, and a nut on the end of the stem limits the amount of opening of the ball. Fixed on said stem 11 is a circular perforated plate 13, and turning within desired limits of motion on said stem in contact with said plate 13 is a similarly-perforated damper 15, the degree of opening of said damper being limited by a pin working in a slot 17 in the hub of said damper 15, it being understood that said plate 13 has all but an air-tight fit in the cylinder 4, and just so as not to touch the periphery thereof. Thus by adjust-

ing the damper 15 the rate and friction of the incoming air and its tendency to raise and close the ball-valve 10 may be regulated as circumstances require. At suitable places along the line of tubing are despatching-inlets 20 20 for the insertion of the carriers and discharging-outlets 22 22, into which the carriers are shunted from the main line 1 and from which they are discharged in the usual manner. Said despatching-inlets are each closed normally air-tight by valves or flaps 24 which are normally held closed by the external air pressure, or by the usual springs or other devices, and said discharge-outlets 22 are each also normally closed air-tight by valves or flaps 26, which are normally held closed by the external air-pressure or by the usual springs or other suitable devices of such character that the impact of the cash-carriers when arriving at them will momentarily open the said valves 26 to permit said carriers to drop out, said valves immediately closing again automatically. Normally—that is, when no cash-carrier is in the line—the ball-valve 10 will be on its seat and all the valves 24, 26 will be closed, and all the duty the exhauster 2 need then do is to maintain the normal small vacuum in the line, thereby reducing its necessary duty to a minimum. Now suppose the valve 24 of any despatching-inlet 20 is opened to insert a carrier. This opening momentarily reduces the vacuum by allowing some air to enter the line, and the valve 10 drops from its seat, opening the terminal air-inlet, which, as will be apparent, is at the remotest point of the line, measuring through the tubing, from the exhauster, and therefore beyond any despatching-inlet, and any carrier that may be inserted into the line. There is now a movement of air through the line toward the exhauster, which when the cash-carrier is inserted moves said carrier toward the exhauster, and the valve 24 at that inlet where the carrier was inserted immediately closes. The pressure of the carrier introduces, as we have hereinbefore stated, additional resistance to the motion of the air, and valve 10 remains more or less open, allowing air to enter at the terminal air-inlet 3, to maintain the requisite current in the line to move the carrier through the line until it is discharged at the proper outlet. Immediately after the valve at the outlet closes the ball-valve 10 also closes and the exhauster again performs only its minimum duty. Suppose that while one carrier is traveling through another is inserted into the line. It may be either behind—that is, farther from the exhauster—or in front of—that is, between the first carrier and the exhauster. In the first case the insertion of the second carrier will not even momentarily have any practical effect on the first carrier; but the valve 10 may open a little more in accordance with the increased resistance in the line. In the second case, the motion of the first carrier will be momentarily arrested or checked, and then when the valve of the despatching-inlet at which the second carrier was inserted closes the first carrier will again proceed toward the discharge-outlet, in both cases, of course, the second carrier also moving through the line and valve 10 opening according to the resistance in the line. When the first carrier drops out of its discharge-outlet, the second carrier will be momentarily arrested or checked and then as the valve of the discharge-outlet closes will continue on its journey, the valve 10 adjusting itself to the reduced resistance in the line. Thus under all conditions the valve at the terminal air-inlet 3 adjusts itself to the conditions of service in the line and reduces the duty of the exhauster to minimum required for that service. Referring to Fig. 4, the depending tube 30 is preferably closed at its lower end, which has a small hole 40 and is provided with circumferential ports 31. A sleeve 34, provided with circumferential ports which in the open position register with the aforesaid ports 31, is preferably closed at the bottom and works with an easy approximately-tight fit on said tube 30, being stopped at its open-port position by a pin 36, which works in a slot 37. The ports and the weight of the sleeve are so adjusted that when no carrier is in the line the sleeve will be drawn up by the partial vacuum in the line and close the ports 31, but that when a carrier is in the line the sleeve will descend to more or less open the ports, according to the resistance in the line, the operation of this form of closure being the substantial equivalent of the ball shown in Fig.

3. Any suitable device may, of course, be used to automatically control the exhauster according to the varying needs of the line. A suitable governor is shown in Fig. 3 (5), consisting of a diaphragm 47 of the well-known type in communication by tube 45 with the line-tube 1. Said diaphragm 47 controls the valve 48 on the steam-pipe 51 by the lever 50, and said valve controls the speed of the engine 52, which drives the exhauster 2, so that when the terminal inlet-valve is opened, as when a carrier is in the line, the diaphragm 47 being raised by the spring 49, the valve 48 is opened and the engine and exhauster run at relatively-high speed, but that when the terminal inlet-valve and tube-line are closed, as when no carrier is in the line, the vacuum developed in tube 1 will draw down the said diaphragm, closing said valve 48 and slowing down the engine and exhauster."

There can be no question as to the utility of the apparatus of the patent in suit. Aside from its convenience, it is highly economical in reducing to a minimum the power necessary for the operation of a pneumatic despatch system within the limits of distance for which such patented apparatus is adapted. But the defendants deny the validity of the patent in suit on the ground of prior patents or other matter of an anticipatory character, and also deny that, on the assumption that the patent in suit is valid, they have infringed its claims or either of them. We shall first consider the question of the validity of the patent.

The combination of claim 1 relates to a vacuo despatch system, and consists of (1) a line of tubing, (2) an exhauster operatively connected therewith, and (3) a terminal air-inlet having a closure which automatically shuts the air-inlet when no carrier is being despatched, and automatically opens the same when a carrier is being despatched, substantially as described. The combination of claim 2 also relates to a vacuo despatch system, and consists of (1) a line of tubing, (2) an exhauster operatively connected therewith, (3) despatch-inlets and discharge-outlets normally closed, and (4) a terminal air-inlet on said line remote from said exhauster, provided with a closure which is arranged to automatically shut the said terminal air-inlet when no carrier is being despatched, and automatically open it when a carrier is being despatched, substantially as described. The meritorious and distinguishing feature of the apparatus of the patent in suit is its capacity to transmit carriers, not by means of air in the tubing compressed beyond its normal condition or density, nor by means of air in any portion or portions of the tubing so compressed in connection with air so rarified in other parts of the tubing as to constitute a partial vacuum. For such compression of air would involve waste of power and consequently unnecessary expense. It is the capacity of the apparatus to transmit carriers by means of air in the tubing so rarified between the carrier and its point of discharge as to constitute a partial vacuum, without any use of air in the tubing behind the carrier compressed beyond its normal external condition and thereby to reduce the expenditure of power to a minimum. When the apparatus is in a normal condition of rest, that is to say, not transmitting a carrier, the exhauster causes only a slight vacuum or rarification of the air in the tubing just sufficient to keep the valves shut. It is known as a closed system, for such it is in its normal condition. If any of the despatch inlets

were inadvertently or otherwise opened without the insertion of a carrier, the closure or valve 10 will automatically open, and then automatically shut the terminal air-inlet 3. By arranging the tubing in a loop as shown in Fig. 1, carriers may at the same time be despatched in opposite directions. The terminal air-inlet is remote from the exhauster, not necessarily in point of distance on a straight line between the two, but with respect to the length of the tubing between them.

In the brief for the defendants many patents are referred to in support of their contention that the patent in suit is invalid by reason of direct anticipation or the prior art. Among these are U. S. patents Nos. 570,161, and 624,201, to Fordyce; No. 367,386 to Given; No. 411,333 to Given and Kelly; Nos. 551,602, 582,829 and 640,020 to Persall; No. 648,137 to Woodman; and No. 338,138 to Buell; in all of which a pressure and not a vacuum despatch system is disclosed. It is urged that it did not involve inventive genius to make such changes in the apparatus of the above patents as to adapt them to the transmission of carriers under a vacuum system such as that of the patent in suit—that such alterations were within the competency of any one skilled in the art. Doubtless had the apparatus in question been seen and examined by those skilled in the art, as disclosed by the above patents, and they had been asked to make such changes, they might have done so. But this circumstance fails to overcome the presumption of validity arising from the granting of the patent, coupled with the nature of the changes necessary to be made to convert pressure despatch system into vacuum despatch systems.

In addition to the above patents, the defendants rely upon U. S. patents No. 652,960 to Foyer; No. 489,932 to Clay; the second certificate of addition to the French patent No. 97,158 to Crespin & Lapergue; British patent No. 5,536 to Blakeney; and U. S. patents No. 431,699 to Leake, and No. 566,575 to Hazard. No one of the last named patents discloses the combination of either of the claims of the patent in suit. Patent No. 652,960 to Foyer, discloses a combined vacuum and compressed air system, unlike the system of the patent in suit in that no vacuum is produced throughout the length of the system for forwarding and returning carriers wherever inserted in the tubing, but, on the contrary, contains two independent transmission tubes in one of which a partial vacuum is created to send carriers from the salesman's station to the cashier's station, and in the other compressed air is employed to return them from the cashier's station to the salesman's station. The apparatus also lacks a closure for a terminal air-inlet having the operation and results of the closure of the terminal air-inlet of the patent in suit; nor does it disclose a terminal air-inlet remote from the exhauster allowing carriers to be despatched in opposite directions in a loop line of tubing. Patent No. 489,932 to Clay also discloses a combined vacuum and compressed air system. The carriers are sent from subscribers' stations by means of a vacuum to a central station, and are transmitted from the central station to the subscribers' stations by compressed air in the tubing. In this system only one carrier can be sent from one of the subscribers' stations at a

time. For if several carriers were inserted in the tubing, the delivery of the first would cause the introduction of compressed air which would return the other carriers to the outer or terminal station; whereas, in the apparatus of the patent in suit, although several carriers are inserted in quick succession in the tubing at any salesman's station, the terminal air-inlet valve will automatically open and remain open until all the carriers are delivered, when it will automatically shut; the direction of the air current not being reversed but always in a direction toward the exhauster. The apparatus of the Clay patent lacks a terminal air-inlet having the operation and producing the results of the terminal air-inlet of the apparatus of the patent in suit.

The apparatus of the above-mentioned French patent No. 97,158 to Crespin & Lapergue, with the exception of that shown in Fig. 2 of the second certificate of addition, discloses a purely pressure system for the transmission of carriers, termed "trains," through a long line of pneumatic tubing divided into a number of small sections; the carriers being moved successively through the sections by the pressure of air in excess of its normal external condition. A carrier propelled by compressed air will pass through and to the end of the first section; "thence it will pass into the second section, where, by its passage, it will close a door behind it, and will instantly open a valve," thereby admitting compressed air for its transmission through the second section, and so on until the carrier reaches the discharge-outlet. But in the second certificate of addition, the patentees refer to Fig. 2, as showing a good "vacuum relay," and say that "its operation consists in maintaining the line closed and emptying it of air as completely as possible in the intervals between the trains, opening the passage only at the moment the trains pass." Under this vacuum system, a carrier cannot be despatched whenever desired, as is practicable in the apparatus of the patent in suit, nor, as far as appears, can there be intermediate despatch-inlets. We do not find in the above mentioned apparatus a terminal air-inlet with a closure automatically shutting and opening such inlet, and having the operation or producing the results of either of the combinations of the patent in suit.

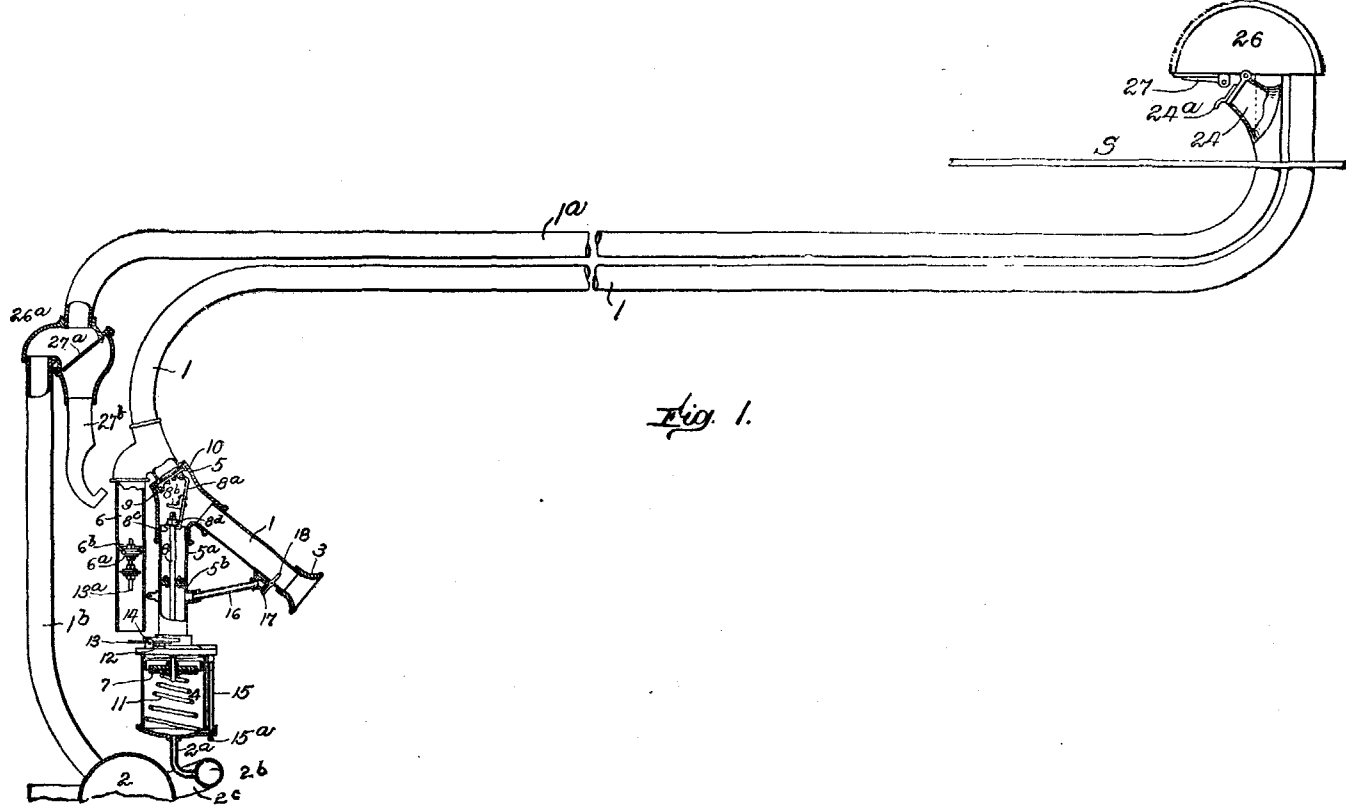
The British patent No. 5,536 to Blakeney clearly is not an anticipation of the patent in suit. There is a terminal air-inlet and an exhauster at each end of the line. Not more than one carrier can be sent from either end of the line at one time. After the insertion of a carrier in the sector, the latter has to be moved manually from an inclined to a vertical position, and finally if a sector accidentally or inadvertently is placed in a position proper for the despatching of a carrier, and the latter should not be inserted, the exhauster would cause the air to move through the tubing until such sector was manually replaced in its normal position of closure. The apparatus of the British patent also lacks despatch-inlets and discharge-outlets having the operation and producing the results of either of the combinations of the patent in suit. Patent No. 431,699 to Leake relates to tubular switches for transferring carriers from one to another line of tubing.

It is confined to switching mechanism. It does not disclose either of the combinations of the patent in suit.

Patent No. 566,575 to Hazard shows an apparatus under which air continues for a period of time to flow through the tubing when no carriers are being transmitted, and such flow will continue until a carrier is inserted in the tubing to be returned from the cashier's station to the salesman's station, thereby wasting power during that interval. The closure does not automatically operate upon the discharge of the carrier at the cashier's station, nor, as stated, until it is again inserted in the line of tubing. This apparatus thus lacks the terminal air-inlet with a closure automatically shutting such inlet when no carrier is being despatched, and automatically opening the same when any carrier is being despatched, and keeping it open until such carrier or other carriers in transit is or are despatched, when the closure again operates.

No one of the foregoing patents discloses a combination containing elements the same as or equivalent to all those of the combinations of the patent in suit, co-operating upon the same principle and performing the same function in substantially the same manner and producing substantially the same results. It appears from the file wrapper and contents put in evidence by the defendants that no reference was made in the patent office to any of the foregoing patents or any others as anticipating or otherwise affecting the validity of the application for the patent in suit. The only objection encountered in the patent office by the inventors was alleged want of utility; but this objection was properly withdrawn and the patent granted. We have no doubt of its validity. We further think that within a limited field it covers what may fairly be deemed a pioneer invention, and its claims are entitled to a somewhat liberal application of the doctrine of equivalents. Paper Bag Patent Case, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122. We are therefore brought to the question of infringement with which the court below solely dealt in deciding the case.

The parties agreed by stipulation made part of the record that the defendants December 10, 1906, "installed in their store in Newark, New Jersey," a pneumatic despatch tube apparatus identical with that shown and described in "complainants' exhibit, description and drawings of defendants' pneumatic despatch tube apparatus," and have continued the use of such apparatus up to the present time. The drawing which illustrates the defendants' apparatus sufficiently for all practical purposes in considering the question of infringement is Fig. 1, as follows:



In the description of the defendants' apparatus it is said:

"The drawings illustrate a Pneumatic Despatch Tube System of the class known as the 'Vacuo' or 'all sealed' system, wherein a partial vacuum is maintained in the transit tubes by means of vacuum producing machinery, and air is admitted to the transit tubes for driving carriers, through the end of the transit tube, called the bell-mouth, such air being controlled by a normally closed valve. This valve is located in the transit tube near the end of the transit tubes, most remote from the source of power, and is open only when carriers are being transmitted from one of a plurality of stations to another of said stations, there being two stations on each line of the transit tubes, the station near the 'bell-mouth end,' or end most remote from the source of power, being designated as the cashier's station, the other station being designated as a salesman's station. Figure 1 of the drawings is a diagrammatic view of a pneumatic despatch tube system of the 'all sealed type' with the operating parts in section showing the normal or closed position of the same. * * * Referring to Fig. 1—1 is a transmission tube connecting the cashier's station C with the salesman's discharge terminal 26 at the salesman's station S. 27 is a normally closed delivery valve, normally closing the opening in the discharge terminal 26. 1a is a transmission tube connecting the terminal 26 at the salesman's station S. with the discharge terminal 26a located at the cashier's station C and which terminal is normally closed by a delivery valve 27a through which the carriers are discharged into the receiving hopper 27b. 24 is a despatching inlet normally closed by the valve 24a and located at the salesman's station S, through which inlet carriers are inserted into the transit tube 1a. 1b is a tube connecting the terminal 26a with the vacuum drum or source of power Fig. 2, and which drum or exhauster is normally in communication with the transmission tubes 1 and 1a. 3 is a bell-mouth or end of the transit tube 1 through which carriers are inserted for transmission from the cashier's station C to the salesman's station S, and through which air is admitted for the driving of carriers from either station to the other and is located at the cashier's station C at a point most remote from the source of power. 5 is a casing or housing interposed in the transit tube 1 near the bell-mouth 3, and has mounted therein a valve 10, pivoted at 9, normally closing the transit tube 1 to the admission of external atmosphere. 4 is a cylinder attached to the housing 5 and carries mounted therein the piston 7 which is connected with and adapted to operate the valve 10 through a piston rod 8 and a link 8a, provided with a yoke 8c through which the piston rod 8 is slidably mounted, said piston rod 8 being retained in said yoke 8c by the retaining nut 8d. Said link 8a is also provided with a lug 8b located and adapted so as to come into contact with the upper end of piston rod 8 when the same travels upwardly. Said cylinder 4 is attached to a casing or housing 5 by means of the depending pipe 5a but communication between said cylinder 4 and said housing 5 is prevented by the head 5b through which the piston rod 8 travels. Said head 5b being provided with a stuffing box adapted to prevent leakage of air around said piston rod 8. A spiral spring 11 is interposed between the bottom of the cylinder 4 and the piston 6 and normally holds the piston 7 in the upper part of the cylinder 4. The lower part of the cylinder 4, below the piston 7, is connected with a small suction drum or header 2b, through a pipe 2a. This small suction drum or header 2b is connected to the main suction drum 2 by means of the pipe 2c, and a partial vacuum is normally present in the cylinder 4 both above and below the piston 7, and in the pipe 2a, the header 2b, the pipe 2c and the drum 2. The cylinder 4 above the piston 7 is adapted to communicate with the atmosphere through a port 12 normally closed by valve 13, pivoted at 14 upon the outside of said cylinder 4. 6 is a hollow column or cylinder connected with and in communication with the transmission tube 1 at a point near the valve 10 and between said valve 10 and the salesman's station. Said cylinder 6 having mounted therein a piston 6a normally held against the bushing or seat 6b by the action of the vacuum in the transmission tube 1. This piston 6a is adapted to drop by gravity away from its seat or bushing 6b, through a fluctuation of the vacuum in the transmission tube 1. Said piston 6a is provided with a short rigidly mounted piston rod 13a which

comes in contact with a lever of the valve 13, when said piston 6a falls by gravity (through being released from its seat by a fluctuation of the vacuum in transmission tube 1), and opens the port 12 and admits air to the top of cylinder 4 above said piston 7. Cylinder 4 is provided with a by-pass 15 connecting the top and bottom of said cylinder above and below the piston 7, the duct of said by-pass 15 is restricted and controlled by an adjustable timing valve 15a. 16 is a pipe connecting with and adapted to admit air to the top of the cylinder 4 above piston 7. Said pipe being normally closed by a valve 17 mounted in the bell-mouth 3 and having a trip 18 projecting into the bell-mouth. Said pipe 16 communicating with said cylinder 4 through the lower end of the depending pipe 5a at a point below the sealing wall or head 5b. The operation of the system is as follows:

The cashier or operator at the cashier's station, in despatching a carrier to the salesman's station S inserts the carrier into the bell-mouth 3. * * * When it engages and depresses the trip 18 opening the valve 17 and admitting air to the top of cylinder 4 above the piston 7, and, there being a normal vacuum beneath the piston 7, the air admitted to the top of said cylinder 4 by the opening of the valve 17 forces said piston 7 downwardly against the tension of the spring 11 and the said valve 10 is thereby opened by means of the said rod 8 and the link 8a connecting the said valve 10 with said piston 7. The opening of this valve 10 admits air into the transmission tube 1 beyond the seat of said valve through the bell-mouth 3 and the short section of the transit tube 1 interposed between the housing 5 and said bell-mouth 3, driving the carrier through said transmission tube 1 in the direction indicated by the arrow, towards the salesman's station S. The carrier having passed the trip 18, the valve 17 closes by its own gravity, or by a spring (not shown) provided for that purpose. The closing of this valve 17 shuts off the admission of air to the upper part of said cylinder 4, and the air that has remained in said cylinder and which had forced the piston 7 downwardly is gradually exhausted through the by-pass 15 by the timing valve 15a and through the pipe 2 and header 2b, pipe 2c and drum 2. As this air is exhausted, the spring 11 gradually raises the piston 7 and the piston rod 8 coming in contact with the lug 8b, of the line 8a, forces the valve 10 toward its seat or normally closed position, and by the time the carrier has discharged through the valve 27 at the salesman's station, the valve 10 has been moved into the path of the air current in the housing 5 sufficiently to cause it to be engaged by said air current and quickly exerted to its seat in advance and at greater speed than the travel of the piston rod 8. The closing of said valve 10 shuts off further admission of air to the transit tubes. The closing of this valve 10 is timed and regulated by the timing valve 15a. The full opening of this timing valve 15a permits the rapid exhaustion of the air in the top of said cylinder 4, and the consequent rapid rise of said piston 7 closing said valve 10, and the partial closing of said timing valve 15a retards the exhaustion of the air in the cylinder 4 thereby allowing said valve 10 to remain open for a longer period. In despatching a carrier from the salesman's station S to the cashier's station C the operator opens the valve 24a and inserts the carrier into the despatching inlet 24. * * * The opening of this valve admits air to the transmission tubes 1 and 1a causing a fluctuation of the pressure within said tubes, causing the piston 6a to drop by gravity from its seat 6b and the piston rod 13a comes in contact with the lever attached to valve 13 opening said valve, admitting air through the port 12 to the top of cylinder 4 above the piston 7. The piston 7 is now forced downwardly in the manner heretofore described in the operation of sending a carrier from the cashier's station to the salesman's station. The valve 10 is consequently opened admitting air through the bell-mouth 3 causing the carrier to be transmitted to its destination. The valve 24a at the salesman's station closes immediately after the carrier has been inserted into the inlet 24. The rush of the air current through the transit tube 1 when the valve 10 is open is such that a partial vacuum is created in the upper end of the hollow column or cylinder 6 (which is in communication with the transit tube 1) above the piston 6a, this partial vacuum causes the piston 6a to again rise to its seat 6b, thereby allowing the valve 13 to close, cutting off the admission of air to the top of cylinder 4 and allowing said piston 7 to close the

valve 10 in the manner heretofore described, so that when the air above said piston is exhausted from the top of cylinder 4 through the by-pass 15, regulated by the valve 15a, said valve 10 will be closed immediately after the discharge of the carrier and the system has resumed its former normal position. In the event that carriers are inserted for transmission at either station simultaneously or in such quick succession that more than one carrier is being transmitted at a time, an added quantity of air is admitted to the top of cylinder 4 through the opening of the valve 17, if the succeeding carrier is inserted at the cashier's station, or, the opening of the valve 24a at the salesman's station causes an interruption of the travel of the current of air in the transit tube 1, momentarily, and this momentarily destroys the vacuum in the hollow column or cylinder 6 above the piston 6a, and the piston 6a again drops downwardly from its seat 6b and opens the valve 13, admitting an additional quantity of air to the top of cylinder 4 above the piston 7 causing the opening of the valve 10, in the event the same has closed or partly closed, and the timing of the operation of said mechanism is again set to commence from the insertion of the last succeeding carrier."

Careful examination of the foregoing agreed statement of facts touching the construction and operation of the defendants' apparatus, in connection with the testimony, produces the conviction that the defendants have appropriated the very kernel and essence of the combination of the patent in suit. Without going into details we agree with the court below in holding that the defendants' apparatus contains the first two elements in both of the claims of the patent in suit, namely, "a line of tubing" and "an exhauster operatively connected therewith," and also contains the third element in the combination of claim 2, namely, "despatch-inlets and discharge-outlets normally closed." But the court below held that the defendants' apparatus does not contain the third element of the combination of claim 1, and the fourth element of the combination of claim 2 of the patent in suit, namely, in claim 1 "a terminal air-inlet having a closure which automatically shuts the air-inlet when no carrier is being despatched and automatically opens same when a carrier is being despatched," and in claim 2 "a terminal air-inlet on said line remote from said exhauster provided with a closure which is arranged to automatically shut the said terminal air-inlet when no carrier is being despatched and automatically open it when a carrier is being despatched." It is not disputed that the valve 10 of the combination of the patent in suit, or its equivalent, is in the terminal air-inlet of the defendants' apparatus, that it serves to shut from the transit tubes air of normal external pressure, and that the defendants' valve 10 is arranged to shut the terminal air-inlet when no carrier is being despatched and open it when a carrier is being despatched. But it is claimed that while valve 10 of the combination of the patent in suit automatically opens and shuts the terminal air-inlet, valve 10 of the defendants' apparatus does not automatically open or shut the terminal air-inlet.

We perceive no force in this contention. It is as unnecessary as it would be wearisome, in view of the agreed statement of facts, to discuss minor details of arrangement or construction of the closure mechanism in the defendants' apparatus, or to attempt a precise definition of the term "automatically." Four things are obvious: (1) that in the defendants' apparatus as in that of the patent in suit, an exhauster being common to both, the transmission of a carrier is due to the difference be-

tween air pressure in the transit tube, not above its normal external density, behind the carrier, and a partial vacuum in such tubing in front of it; (2) that in neither case does the apparatus gather and insert carriers into the tubing for transmission, but in both cases they must be manually inserted; (3) that in both cases the mere insertion of the carrier results in its transmission through the tubing by means of the partial vacuum in front of it created by the exhauster; and (4) that in both cases the opening and closing of the terminal inlet are caused by variation in air pressure in connection with gravity or its equivalent. The defendants' apparatus, therefore, notwithstanding some difference in its details of arrangement or construction is neither more nor less automatic than that of the patent in suit; the manual insertion of the carrier in either case being the controlling factor in the operation of the apparatus.

We think that undue significance was attached by the court below to the phrase "substantially as described." The complainants certainly are not by any descriptive language in the claims or either of them restricted to the precise form or forms of closure mechanism preferably set forth in the patent description. Nor does the description state directly or indirectly that the patentees were to be confined to such particular form or forms of closure mechanism. On the contrary the patentees say:

"The invention, therefore, is not limited to any special closing device, but equally covers all such devices which, in combination with the line and the exhauster, close the line when no carrier is being despatched and open it when one or more carriers is or are being despatched, thereby producing the economy of energy at which our invention aims. * * * Said closure can be constructed and arranged in many ways, without departing from our invention, and we show two modifications thereof which work well in practice."

Further, we have already said that the apparatus of the patent in suit was, within a limited field, a pioneer invention, and that the claims are entitled to some liberality in the application of the doctrine of equivalents; and we think, in view of the new and meritorious character of the combination invention of the patent in suit, that it involves no abuse in the application of that doctrine to hold that the combination of the defendants' apparatus contains elements the same as or equivalent to those of the combinations of claims 1 and 2, co-operating upon the same principle and performing the same function in substantially the same manner and producing substantially the same results. The timing valve 15a to regulate the discharge of air from the portion of cylinder 4 above piston 7, was necessitated by the peculiar and circuitous form of closure mechanism adopted by the defendants for the purpose, as it seems to us, of reaching substantially the same result as that secured by the closure mechanism of the patent in suit. But be that as it may, it does not change the essential constructive principle or function of the apparatus, and if an improvement, regard being had to the character of the invention of the patent in suit, its presence cannot avoid the charge of infringement.

In view of the foregoing considerations we think the court below erred in dismissing the bill, and that its decree must be reversed, with

costs, and with a direction for the entry of a decree in favor of the complainants for an injunction and an accounting as prayed for in the bill; and it is so ordered.

J. B. McPHERSON, District Judge. I agree that the patent in suit is valid, but feel obliged to dissent from the conclusion that the appellees have infringed. Upon this branch of the case I am satisfied with what Judge Lanning has said, and I would affirm the decree on his opinion.

UNDERWOOD TYPEWRITER CO. v. TYPEWRITER INSPECTION CO.

(Circuit Court of Appeals, Second Circuit. July 5, 1910.)

No. 218.

PATENTS (§ 328*)—INFRINGEMENT—TYPEWRITING MACHINES.

The Wagner patent, No. 523,698, and the Wagner and Wagner patent, No. 559,345, both for improvements in typewriting machines, construed, and held not infringed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Equity. Suit by the Underwood Typewriter Company against the Typewriter Inspection Company. Decree for defendant, and complainant appeals. Affirmed.

On appeal from a decree dismissing the bill in a suit for infringement of two letters patent owned by complainant, and granted, respectively, to H. L. Wagner, assignor to Franz X. Wagner, and to H. L. and F. X. Wagner, for improvements in typewriting machines. The first of these, No. 523,698 called the senior patent, was granted July 31, 1894, claims 1, 3 and 11 being in issue. The second, No. 559,345, called the junior patent, was granted April 28, 1896, claim 26 being in issue.

The defendant is the seller of the alleged infringing machines manufactured by E. C. Stearns & Co. The Stearns Company is defendant in a companion suit involving identical issues and counsel have stipulated on the record that the testimony in the above-entitled action shall also be the testimony in the action pending against the Stearns Company.

The Circuit Court, apparently with considerable hesitation, held that claim 3 of the senior patent and claim 26 of the junior patent were valid, but that neither was infringed.

Arthur v. Briesen and Eugene Eble, for appellant.

J. Edgar Bull and Alfred Wilkinson, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. As we agree in thinking that none of the claims is infringed we will confine what we have to say to the defense of noninfringement.

The claims of the senior patent, which are in controversy, are as follows:

"1. The combination, with a suitably actuated type-bar provided with a plurality of type, of a platen or paper carriage made vertically shiftable in a rectilinear direction so as to bring the paper to the printing points of the various types, movable arms C" located on opposite sides of the machine and on which the carriage permanently rests and independent levers for shift-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing the arms, and a detent for holding the carriage after being shifted or raised, substantially as described."

"3. The combination with a suitably actuated type-bar of a platen or paper carriage, movable legs for the carriage, arms C" made to engage said legs, a rock shaft to which said arms are fixed, an actuating lever for each of said arms, and a detent for engaging one of said arms, the actuating lever of said last named arm being made to engage the detent to release the latter, substantially as described."

"11. The combination with a suitably actuated type-bar provided with a plurality of type, and a pivot about which the type bar swings, of a platen or paper carriage made vertically shiftable so as to bring the paper to the printing points of the various types, movable arms C" located on opposite sides of the machine and on which the platen permanently rests, and independent levers for shifting the arms, said levers being loose or detached from the arms C" so that the latter can move independently of the levers, substantially as described."

The claim of the junior patent is as follows:

"26. A suitably-actuated type-arm provided with a plurality of type, in combination with a vertically-movable platen, oppositely-located keys for moving said platen, a lock for one of said keys, said lock having a releasing-arm actuated by another of said keys and a rock-shaft to opposite end portions of which said lock and releasing arm are fixed, substantially as described."

The elements of the combination of the first claim are:

First. A suitably actuated type-bar provided with a plurality of type.

Second. A platen or paper carriage made vertically shiftable in a rectilinear direction.

Third. Movable arms C" located on opposite sides of the machine and on which the carriage permanently rests.

Fourth. Independent levers for shifting the arms.

Fifth. A detent for holding the carriage after being shifted or raised.

The elements of the third claim are:

First. A suitably actuated type-bar.

Second. A platen or paper carriage.

Third. Movable legs for the carriage.

Fourth. Arms C" made to engage said legs.

Fifth. A rock shaft to which said arms are fixed.

Sixth. An actuating lever for each of said arms, one of said levers being made to engage a detent.

Seventh. A detent for engaging one of said arms.

The elements of the eleventh claim are:

First. A suitably actuated type-bar provided with a plurality of type.

Second. A pivot about which the type-bar swings.

Third. A platen or paper carriage made vertically shiftable.

Fourth. Movable arms C" located on opposite sides of the machine on which the platen permanently rests.

Sixth. Independent levers for shifting the arms C", said levers being loose or detached from the arms C" so that they can move independently of the levers.

The elements of claim 26 of the junior patent are:

First. A suitably actuated type-arm provided with a plurality of type.

Second. A vertically movable platen.

Third. Oppositely located keys for moving said platen.

Fourth. A lock for one of said keys, said lock having a releasing arm actuated by another of said keys.

Fifth. A rock shaft, to opposite end portions of which said lock and releasing arm are fixed.

Long prior to July, 1894, the typewriting art had advanced to a high state of perfection. Neither of the complainant's patents is generic; both relate to comparatively unimportant improvements. A broad construction of the claims is, therefore, unwarranted.

The defendant's machine does not infringe claim 1 of the senior patent because it does not have the vertically shiftable platen or paper carriage which is the second element of the combination of that claim. In the defendant's machine the carriage moves horizontally, but not vertically or in a rectilinear direction. The difference in the movement of the platen of the patent and of the defendant's machine might be disregarded were it not for the fact that the words "in a rectilinear direction" were inserted after the claim had been rejected on the patent to Mulligan, cited by the examiner.

The defendant does not have the third element of the claim for the reason that its carriage does not rest permanently on movable arms located on opposite sides of the machine or, indeed, on movable arms of any kind.

The defendant does not have the independent shifting levers of the fourth element, but parts known as permanent and temporary shift keys, located one above the other on the extreme right of the keyboard. The permanent shift key is not a lever, but is used to depress and hold in a depressed position the temporary shift key which is used to release the permanent shift key, the latter being dependent upon the former. It cannot therefore be regarded as one of the "independent levers" of the claim for reasons that it is not a lever and it is not independent.

The defendant does not have the "detent for holding the carriage" unless the permanent shift key can be so considered.

But this argument of the complainant is fatal to its contention that the same part may be a detent, and an independent lever. Either the fourth or the fifth element of the claim is lacking.

If we assume that the permanent shift key is a detent for holding the carriage by the temporary shift key lever, we cannot say that it is independent of that lever. If it be independent it is not a detent. Furthermore, it does not hold the carriage in a shifted position. It does hold the platen, but "platen" and "carriage" are not equivalent terms, in this controversy at least, for the reason that the patentee only succeeded in getting the claim allowed by consenting to the substitution of the latter word for the former, thus limiting the claim to a structure where the carriage, including the platen, is held by the detent and not the platen alone. In August, 1893, the examiner wrote:

"The word, 'platen' should read 'carriage' in line 5, claim 1."

To this the attorneys replied:

"Claim 1, line 5, change 'platen' to 'carriage.'"

Having consented to this change in order to secure the claim they now seek to have the claim construed precisely as it was before the change was made. This cannot be done.

The defendant's machine does not infringe the third claim. Here, again, we have the self-imposed limitation—the patentee consenting to the substitution of “carriage” for “platen.”

As before stated these words cannot be regarded as synonymous, on the contrary, each must be construed to refer, respectively, to the “carriage C” and the “platen A” of the patent. The defendant does not have the “movable legs,” or “movable arms,” which constitute the third and fourth elements of the claim for the reason that its carriage is never shifted in the sense of the patent, but rests on stationary horizontal tracks, upon which it travels. As it has no movable legs it can have no movable arm to engage “said legs.” Defendant's arms do not support the carriage, but only the platen, and are in no way connected with the guides which are said to be the movable legs and, of course, do not “engage” them. The seventh element of the claim is also absent in defendant's machine. The arms which support the platen are at the top of the machine and cannot engage with a detent which, in both structures, is at the bottom of the machine. In the patented structure one of the arms C” engages directly with the detent, but by no possibility can either of the arms 41 41 which support the platen and which, complainant contends, are the equivalents for the arms C” of the patent, engage with the detent of defendant's machine.

The defendant does not infringe claim 11 of the senior patent for the reason that it does not have the fourth and fifth elements thereof. The claim was rejected on reference to the Mulligan patent and was only allowed after the patentee had limited it by adding thereto the words “said levers being loose or detached from the arms C” so that the latter can move independently of the levers.”

The defendant does not have this added function.

The defendant does not infringe claim 26 of the junior patent for the reason that it does not have the third, fourth and fifth elements thereof. The claim as originally filed was much broader than as allowed. By amendment the keys must be “oppositely located,” and the combination was enlarged to include “a rockshaft to opposite end portions of which said lock and releasing arm are fixed.”

The defendant's machine does not have oppositely located keys, one of them having a lock and the other an arm, which, when the key is pressed down, releases the lock. The permanent and temporary shift keys at the lower right hand corner of the defendant's structure do not answer the claim because they are located as near each other as it is possible to place them. It cannot be that said phrase “oppositely located” imposes an unnecessary limitation on the claim; the patentee could not have obtained the claim without it. Again, the defendant does not use a lock for one of said keys which is unlocked by a releasing arm actuated by the other key, nor does it have a rock-shaft to opposite end portions of which said lock and releasing arm are fixed. In the patented structure there is a spring actuated rock-shaft extending across the entire front of the machine from the temporary shift key on the extreme left to the permanent shift key on the extreme

right. When the permanent key is depressed a detent on the rock-shaft is sprung into a notch on the upright of the key which is held in this position until the temporary key at the extreme left of the machine is depressed, by which action the permanent shift key is released.

The defendant has no such mechanism.

We cannot resist the conclusion that the complainant is attempting to broaden the claims in controversy in a manner not justified by the position of the patentees in the art. Their machines are, no doubt, ingenious and successful, but so are those of the defendant, and we see no reason why the latter should pay tribute to the former. In the nature of the case, both being typewriters, many similarities are observable between the two machines, but we are confident that the defendant has not used the combinations covered by the claims in controversy.

The decree is affirmed with costs.

TRETHAWAY et al. v. W. B. BERTELS & SON CO.

(Circuit Court of Appeals, Third Circuit. July 6, 1910.)

No. 1,361.

PATENTS (§ 328*)—NOVELTY—CAN COVER-FASTENER.

The reissue, No. 12,629, of the Bertels patent, No. 802,677, for a can cover-fastener, *held void* for lack of patentable novelty, in view of the prior art.

Appeal from the Circuit Court of the United States for the Middle District of Pennsylvania.

Suit in equity by the W. B. Bertels & Son Company against William Trethaway, John Trethaway, Joseph Trethaway, Richard Trethaway, and Charles Trethaway. Decree for complainant (175 Fed. 971), and defendants appeal. Reversed.

E. T. Fenwick and Melville Church, for appellants.

David P. Wolhaupter, for appellee.

Before LANNING, Circuit Judge, and BRADFORD and McPHERSON, District Judges.

BRADFORD, District Judge. This is an appeal taken by William Trethaway, John Trethaway, Joseph Trethaway, Richard Trethaway and Charles Trethaway, from a decree of the Circuit Court of the United States for the middle district of Pennsylvania, in a suit in equity brought against them by the W. B. Bertels & Son Company for infringement of reissue letters patent of the United States No. 12,629, dated April 9, 1907, the same being a reissue of an original patent No. 802,677, dated October 24, 1905, for an alleged new and useful cover-fastener for cans. The original patent was granted to Charles E. Bertels and was by him assigned to the Wyoming Valley Trust Company, Trustee, and the reissue patent was granted to Bertels as assignor to that company as trustee. The title to the patent subse-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

quently passed to the complainant below, appellee. The patent in suit contains four claims, all of which were sustained by the court below and held to have been infringed. They are as follows:

"1. The combination with a receptacle having a wired edge disposed on the inner side thereof, of a cover having inward-projecting bosses, fastening devices embodying buttons adapted to interlock with the edge, and rivets rigidly connected with the buttons and having nicked heads disposed within the bosses, the nicks being arranged lengthwise of the buttons.

"2. The combination with a receptacle having an inturned rolled edge, of a cover, cover-fastening devices including buttons adapted to interlock with said inturned edge, and button-carrying members having nicked operating-heads shaped to indicate the positions of the buttons and bearing a definite relation thereto.

"3. The combination with a receptacle having an inturned edge, of a flat cover stamped to form inward-projecting bosses, fastening devices embodying buttons adapted to interlock with the inturned edge, and button-carrying members having tool-engaging heads disposed within the bosses and shaped to indicate the positions of the buttons.

"4. The combination with a receptacle having an inturned edge, of a flat cover having inward-extending bosses and fastening devices embodying buttons adapted to lock with the inturned edge, and button-carrying members having operating-heads located wholly within said recesses."

In the description of the patent in suit Bertels, among other things, says:

"This invention relates to cover-fastenings for cans. The object of the invention is to dispense with the employment of screw-threads, hinges, and hasps, and staples, and other equivalent forms of fastening devices for holding a cover upon a can, and in lieu thereof to provide a simple and thoroughly efficient form of fastening device which may be readily applied to the cover and which by interlocking with the edge or rim portion of the can will be positive in holding the cover and can assembled; furthermore, to obviate the formation of obstructions or extended parts in the fastening device, whereby damage thereto will be positively prevented. * * * The present invention is described as used in connection with a metallic can, such as employed in the shipping of lard; but it will be obvious that the locking device will be adaptable for use in connection with cans or receptacles for holding other materials and also cans constructed on other lines than that shown."

The patented mechanism may be generally described as consisting of a can with an inwardly projecting rim or bead running around on the inside of the upper edge, and in such position as to be engaged by the locking device, which consists of an oblong strip of metal with an opening in it to be engaged by the shank of a rivet having a head with a nick or slot disposed longitudinally of the button, the nick or slot serving at once as a means of turning the button and to indicate by its line of direction whether the button is or is not in engagement with the bead of the can. There is a depression or boss in the cover in which the head of the rivet rests in order that it may not extend above the plane of the cover and thereby interfere with the labeling of the can or prevent the "piling of the cans one on the other without denting the bottoms or possibly damaging the locking devices." The button which is engaged by the shank of the rivet is just beneath the bottom of the depression or boss and at such a level as will permit its engagement with the bead or inwardly projecting rim of the can in such manner as to produce "sufficient frictional resistance between the button and the bead to prevent the former from accidentally working

loose." The cover is to be provided with as many locking devices as may be found necessary or desirable.

The defendants below, appellants, attack the validity of the reissue, deny infringement and challenge the validity of the patent for want of novelty. It is unnecessary to discuss the question of infringement or that relating to the reissue, as we are clearly of opinion that the invention was devoid of patentable novelty. The presumption of validity arising from the grant of letters patent is of no avail where the prior art excludes all reasonable assumption of novelty or the exercise of inventive genius. Utility alone cannot support the patent monopoly. In this case the prior art, if not operating by way of direct anticipation of the combinations of the several claims, left no room for the exercise of inventive genius or the display of patentable novelty with respect to them. No discussion of the subject at length or in detail is required. There are many patents so clearly disclosing the prior art as to negative beyond question any patentable novelty in the alleged invention. Among them are English patent No. 10,410 to Turner, English patent No. 1,478 to Mauser, and the following United States patents: No. 362,920 to Schandelin, No. 388,992 to C. & E. H. Morgan, and No. 589,780 to Howard.

For the reasons given the decree of the court below must be reversed, with costs; and it is so ordered.

STATE BANK OF CHICAGO et al. v. HILLMAN'S.
(Circuit Court of Appeals, Seventh Circuit. June 10, 1910.)

No. 1,629.

1. PATENTS (§ 165*)—SCOPE—DESCRIPTION OF INVENTION.

A patentee cannot describe something to the world in his letters patent that means just that thing or its equivalent, and, having claimed that, claim in addition something not thus described and not equivalent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.*]

2. PATENTS (§ 328*)—INFRINGEMENT—CURTAIN-STRETCHER.

The Mayr patent, No. 705,857, for a curtain-stretcher, is limited by the description and drawings to a stretcher the bars of which are "adapted to fold in the same plane." As so construed, *held* not infringed.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Suit in equity by the State Bank of Chicago, Walter A. Mayr, Charles G. Carlson, and the Chicago Curtain Stretcher Company against Hillman's, a corporation. Decree for defendant, and complainants appeal. Affirmed.

The appeal is from a decree dismissing the bill for want of equity. The bill was to restrain the infringement of letters patent No. 705,857, issued July 29, 1902, to Walter A. Mayr, for a curtain-stretcher. The material descriptive portion of the patent is as follows:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"My invention relates to curtain-stretchers; and the object thereof is to provide a curtain-stretcher having a center brace, the side bars and brace being so constructed that they may be folded together intact, a further object being to provide a curtain-stretcher of the greatest efficiency with a minimum cost of manufacture. I attain these objects by the construction illustrated in the accompanying drawings, in which—

"Figure 1 is a front view of a curtain-stretcher constructed according to my invention. Fig. 2 is a view of the center brace and side bars folded and illustrating the operation of unfolding. Fig. 3 is a rear view of a curtain-stretcher, showing a modified form. Fig. 4 is a view illustrating the operation of the same in folding or unfolding; and Fig. 5 is a rear view of the bars folded, as in Fig. 2, but showing another modified form.

"In the accompanying drawings the several parts of my improved curtain-stretcher are indicated by numerals of reference, and in the practice of my invention I provide a center brace 6, which may be slotted at one end, as shown at 7. On the unslotted end I secure a plate 8, proportioned in length to the width of the side bars, and on the slotted end I secure a plate 9 of greater length than the plate 8 and also proportioned in length to the width of the side bars. To the plate 8 I pivotally secure two similar bars 10, having rounded corners, as shown at 11, the said bars being so pivoted on the plate that when the bars are extended the ends 12 will bear against each other and prevent the bars swinging around backward. To the plate 9 I pivotally secure two similar bars 13, having rounded corners 14 and flat ends 15, and the bars 13 are pivoted on the plate 9, so that the flat ends will bear against each other when the bars are extended the same as the ends 12 of the bars 10; but the pivotal points of the bars 13 with the plate 9 are at a greater distance from the center of the plate longitudinally than the pivotal points of the bars 10 with the plate 8, the distance being proportioned to the width of the bars. The ends of the bars 10 and 13 are slotted, as shown at 16 and 17, and end bars 18 and 19 are mounted on these slotted ends in a manner well known or in any suitable manner.

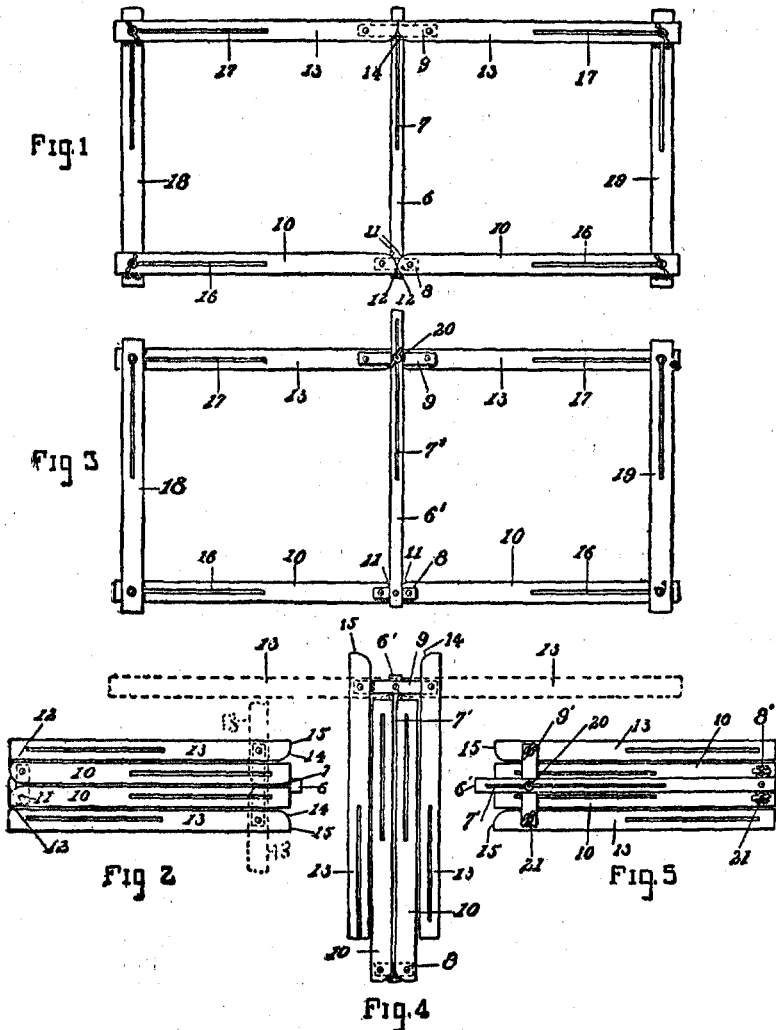
"In operation when it is desired to fold the curtain-stretcher for storage the end bars 18 and 19 are removed. The bars 10 are then turned inwardly parallel with the brace and above the same, the ends being sprung upward over the top of the bars 13, as indicated in Fig. 2, the bars 13 being indicated by dotted lines. The bars 13 are then folded outside of the bars 10, as shown in full lines in Fig. 2, and lie in the same plane when folded.

"In explanation of the above operation it may be stated that in practice it is customary to make both the bars and brace of considerable length, and they are usually made of light material, so that the ends of the bars 10 may be sprung up sufficiently to allow the hinged ends of the bars 13 to pass in under the same, or the free ends of the bars 10 may be sprung up and then may be turned outward over the bars 13, forcing the free end of the bars 13 downward until the bars 10 are in an open position, when the bars 13 may be turned outward. Thus owing to the lightness of the material used usually in making these curtain-stretchers either the bars 10 or bars 13 can be opened first. This can only be done, however, by springing the free ends of the bars out of the normal plane, and when folded the hinged ends of the bars 13 will bear against the free ends of the bars 10 by reason of the fact that they lie in the same plane, and both sets will be held against unfolding without any other fastening means.

"In Figs. 3 and 4 I have shown a modified form of construction in which provision is made to open the bars and close them without springing the ends as previously described. In this construction the brace 6' is made longer, as well as the slot 7', and when it is desired to fold the bars the thumb-nut 20 is loosened and the plate 9 is slid back along the brace to the position shown in Fig. 4, when they may be readily folded together, after which the plate 9 may be slid back until the ends of the bars are all even, when the nut may be again clamped, thereby clamping all the parts together, as will be readily understood.

"In Fig. 5 I have shown bolts and winged nuts 21 to secure the plates 8' and 9' to the respective bars instead of rivets, and these nuts may be turned down to clamp the bars either in an open or closed position."

The drawings are as follows:



The claims relied upon are 2, 3, 5, 6 and 9 as follows:

"2. In a curtain-stretcher, a center brace, a plate secured to one end thereof, a plate adjustably secured to the other end of said brace, and jointed side bars pivotally connected with said plates respectively and both retained in pivotal connection in an extended and folded position for the purpose set forth.

"3. In a curtain-stretcher, a center brace slotted at one end, a plate secured to the unslotted end, a plate adjustably secured to the slotted end by a bolt and winged nut, and jointed side bars pivotally connected with said plates and both retained in pivotal connection in an extended and folded position, as and for the purpose set forth."

"5. In a curtain-stretcher, a center brace, a plate connected with each end thereof, jointed side bars pivotally connected with said plates and both retained in pivotal connection in an extended and folded position, said side

bars having rounded inner corners and flat ends, as and for the purpose set forth.

"6. In a curtain-stretcher, a center brace, a plate adjustably secured to one end thereof, a plate secured to the other end thereof, a side bar composed of two pieces pivotally connected with each of said plates and both retained in pivotal connection in an extended and folded position, the abutting ends of said pieces having rounded inner corners and flat ends, as and for the purpose set forth."

"9. The combination in a curtain-stretcher of two end bars, two side bars each of which is composed of two pieces, a center brace-bar pivotally connected with said side bars at each end, and both retained in pivotal connection in an extended and folded position, each of the two pieces composing said side bars having rounded corners whereby they may be folded inward upon said center brace-bar, as and for the purpose set forth."

Claim 1 will stand as an illustration of claims 4, 7 and 8 in their differentiation from the claims relied upon, and is as follows:

"1. In a curtain-stretcher, a center brace, side bars pivotally connected with each end thereof, said side bars being jointed and adapted to fold in the same plane upon said brace while retained in pivotal connection with each end thereof, one of said side bars being longitudinally adjustable on said brace, as and for the purpose set forth."

Further facts are stated in the opinion.

Edward Rector and Wm. R. Rummler, for appellants.

Marcellus Bailey, for appellee.

Before GROSSCUP, BAKER and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge, after stating the facts as above, delivered the opinion.

The curtain-stretcher put upon the market by appellee and sold in very great numbers is identical with the curtain-stretcher that the appellants sell. If, therefore, the curtain-stretcher that appellants put upon the market be within the Mayr patent, and the Mayr patent be valid, a case of infringement is made out.

The descriptive portion of the patent shows a brace, on the one end of which is a plate pivotally connected with one set of side bars, and on the other end another plate, greater in length however, pivotally connected with the other set of side bars; each plate proportioned in length to the width of such bars; the difference in the length of the plates being intended to give room to the bars, edge to edge, when folded in the same plane after use; the close pivoting on the shorter plate being overcome by the bars being made of such light material that the free ends of one set of bars may be sprung up sufficiently to allow the pivoted ends of the other set of bars to pass under in the process of taking their place in the "normal plane." Such plates, of differing length, such bars, and such operation, unquestionably, were what was in the mind of the inventor when the description was drawn. Nothing other than plates of differing length, bars pivotally joined, or the springing method of getting into place, appears from the description to have been in mind. In the absence of the fact that, in the claims sued upon, the phrase "to fold in the same plane upon said brace" was omitted, no one would conceive that the patentee intended anything else than what has just been described.

The curtain-stretcher put upon the market by appellants, however,

does not correspond to this description. Instead of the plates being of differing length, and so proportioned that when the stretcher is folded the bars will be in a single plane, appellants' commercial curtain-stretcher contains brace plates of the same length; and instead of both side bars being pivotally connected upon the plate (that is, closely connected), the slot is used to give a loose adjustment, so that when folded up, instead of being in a single plane, the bars can be in two separate planes, lying with their sides upon each other, and without utilizing the springing quality of the material at all. And this, though absent from the description, is said to be contained in the claims sued upon. The question of law presented, then, is this: Can the patentee rightfully include in his claims something that does not emerge from the description? Can a patentee describe something to the world in his letters patent that means just that thing or its equivalents and nothing else, and, having claimed that, claim in addition something not thus described and not its equivalents?

We think not. The description is required to set forth the invention in such full, clear, concise and exact terms as to enable any person, skilled in the art to which it appertains, or with which it is most nearly connected, to make and use the same; and the claim is to enable the public to know the bounds and scope of the invention "thus disclosed"; but "any claim which is broader than the described invention, is void; even where that invention is valuable, and could have supported a valuable claim." Walker on Patents (4th Ed.) § 177, citing *Edison v. American Mutoscope Co.*, 114 Fed. 934, 52 C. C. A. 546.

There is nothing in *Winans v. Denmead*, 15 How. 330, 14 L. Ed. 717, or the *Paper Bag Patent Case*, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122, brought to our attention since the argument, nor in any of the rules of law cited ("that the claims of every patent should be construed, if possible, to cover and protect the actual invention made by the patentee, and should not be restricted to the particular form of device disclosed in his patent, if other forms may embody it," or that "the patentee's claim is the 'measure of his invention,'" or that "where the claims of a patent are clear and unambiguous, there is no room for construction") that contravenes what has just been said; for what is said in both of these cases, and in all of these rules, is based on the fact that the inventive concept is disclosed in the description, whatever may have been the mechanical form that such concept subsequently took. Certainly it was not intended by these cases or these rules that an inventive concept, that is separate and apart from the one embodied in the description, should become a part of the patent simply by being included in the claims.

The concept contained in the description of the letters patent before us is a curtain-stretcher, the bars of which, when folded, will lie in the same plane. That concept runs throughout the whole description. Both the advantage of the invention and its means of operation are confined to that concept. "By reason of the fact that they lie in the same plane," says the description, "both sets will be held against unfolding without any other fastening means." Now, the stretcher actually put upon the market, different from this, is clearly an afterthought. And the mere omission of the words "adapted to fold in the same plane,"

in the claims sued upon, cannot be held to show a concept in the description different from the one to which the description is confined.

The decree of the Circuit Court is affirmed.

NOTE.—The following is the opinion of Kohlsaat, Circuit Judge, in the trial court:

KOHLSAAT, Circuit Judge. Complainants seek to have defendant enjoined on final hearing from infringement of claims 2, 3, 5, 6, and 9 of patent No. 705,857, granted to complainant Mayr, July 29, 1902, on application filed November 16, 1901, for a curtain-stretcher. The claims in suit read as follows, viz.:

"2. In a curtain-stretcher, a center brace, a plate secured to one end thereof, a plate adjustably secured to the other end of said brace, and jointed side bars pivotally connected with said plates respectively and both retained in pivotal connection in an extended and folded position for the purpose set forth.

"3. In a curtain-stretcher, a center brace slotted at one end, a plate secured to the unslotted end, a plate adjustably secured to the slotted end by a bolt and winged nut, and jointed side bars pivotally connected with said plates and both retained in pivotal connection in an extended and folded position, as and for the purpose set forth."

"5. In a curtain-stretcher, a center brace, a plate connected with each end thereof, jointed side bars pivotally connected with said plates and both retained in pivotal connection in an extended and folded position, said side bars having rounded inner corners and flat ends, as and for the purpose set forth.

"6. In a curtain-stretcher, a center brace, a plate adjustably secured to one end thereof, a plate secured to the other end thereof, a side bar composed of two pieces pivotally connected with each of said plates and both retained in pivotal connection in an extended and folded position, the abutting ends of said pieces having rounded inner corners and flat ends, as and for the purpose set forth."

"9. The combination in a curtain-stretcher of two end bars, two side bars each of which is composed of two pieces, a center brace bar pivotally connected with said side bars at each end, and both retained in pivotal connection in an extended and folded position, each of the two pieces composing said side bars having rounded corners whereby they may be folded inward upon said center brace bar, as and for the purpose set forth."

The main difference between the claims sued on and those not sued on consists in the omission from the former of the provision requiring the device to be "so constructed as that it shall be adapted to fold in the same plane." This clause, defendant insists, should be read into all the claims. Complainant's commercial device does not conform to this description. The only stretcher covered by the drawings and specification consists of two side bars slotted at their outer ends, supported by a center bar or brace, and two end bars or braces, all slotted at their ends next the upper side bar, as shown in the drawings, whereby the size of the frame may be varied. These side bars are each in two parts, or sections, pivotally secured to plates, one which is rigidly attached to the lower end of the middle brace at the longitudinal center of said lower side bar, the other having movable or floating connection with the slot in the upper end of said center bar, wherein its upward and downward movement in the slot are made rigid at will by means of a set screw. This upper plate, as stated, is made wider than the lower plate, and when moved in the slot carries the pivoted sections of the upper side bar with it. The outer ends of the upper side bar move correspondingly in the slots formed in the end bars. Whenever it is desired to narrow the frame, the end braces or bars are moved toward the center in the slots provided in the side bars for that purpose, and likewise fixed at desired points by set screws. By reason of the greater width between the pivotal connections of the sections of the upper side bar, those sections are shown to fold downwardly, so as to inclose in the same plane the upwardly folded sections of the lower side bar, edge to edge. Of course, it is a matter of indifference as to which plate is the wider. The upper is taken for the purpose of illustration, merely, in the drawings. Defendant's device, as well as complainant's commercial sketches, do not employ

the plates of different width. Therefore, if it be an essential feature of the patent in suit that the side bars be folded in the same plane, defendant cannot be held to infringe, since his device is not adapted to be, and is not, folded in the same plane.

The curtain-stretcher art is an old one, and analogous to quilting and other stretcher arts. The patent in suit had a hard struggle in the Patent Office, mostly in overcoming the provisions of patent to Whipple, No. 680,301, granted August 13, 1901, for quilting frames. It is claimed by complainant that the examiner's objections were overcome after several attempts by the addition of words providing for a device wherein the sections of the side bar should, respectively, remain in pivotal connection with the several plates at all times, whether open or folded. An examination of the file wrapper and contents leaves the court in doubt as to whether this change in wording, or persistent insistence won the day. The claims in suit do not call for adaptability to being folded in the same plane. Nothing is said in them about folding. Indeed, it is not disclosed how the device of the claims in suit could be folded, in the absence of drawings and specification. The sections of the side bar as described in the claims must inevitably obstruct each other in folding.

This device seems somewhat at variance with the stretcher covered by the patent. If, however, it be conceded that complainant is entitled to a stretcher which employs plates of equal length at both ends of the center brace, it becomes necessary to look into the prior art to ascertain whether there be any novelty in maintaining pivotal connection between the side bar sections and the several plates upon the center brace. The prior art, in this respect, is fairly summed up in the Whipple stretcher, as shown in figure 5 of the drawings accompanying Whipple patent No. 655,038, granted April 7, 1885. Substantially the only difference between this latter stretcher and that now claimed by complainant consists in the means employed for securing pivotal connection of the side bar sections with the plate located near the end of the center brace.

For the purpose of insuring freedom of action in folding the sections, or arms, the plate is provided near its ends with diagonal pivot slots through which the pivot moves, thus making it possible to withdraw the point of the pivoting away from the center of the plate. The side sections may in this way be raised into, or lowered from, an end to end alignment without undue frictional interference with each other. This result is attained in the patent in suit by rounding the corners of the ends of the bars or sections of the side bar adjoining the center brace. This would seem to be the equivalent of the pivot slot of the Whipple patent above referred to. In both devices, the arms or sections of the side are in constant pivotal connection with the plate upon the center brace; the one, more convenient than the other perhaps, but to all intents and purposes the same. That the Whipple device shows the operation as to one side bar does not change the situation. Both require the clamping of set screws to hold them in place. The rounding of the corners above spoken of is found, but not claimed, in the Carlson patent No. 701,014. This patent discloses a stretcher which folds in practically the same manner as does defendant's and complainant's commercial device.

From the file wrapper and contents it appears that the patent in suit was not cited by the examiner in connection with the granting of this patent, although it was pending at the same time and granted prior to the issue of the patent in suit upon an application filed subsequent to the filing of the application for the patent in suit. It is also found in patent No. 314,997, granted to Camp on April 7, 1885, for a cot.

There is no merit in complainant's contention that the term "pivotal connection," as used in the claims in suit, is not broad enough to include what they term the shifting oscillating connection of the bolts in the slots f^4 and f^5 of the Whipple device. Pivotal connection does not necessarily mean that the pivot shall be permanently located or fixed. The Whipple arrangement is clearly a pivotal connection. If the specification and drawings are to be resorted to, they call for a stretcher which is so constructed that it will fold in the same plane. The same construction which is asked for by complainant as to the claims in suit—i. e., that folding in the same plane is not contemplated therein—would eliminate the rounded corners and flat ends from claims 2 and 3, since they are not therein mentioned. These claims, if so construed, would

read exactly upon the Whipple patent. If the diagonal plate slot of Whipple is the equivalent of the rounded inner corner and flat end of claims 5, 6, and 9 in suit, and of each thereof, then the same is true of these claims. Unless the claims in suit are limited to stretchers so constructed as to fold in one plane, they are deemed to be anticipated by the prior art. If they be so limited, defendant does not infringe.

The bill is dismissed for want of equity.

GEORGE FROST CO. et al. v. SAMSTAG et al.

(Circuit Court of Appeals, Second Circuit. July 19, 1910.)

No. 327.

1. PATENTS (§ 21*)—USE OF DIFFERENT MATERIAL—"INVENTION."

The use of a different material in constructing an article previously patented involves invention where it produces a useful result, increased efficiency, or a decided saving in operation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 23; Dec. Dig. § 21.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3749-3754.]

2. PATENTS (§ 328*)—INFRINGEMENT—HOSE SUPPORTERS.

Gorton patent, No. 552,470, for a hose supporter, in so far as it provided for a rubber button, involved patentable invention and covered a supporter having a shankless button of rubber or other clinging material.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit by the George Frost Company and another against Henry F. Samstag and others. From a decree of the Circuit Court for the Southern District of New York dismissing the bill on the ground that letters patent No. 552,470, for hose supporters, was not infringed ([C. C.] 173 Fed. 793), complainants appeal. Reversed.

W. K. Richardson and A. D. Salinger, for appellants.

Edmund Wetmore and George D. Seymour, for appellees.

Before WARD and NOYES, Circuit Judges, and HAND, District Judge.

WARD, Circuit Judge. This patent has been heretofore considered by this court and upheld as for an invention which made the first really practical garment supporter. The Circuit Court in *Frost v. Cohn* (C. C.) 112 Fed. 1009, and this court on appeal—119 Fed. 505, 56 C. C. A. 185—have held that Gorton's invention was the substitution in garment supporters of rubber or an equivalent material for the button in combination with the old metal pear-shaped loop in place of any other material previously used. Judge Coxe said:

"The crucial question is one of invention. It is argued by the defendants that Gorton's sole contribution to the art was the substitution of a rubber button for the metal buttons previously used, and that this was merely a change of material involving only mechanical skill. Conceding that the defendants' diagnosis of the issue is somewhat severe in lopping off the other members of the combination, nevertheless the court sees no way to escape the conclusion that the fate of the patent depends upon the effect of the introduction of the rubber button into the old structures. Did this involve invention? Assuming that the case involves a change of material and nothing more, how stands the law?"

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In *Hicks v. Kelsey*, 18 Wall. 670, 21 L. Ed. 852, Mr. Justice Bradley states the rule as follows:

"The use of one material instead of another in constructing a known machine is, in most cases, so obviously a matter of mere mechanical judgment, and not of invention, that it cannot be called an invention, unless some new and useful result, an increase of efficiency, or a decided saving in the operation, is clearly attained. Gorton's achievement is clearly within the exception and combines the three alternative essentials there stated. His supporter attains a new and useful result, an increase of efficiency and a saving in operation."

He referred to his decision in *Union Hardware v. Selchow* (C. C.) 112 Fed. 1006, handed down at the same time, in which invention was not found in substituting sheet steel for cast steel in trucks for roller skates. There can be no doubt as to what his opinion of Gorton's invention was.

Judge Wallace on appeal said:

"As the scope of the claim must be as broad as any structure which would infringe it, the consideration of its patentable novelty is narrowed to the single question whether it was invention to substitute in the old hose supporter, in lieu of the metal button, a button made of rubber, leather, felt, or any other fibrous or yielding material to which the fabric of the stocking would tend to cling.

"On first impression it would seem to have been an obvious thing to select some kind of material for the button that would resist the tendency of a smooth button to slip, although firmly gripped, and yield sufficiently, while resisting the slipping, to obviate the abrasion of the fabric. It was common knowledge that rubber is neither as hard nor as unyielding as metal, bone, or pearl. It was also common knowledge that it has the property of clinging, and its use on shoes, stairway steps, and for mats and floor coverings are familiar instances illustrating its adaptability to prevent slipping. It had also been used for buttons in order that its elasticity would permit the button to yield easily to sudden pressure, and yet not abrade the fabric of the button-hole, as in the instance of the collar stud of the Allen patent. But in none of its prior uses had it been employed as the member of a device between which and another member a portion of the fabric was to be clamped. The instances of the prior use of such a material do not necessarily suggest its adaptability to do the work required of a button in a hose or garment supporter more efficiently than one of metal. That its selection was not an obvious thing is persuasively and cogently shown by the fact that during many years numerous inventors were trying to remedy the defects in the old device, and it did not occur to them how simply and satisfactorily this could be done by making the button of rubber or some other elastic or yielding material. Its employment in the device of the patent was a new one, and imparted to the device a remarkable efficiency, as compared with that of the best type of former devices. Without the aid of such an experimental demonstration as was made upon the argument, it would be difficult to realize the practical value of the improvement.

"We have not overlooked the prior patent showing a device having a pair of jaws faced with springy or elastic material, which are pressed against the intervening fabric to hold it between them, nor the prior patent for a supporter in which an ordinary button of pearl or bone or some hard material is stitched to its place by thread. These patents are of insignificant value as anticipatory references, or as suggesting the adaptability of the material for the new occasion of its use."

It is true that the court was only considering claim 1 of the patent in connection with a button having a rubber-covered shank.

"Claim 1. In a hose supporter, the combination of the webbing, the loop having an opening large at one end and narrower at the other, the button supporting plate, and the button composed of the central support and the surrounding rubber portion, substantially as set forth."

But the language used was applied to the invention, and was not confined to that or to any particular form of it. Counsel for the appellee felt the force of this, and met it by saying that the Circuit Court fell into an error. Their language is:

"This is conclusive on the point that the judge was mistaken in so far as he assumed that the device of the patent in suit was the first garment supporter to contain, as an element, a rubber button. But for this mistake of fact, contrary to the evidence, his decision would probably not have contained the statements as to the breadth and character of the invention in the paragraph beginning, 'Here was a situation,' as well as the paragraph immediately following. The mistake is not to be wondered at, considering the number of exhibits.

"But, whatever may have been the cause of this error, the fact remains that the initial decision on which all the litigation under the patent in suit has hung, contains a fundamental error of very far-reaching effect, namely, the supposition on the part of Judge Coxe that the invention of the patent in suit was the introduction of an element of rubber into a garment supporter."

We think the appellee overlooks the fact that Judge Coxe was not speaking of all garment supporters, but only of those in combination with the old metal pear-shaped loop.

The claims under consideration in this case are 2 and 4:

"Claim 2. In a hose supporter, the combination of the webbing, the loop having an opening large at one end and narrower at the other, and the rubber button, substantially as set forth."

"Claim 4. In a hose supporter, the combination of the webbing, the supporting plate attached thereto, the button or stud mounted thereon and having a flanged head of rubber, the loop also attached to the webbing and having an opening large at one end and narrower at another, substantially as and for the purpose set forth."

The appellee insists that the patent contemplated only buttons having a rubber-covered shank, and this was the view taken by the court below. But Fig. 9 shows that shankless buttons were also contemplated, and they were covered by claim 2.

It is said that this Fig. 9 should be eliminated from the patent. We know of no case authorizing the court to strike out of the specifications a figure inserted by the inventor. The button of this figure must be regarded as a rubber head. The defendants' button has a rubber head and operates exactly as does the button of Fig. 9 and reads on both claims 2 and 4.

The fact that it also has a bare metal shank in the form of a gooseneck does not take it out of the patent as heretofore construed by this court. The British patents to Knight and to Parry are disregarded as references. The former because subsequent to Gorton and the latter because not having the metal pear-shaped loop, which is an essential feature of the patented invention.

Decree reversed, with costs.

Fig. 9.

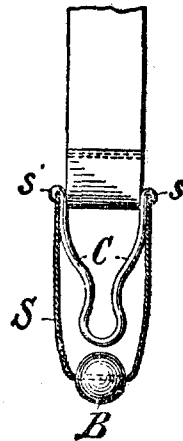
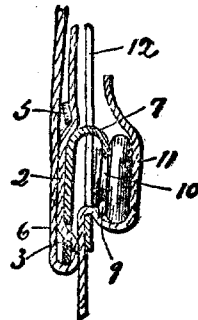


Fig. 4.



PARSON MFG. CO. v. COE.

(Circuit Court, D. New Jersey. May 23, 1910.)

1. PATENTS (§ 328*)—INFRINGEMENT—STEAM BLOWER.

The Parson patent, No. 573,480, for a steam blower, claim 1, in view of the disclosures of the prior art and the proceedings in the Patent Office, is limited to a construction in which the superheater is located in an inclosed brick incased chamber arranged above the grate of the furnace and adjacent to the side wall of the furnace. As so construed, *held* not infringed.

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—SMOKE-CONSUMING FURNACE.

The Parson reissue patent, No. 12,072 (original No. 681,457), for a smoke-consuming furnace, claim 2 is void as for a mere aggregation, and not a combination, of elements. Claim 1, if conceded validity, *held* not infringed.

3. PATENTS (§ 328*)—INVENTION—GRATE BAR.

The Parson patent, No. 702,585, for a grate bar, *held* void for anticipation and lack of invention in view of the prior art.

In Equity. Suit by the Parson Manufacturing Company against Charles T. Coe, trading as the New York Grate Bar Company. Decree for defendant.

S. D. Oliphant, Jr. (Steuart & Steuart, of counsel), for complainant.
Charles C. Gill, for defendant.

CROSS, District Judge. There are three patents involved in this controversy which the bill of complaint alleges are capable of conjoint use and have been conjointly used. They were all issued to one Henry E. Parson and assigned to the complainant. Of these patents the first which will be considered is No. 573,480, dated December 22, 1896, for a steam blower. Of its two claims the first only is involved.

"1. The combination of a steam blower, an elongated brick-incased chamber arranged above the grate of the furnace, adjacent to the side wall of the furnace, a superheater located in said chamber, a valved steam-supply pipe for connecting the superheater with the steam blower, and a steam pipe connecting the superheater with the boiler, substantially as set forth."

Among the defenses thereto set up by the answer are invalidity and noninfringement. The question of its validity need not be considered, since the conclusion has been reached that, to sustain the validity of the patent, the claim in question must be narrowly construed, and, thus construed, the defendant is not guilty of infringement.

The file-wrapper is in evidence and its inspection discloses that the application for the patent as originally made contained three claims, all of which were rejected by the examiner, who cited several patents in the prior art as anticipations. The applicant accepted the judgment of the examiner, and thereupon filed amended claims which were allowed, and appear in the patent under consideration. Among the claims disallowed was the following:

"3. The combination of a steam blower, composed of an exterior casing and a nozzle-frame having inwardly-extending nozzles, a superheater located in a brick-incased chamber at the interior of the furnace, a valved steam supply

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pipe, for connecting the superheater with the nozzle-frame and a steam pipe connecting the superheater with the boiler, substantially as set forth."

The patentee in submitting the amended claims, wrote the commissioner as follows: "In view of the references we have taken out the specific claims to the construction of the steam blower and rely on the construction of the superheater for obtaining the allowance of the application"—and it was upon this element of the combination that the applicant's case was rested. Viewing the case as thus presented, it will appear that "a superheater located in a brick-incased chamber at the interior of the furnace" was old, and was conceded to be so by the patentee when he eliminated it from his claim after objection by the examiner, and substituted therefor the following language:

"A brick-incased chamber arranged above the grate of the furnace, adjacent to the side wall of the furnace, a superheater located in said chamber."

From the above quotations it appears that the patentee was obliged to, and did, surrender the idea of locating his brick-incased chamber, containing the superheater at will, in any part of the interior of the furnace, and chose in lieu thereof to locate it in a specifically defined place in the interior of the furnace; that is to say, above the grate and adjacent to the side wall of the furnace. These involuntary concessions induced the allowance of the patent, and the complainant cannot now be heard to minimize or disregard them. The complainant's expert contends, however, that the brick-incased chamber of the patent may be dispensed with and the superheater pipe imbedded in the wall of the furnace. This insistent, however, is untenable. In the first place, it omits altogether the element of a brick-incased chamber within the meaning of the claim, and, again, a superheater thus located would not be adjacent to, but within, the side wall of the furnace, nor would it be above the grate bar of the furnace, which bar is of necessity within and inclosed by the walls of the furnace. Furthermore, it was old in the art to locate the superheater in any of the different inclosing walls of the furnace. The patent to Miller No. 418,955, January 7, 1890, that to Metz, No. 498,959, June 6, 1893, and that to Wheelen No. 341,196, May 4, 1886, show superheaters located in the front end wall of the furnace. Tinkhan No. 460,189, September 29, 1891, shows a superheater protected in the rear end wall. Farr, No. 303,963, August 19, 1884, shows a superheater located in the bridge wall. Tinkhan, No. 497,392, May 16, 1893, Tinkhan No. 534,297, February 19, 1895, and Elliott, 248,925, November 1, 1881, show the superheater in the side wall or walls, and Livingston 399,541, March 12, 1889, located them, quoting from the specification, "On the preferred part, the part preferred being on each side of the door at the front inside." Moreover, the prior art shows, not only that the superheater pipes were previously imbedded in the walls of the furnace, but that they were thus imbedded for the very purpose, as claimed by the complainant, of protecting them from injury by the intense heat of the furnace fire. For instance, Tinkhan, in No. 534,297, says in speaking of figure 3 of that patent:

"I have shown a portion of the brickwork as omitted, but in practice I prefer to fill in the space between the pipes with brick or other refractory mate-

rial so as to completely imbed the superheating coils and the steam and air conducting pipes and by thus imbedding said pipes they are effectively protected from being burned out."

The above and other patents might be cited which show the superheater located in well-nigh every conceivable position in the side and end walls of the furnace. It is obvious, therefore, that Mr. Parson in procuring the patent in question was, in order to escape the revelations of the prior art, compelled to select the position which he did. So far as he is concerned, practically every other location was open to general use. The location of the brick-incased chamber inclosing the superheater in the position chosen by the patentee was, as has been shown, the only novel feature in his combination, and the one upon which he chose to stand. Under such circumstances, he is not entitled to any general application of the doctrine of equivalents. In view of the disclosures of the prior art and the limitations imposed upon the claim in question, and keeping in mind that by the term of the claim the superheater of the patent in suit was required to be located in an inclosed brick-incased chamber arranged above the grate of the furnace and adjacent to the side wall of the furnace, it follows that a superheater, which like that of the defendant is not inclosed in a brick-incased chamber, is not above the grate of the furnace, and is not adjacent to the side wall of the furnace, is not within the claim.

An expert who testified for the complainant, but without any examination of the prior art or of the file-wrapper of the patent in suit, calls the construction of the defendant a brick-incased chamber notwithstanding it is a cast-iron box set in the rear end wall of the furnace with its front side or face flush with the wall and directly exposed to the flames. It is a difficult proposition, however, even for an expert to prove that that which is only incased on three sides is incased on four, or that anything can properly be called incased which is not incased. But, assuming that it is a brick-incased chamber, still it is not located above the grate or adjacent to the side wall. That the defendant's superheater may be laterally above the grate and consequently at a higher elevation than the grate does not bring it within the terms of the claim. "Above the grate," as used in the claim, and illustrated by the drawings and specifications, means over the grate; that is, within the area which would be bounded by the exterior lines of the grate if they were upwardly projected. Or, to put it in another way, the claim requires the brick-incased chamber holding the superheater to be located vertically above the grate. To permit it to be placed elsewhere would strain simple language out of its ordinary meaning.

Great stress is laid upon the durability and utility of the complainant's brick-incased construction. That, however, is a question which the defendant may properly determine for himself. If he adopts a less effective or durable method, he must suffer the consequences. In saying this it must not be taken for granted, however, that the exposed surface of the cast-iron box inclosing defendant's superheater is at all lacking in durability or efficiency. The evidence is strongly to the contrary. Since, therefore, there is no evidence of

infringement by the defendant of the patent in question, the bill of complaint as to it must be dismissed.

Patent No. 12,072, reissue dated January 6, 1903, is for a smoke-consuming furnace. The first and second claims are involved, and read as follows:

"1. The combination with a closed combustion-chamber and ash-pit, of a grate, a banking platform having air-channels, a bridge-wall having air-channels which communicate with the air-channels of the banking platform and receive air from the region of the ash-pit, the channels of the bridge-wall delivering air to the fire-chamber, a hot-air-blast pipe arranged within the fire-chamber and heated thereby and delivering hot air under pressure to the ash-pit, a blower delivering air under pressure to the hot-air-blast pipe, and means for dividing the blast between the ash-pit and the fire-chamber.

"2. The combination with a closed combustion-chamber and ash-pit, of a grate, a banking platform having air-channels, a bridge-wall having air-channels which communicate with the channels of the banking platform and receive air from the region of the ash-pit, the channels of the bridge-wall delivering air to the fire-chamber, a hot-air-blast pipe arranged within the fire-chamber, and heated thereby and delivering hot air under pressure to the ash-pit, a blower delivering air under pressure to the hot-air-blast pipe, means controlled by the boiler-pressure for automatically regulating the force of the said blower, and means for dividing the blast between the ash-pit and the fire-chamber."

The original patent, No. 681,457, was dated August 27, 1901. The application for reissue was filed March 21, 1902. In his verified application for reissue Parson says:

"First. Claim 1 of the original patent includes as essential elements a banking platform and a fire bridge, hot air blast extending through the rear wall of the furnace and the base of the fire bridge and banking platform into the ash-pit, a steam blower in said hot-air-blast pipe, heating flues in the banking platform and fire bridge and a damper for opening or closing said hot air supply opening in the blast pipe. The automatic regulation of the forced draft both below and above the grate is in no way dependent upon the use of the banking platform and fire bridge. The blower by which the forced draft is operated might be a steam blower or of some other pattern. The outlet openings for the forced draft delivered above the grate might be in the side, rather than in the top of the fire bridge, and the whole structure might be operated without the use of a damper for opening or closing the hot air supply opening in the blast pipe.

"Second. Claim 2 of the original patent contains as essential elements a banking platform and fire bridge adjacent to said grate, a hot-air-blast pipe extending through the rear wall of the furnace and through the base of the banking platform and fire bridge into the ash-pit, a steam blower at the rear end of the hot-air-blast pipe, a damper in the chimney of the furnace, flues in the banking platform and fire bridge, outlet openings in the top of the fire bridge, a damper in said supply opening of the blast-pipe, and means for opening or closing said damper from the outside of the furnace.

"The same remarks made with reference to claim 1 apply to claim 2. Many of these elements are unnecessary to a complete utilization of the real invention of this case."

The original patent contained two claims. The application for a reissue contained four claims which it was desired should be substituted for the claims of the original patent. Claims 1 and 2 applied for in reissue were rejected by the examiner, who cited several patents as anticipating them. The remaining two claims were allowed, and became claims 4 and 5 as the patent now stands. The applicant acquiesced in the decision of the examiner in rejecting the claims just re-

ferred to, and thereupon presented for his consideration three other claims which became 1, 2, and 3 of patent as reissued. By comparing the rejected claims in reissue with 1 and 2 of the patent as allowed, it is apparent that Parson was obliged to reinsert in claims 1 and 2 the elements of the banking platform and bridge-wall, concerning which the applicant in his sworn affidavit upon which his reissue patent was granted says:

"The automatic regulation of the forced draft both below and above the grate is in no way dependent upon the use of the banking platform and fire bridge."

This admission apparently invalidates claim 2 in reissue. It shows conclusively that that claim calls for an aggregation, and not a combination of elements. But, irrespective of his admission, it is obvious that there is no co-ordination between the automatic regulation of the forced draft and the banking platform, which constitute two of the elements of the claims. The banking platform either with or without such automatic regulation would perform its function in the same way, and the same is true of the automatic regulator. But, if this were not so, the patentee is estopped by the solemn admission contained in his application for reissue from asserting the contrary. Having asserted that the elements referred to were not dependent one upon the other, he cannot now be heard to claim otherwise. Claim 1 in suit is like 2, except that it leaves out the element of automatic regulation. It is difficult to see how this claim can avoid being considered as an aggregation. A banking platform as abundantly appears is used simply to facilitate the cleaning of the fires. At such a time the furnace door must of necessity be open, which cuts off the blower, and renders it inoperative for the time being. The functions of the banking platform and of the blower are distinct and separate. When one is used, the other is not. Their functions are not interdependent. I do not deem it necessary, however, to decide that this claim is invalid, for, in view of the prior art, it must be strictly construed, and thus construed the defendant has not infringed it. Turning to the consideration of but a small portion of the prior art, it will be found that all of the elements of the claim, except the banking platform, having air-channels in combination with the bridge-wall which also has air-channels which communicate with the air-channels of the banking platform, are old. The use of fire bridges with air passages therein for the purpose of heating the air and aiding a more thorough consumption of the smoke and gases arising from combustion is very old in the art. The British patent to Stanley, of 1867, shows not only a superheater, but almost all—indeed all of the elements of the patent in suit in combination, with the exception of a hollow fire bridge and a banking platform with its air-passages. He also suggests the placing of the superheater in the roof or over, or by the side of the fire or at the bridge, or other part where there is great heat. The British patent to Parke (1820) shows the bridge with an air-passage therein, but it did not show any means for supplying a forced draft which was not then invented. The patent to Sutcliffe, 1888, also substantially meets the elements of claim 1 with the exception of the banking plat-

form with its air-channels. One of the drawings also shows the bridge wall beveled, a matter concerning which reference will be made later. As to the automatic regulating device of the patent in suit, that was anticipated by Champion, No. 393,357, of 1888. In the specification of his patent he says:

"It will, of course, be understood that the particular claim of the automatic regulator is immaterial. All that is essential is that the regulating device be operated by steam under boiler pressure, and that the movable part of the device be connected in some suitable way with the valves controlling the supply of steam and air to the injector."

And he further says: "My present invention has for its object to make the construction self-regulating." The construction referred to was that described and covered by a patent No. 362,935, issued to him in 1887, for a steam blower. Patent No. 413,921, of 1889, to Blanchard, is also for an automatic apparatus for supplying steam and air to furnaces. Patent No. 574,188, 1896, to Burke, also covers an automatic blowing apparatus. Notwithstanding Champion's later patent, Parson makes his automatic regulator the most important feature of the patent in suit. Patent No. 532,105 to Sieben and Wagner, 1895, substantially embraces all of the elements of claim 1, with the exception of the banking platform with its air-channels. I have included in the above references several patents showing automatic regulation, notwithstanding the doubt expressed as to the validity of that claim for reasons already given. The prior art cannot be studied without arriving at the conclusion that the patent under consideration, if sustained, must be confined to the specific combination therein set forth. It was because its claim introduced the banking platform and a bridge wall having intercommunicating air-channels that it was allowed. With these elements omitted, the complainant's device was anticipated by several patents. Construed from this standpoint, the patent has not been infringed. Infringement is alleged because the defendant, having become a successful bidder after public competition, entered into a contract which is known in the case as the Ridgewood Pumping Station contract. One of its provisions relating to alterations in certain furnaces was as follows:

"The bridge walls must be rebuilt so as to give a supply of hot air over the fires, said supply to be regulated by damper, and, where possible, bridge wall must be made with a cleaning shelf."

Certain drawings accompanied the contract and showed what is called "cleaning shelf." The defendant's contract it will be noticed did not require him unconditionally to construct a cleaning shelf, but where possible the bridge wall was to be made with a cleaning shelf, and he swears that in its performance he only beveled off the old bridge wall. But beveled bridge walls with underlying air-passages were old in the art, and the construction contemplated would not, if carried out, have constituted an infringement. As a matter of fact, however, in making the attempt to bevel the bridge wall he found that because of its thinness it was impossible to complete the contemplated construction; hence the project was abandoned, and the wall restored to its former condition. There is nothing in the contract, specifica-

tions, or drawings to show that he intended to build the banking platform called for by the Parson patent. The defendant's testimony which is directly to the contrary is the only evidence in the case upon the point. Moreover, the contract, as appears upon its face, was contingent. A cleaning shelf was only to be built in case it were possible by the use of the old bridge wall. While threatened infringement may undoubtedly be enjoined, the evidence in this case shows but a vague and conditional threat, if threat it be, which is best interpreted by what the defendant actually did or rather tried to do before he found out the impossible character of his undertaking. He merely beveled off the bridge wall, and, if that made a cleaning shelf, it was old in the art and only that which he had a perfect right to do, as will appear by examining the following patents: No. 418,955 to Miller, January 7, 1890; No. 421,990 to Tobin, February 25, 1890; No. 640,726, to Wilder, January 2, 1900; No. 498,959 to Metz, June 6, 1893. The burden of proof to show infringement rests upon the complainant, but there is not a word of testimony to show that the defendant ever contemplated, much less threatened to construct, a bridge wall and banking platform with their intercommunicating air-channels as called for by the patent in suit. In order to show infringement, however, complainant's expert, who as to this patent also admitted that he had not examined the prior art or the file-wrapper, testified in this connection that the combination of claim 1 consisted of the following elements:

- "1st. A closed combustion chamber and ash-pit.
- "2d. A grate.
- "3d. A bridge wall in which is formed air-channels on which is formed a banking platform.
- "4th. A hot-air-blast pipe.
- "5th. A blower.
- "6th. Means for dividing the blast."

He was therefore compelled, in order to make out any pretense of infringement on the part of the defendant, to eliminate an element of the complainant's patent. The claims, both of them, demand a banking platform having air-channels, and a bridge wall having air-channels, which communicate with the air-channels of the banking platform, and receive air from the region of the ash-pit. Unquestionably that language sets forth two elements in combination, which elements the expert, in order to support his testimony relating to infringement, was compelled to combine into one to read as follows: "A bridge wall in which is found air-channels and on which is formed a banking platform." It requires no argument to show that his construction is absolutely untenable. It follows that, even if both of the claims are valid, infringement by the defendant has not been shown. As to this patent therefore, the bill will also be dismissed.

But one other patent remains for consideration. It is No. 702,585, dated June 17, 1902. Speaking of this invention, the patentee says:

"This invention relates to an improved grate-bar of that type which is provided with conical perforations extending through the bar and which are used for burning coal dust or small-size fuel with artificial draft, the grate-bar being so improved that increased strength is imparted to the same, warping prevented, and a more reliable support for and interlocking of the grate-bars

obtained; and the invention consists of a grate-bar provided with longitudinal rows of tapering perforations arranged in staggered position relatively to one another and a longitudinal rib of serpentine shape integral with said bar at its under side, the undulations of said rib extending in the spaces between and tangentially to the perforations of the central group of longitudinal rows of perforations of the bar; and the invention consists, further, in the combination of two adjacent grate-bars provided with alternate interlocking tongues and recesses and intermediate straight connecting portions between said tongues and recesses, said tongues being provided with corrugations at their edges and a tubular transverse supporting-bar for the adjacent ends of the grate-bars."

The patent has two claims, but the complainant relies only upon the first, which is as follows:

"1. A grate-bar provided with longitudinal rows of tapering perforations arranged in staggered position relatively to one another, and a longitudinal rib of serpentine shape integral with said bar at its under side, the undulations of said rib extending in the spaces between and tangentially to the perforations of the central group of longitudinal rows of perforations of the bar, substantially as set forth."

The file-wrapper is in evidence, and discloses that after numerous changes and modifications made by the patentee in an effort to obviate objections and avoid citations made by the examiner a patent was finally refused. An appeal was thereupon taken to the examiner in chief, who subsequently allowed the patent.

Several patents were cited by the examiner as anticipations which destroyed any possible claim of invention. Among the patents in the prior art there is one to Scofield, No. 54,415, granted in 1866, in the specifications of which it is said:

"The nature of said invention consists in a grate-bar formed with a rib on its under surface that is corrugated longitudinally with vertical or nearly vertical flexures, so that the under, or bottom edge of the rib forms a corrugated or waved line as seen in figure 2."

The rib was formed thus for the purpose of avoiding the warping and bending of the grate-bar, which, however, in this patent does not seem to have been perforated. Perforations in grate-bars, however, were old, probably as old as the use of stoves or furnaces for burning coal or other like material; indeed, the Parks British Patent of 1820 shows them of the form of the Parson grate-bar. Did it require invention to take this corrugated or undulating rib of Scofield and place it as it had been placed before on the under side of a grate-bar, being careful only to avoid stopping up the perforations of the grate-bar? The patent to Miller of 1885 shows a grate-bar with staggered perforations; the perforations being of tapering or conical form like those of Parson. Miller, however, expressly says that the shape of these perforations was old and disclaimed any invention thereof. The Miller bars also show supporting ribs. A patent to Hess, No. 343,370, of 1886, in Fig. 3 also shows perforations of a conical shape. Patent No. 474,116, 1892, to Duncan, shows a perforated grate-bar in which the perforations are tapered and of staggered arrangement in longitudinal rows. Duncan, speaking of his invention, says:

"My present invention has for its object to provide an improved form of grate-bar that shall be simple, cheap, and durable in construction, that shall permit a uniform and thorough combustion of the fuel, whether this fuel be

coal, wood, coal-slack, or sawdust, and that can be readily cleaned, and which without unnecessary weight of material shall effectively resist all tendency to warp under the intense heat to which such bars are subjected."

Laying aside for the moment the other patents referred to, this of Duncan seems to embody the alleged invention of Parson, as shown and claimed by him. It shows staggered longitudinal rows of perforations of a tapering or conical form with an undulated rib fitted in between the rows of perforations. Whether the rib crosses the grate-bar in exactly the same position and manner in which that of Parson crosses it is immaterial. That is a matter of detail. Any mechanic of ordinary intelligence skilled in the art would have taken care that the rib in crossing the grate-bar diagonally did not obstruct the holes in the grate. It would scarcely be sensible after making holes to stop them up. Again, no invention can be found in increasing or lessening the number of the rows of perforations or in the number or arrangement of such rows or perforations, or in so adjusting the rib as to pass between and around such perforations. In short, there was no invention in placing the old undulated bar of Scofield or Duncan on the under side of a perforated grate-bar, and avoiding the perforations of the bar in so doing. The fact that the claim in question calls for a rib extending in the spaces between and tangentially to the perforations of the central group of longitudinal rows of perforations of the grate-bar adds nothing by way of invention in view of the prior art. Parson discovered no new idea or principle. A serpentine rib is serpentine, and whether more or less so is a matter of degree or measure. It performs the same function in the same way, whether its sinuosities be greater or less.

It should be noted that the complainant for some years has been making and selling a grate-bar with two straight flanges, one on either side of the bar, for which a patent has been applied for. This procedure at once suggests the almost infinite possibilities of the rib of a grate-bar, or rather its location, as a field for invention. The opinion of the examiners in chief is not very satisfactory or convincing. They apparently concluded to give Mr. Parson the benefit of the doubt. It appears as if their judgment had been unduly affected by his use of the word "tangential" and other like technical terms. At all events, I find the testimony of the defendant's expert more satisfactory, wherein, after showing that the form and arrangement of the perforations in the Parson grate were very old, he says:

"The second element of the combination is a stiffening rib placed on the under side of the otherwise flat grate-bar. The effect of this is to stiffen the grate-bar after the manner familiar to the art, and in the way that all plates, slabs and strips of metal, have been stiffened from time immemorial. Such stiffening rib simply makes a T-bar of the cross-section. Iron having this cross-section, and thus stiffened, has long been used in innumerable ways. No novelty, of course, can be found thus far, either in the elements or their combination. The patentee, however, claims novelty because he has given longitudinal rib a 'serpentine shape' so that it will not block up the perforations. That is the whole of this so-called 'invention.' I say the whole of it, because the rest is mere verbiage incident to the zig-zag or serpentine shape of the rib. The placing of a stiffening rib along the middle of the under side of any bar, plate, or strip of iron is a mere commonplace, as much so as an ordinary brace or strut in carpentry. In cast-iron it is as easy to make a stiffening-

rib crooked as straight, and it surely required no inventive insight to see that with a perforated grate-bar (the holes being naturally staggered in accordance with common usages) a stiffening-rib along the middle, would avoid blocking the holes (especially if these are set closely together) by giving this rib a zig-zag or serpentine shape."

In my judgment this patent is invalid. Upon the question of infringement, it is therefore unnecessary to say more than that it appears that the defendant installed a grate at the Ridgewood Pumping Station like the grate of the patent in suit, but for all that the case discloses it may have been one made by the complainant and properly used.

The bill of complaint will be dismissed, with costs.

WESTINGHOUSE ELECTRIC & MFG. CO. v. ALLIS-CHALMERS CO.

(Circuit Court, D. New Jersey. May 24, 1910.)

1. PATENTS (§ 328*)—VALIDITY—INFRINGEMENT—ELECTRIC RAILWAY MOTOR.

The Schmid patent, No. 609,977, for an electric railway motor, one of the principal features of which is the facility afforded for inspection and removal of the parts for repair, and another that the field-magnet is made to inclose and protect the armature, and itself to constitute the support for the armature bearings, was not anticipated, and discloses invention and utility; also *held* infringed by defendant.

2. PATENTS (§ 328*)—INFRINGEMENT—ELECTRIC RAILWAY MOTOR.

The Short patent, No. 546,560, for an electric locomotive, construed, and *held* not infringed.

In Equity. Suit by the Westinghouse Electric & Manufacturing Company against the Allis-Chalmers Company. Decree in part for complainant, and in part for defendant.

Richardson, Herrick & Neave, W. K. Richardson, and Harrison F. Lyman, for complainant.

Thomas F. Sheridan, Clifton V. Edwards, and Lawrence K. Sager, for defendant.

CROSS, District Judge. The record contains two patents for consideration, both of which are alleged to have been infringed by the defendant. The defendant asserts the invalidity of both patents, but, if valid, denies that it has infringed them. The first to be considered is No. 609,977, issued August 30, 1898, to Albert Schmid, assignor to the Westinghouse Electric & Manufacturing Company, for an electric railway motor. The inventor sets forth the objects of his invention in the following language:

"Another object of my invention is to supply a novel form of separable field-magnet admitting of complete protection and inclosure of the armature and at the same time of ready access to the interior parts of the field-magnet itself.

"Another object of my invention is the provision of a form of motor wherein the field-magnets may be readily inspected and repaired without the removal of the armature from the motor and car, either side of the separable field-magnet being thus capable of inspection and repair.

"By the use of my invention, I am further able to dispense with all frame-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

work, except that necessary for the carrying of the reduction-gears, to cheapen the construction, and to gain certain other advantages more fully set out hereinafter."

The patent contains eight claims, but five of which are in issue, namely, Nos. 1, 2, 3, 4, and 6. They are as follows:

"1. In a railway motor, the combination with an armature of a field-magnet constructed in two sections, the upper section being supported by the car truck and the lower section being hinged to and supported by the upper section and adapted to swing downward, substantially as and for the purpose set forth.

"2. In a railway motor, the combination with an armature, of a field-magnet constructed in two sections, the upper section being spring-supported on the car truck, and the lower section being hinged to and supported by the upper section and adapted to swing downward, substantially as and for the purpose set forth.

"3. In an electric car, a motor having a horizontally-divided field-magnet, one member of which is sleeved at one end upon an axle of the car, the other member being hinged to the first-named member at one end and removably fastened thereto at its other end independently of the axle-bearing, substantially as described.

"4. An electric motor, having a horizontally-divided field-magnet, the upper portion of which is provided with an axle-bearing at one end and the lower portion of which is hinged to said upper portion, independently of said axle-bearing, whereby it may be swung downwardly without disturbing said bearing."

"6. In a motor for electric cars, the combination with the armature, of a field-magnet comprising an upper section supported by the car truck and a lower section hinged to said upper section, and means whereby the armature may be supported by either section when the lower section is swung downward, substantially as described."

The several claims, although expressed in somewhat technical language, are easily comprehended. A motor of the character in question necessarily consists of a field-magnet and an armature. The electro field-magnet is stationary, having its poles surrounded by coils of copper wire, within which poles a cylindrical shaped armature is revolved. The armature carries a series of conductors on its circumference, and, as these conductors are energized by the electric current, each conductor in succession is attracted or repelled by the poles of the magnet, whereby the armature is caused to rotate, and such rotation communicated through gearing to the axle of the car. Motors used in the propulsion of street cars manifestly require frequent inspection, and one of the main objects of this patent was to permit the making of a thorough and yet comparatively expeditious and inexpensive inspection of the magnet, the poles and coils and armature, without disconnecting them, as a whole or in part; and, furthermore, if such inspection revealed the necessity of the removal of the parts, which are large and cumbersome, that such removal could be accomplished without tearing up the floor of the car or utterly dismantling or removing the motor. In order to effect these objects, the patent shows the motor casing in halves as it were and hinged together. The precise method of construction and operation, however, can best be shown by adopting in part the language of the specifications:

"As will be readily seen from the drawings, my motor is provided with a field-magnet which entirely incloses the armature and the two parts whereof are hinged together at the back, or at that portion removed from the axle

when suspended. The two parts of the field-magnet are shown at 1 and 2 and the hinge is shown at 3. This hinge is shown as depending from two strong lugs on the back of the upper field-magnet; but it is clear that any one skilled in the art may devise various forms of hinge adapted to this purpose.

"The forward end of the field-magnet is sleeved at 4 upon the axle, the upper or bearing half of the axle box or bearing 4, being cast in one piece with the upper portion of the field-magnet and the lower half being fastened thereto by means of bolts, 18, as shown, or by any other suitable means which will not be disturbed by or interfere with the independent movement of the field-magnet section 2 on its hinges.

"The field-magnets are provided with four poles (marked 5 in the drawings I), which are placed at an angle of about forty-five degrees to the horizon when the motors are in place. Each of these poles is appropriately wound, the windings in one half of the field-magnet being connected with those in the other half by means of a connection 6 sufficiently long to permit of the free opening of the motor.

"The two halves of the field-magnet are recessed at 7 and 8, as shown, for the purpose of receiving the bearings of the armature, one of these bearings being shown at 9. When the field-magnet is closed and the motor is in operative condition, the bearings, 9, are secured to both halves of said field-magnet, the bolts, 10, serving to fasten them to the upper half and the bolts, 11, to the lower half by means of proper threaded openings in the bearings, as shown in Fig. 2. It is evident from this form of construction that upon opening the field-magnet, as illustrated in Fig. 2, the bearings, 9, may be made to follow either the lower half or the upper half of the magnet or casing. If when the lower half is dropped, as shown, the bolts, 10, are unfastened, the bearings will follow the lower half and the poles and coils in the upper half of the field-magnet are open to inspection, as illustrated in Fig. 2. If, however, the lower bolts, 11, are loosened when the field-magnet is opened, the armature will remain with the upper half of the field-magnet and the lower poles and coils will be exposed. Thus the whole field-magnet may be got at without removing the armature from the car, and thus a great saving of time and trouble in repairs is attained."

In addition to the facility of inspection, and removal of the parts of the motor thus afforded, the patentee claims that he is thereby enabled to dispense with all framework, except such as is necessary for carrying the reduction gears, thereby among other advantages lessening the cost of construction. It should be noted, also, that the upper half of the field-magnet frame of his construction becomes the fixed or permanent half of the structure, and that the under half of the field-magnet hinged to it is entirely independent of the axle bearing and capable of being lowered at will without in any wise disturbing the upper half. Fig. 2 shows how, upon opening the field-magnet, the armature may as desired be kept attached either to the lower or upper half of the magnet. That is to say, if one bolt is removed, then the lower half may be dropped upon the hinge, and the armature lowered with that half, whereupon the upper poles and the coils of wire encircling them will be open for inspection. If, however, another bolt is removed, then when the field-magnet is opened upon its hinge, the armature will remain in the upper half of the field-magnet, and the lower poles and coils of wire will be exposed to view; so that, according as one bolt or another is removed, the armature, when the field-magnet is opened, will be found either in the upper or lower half as desired, and the poles and coils of wire of the other half open to observation. Moreover, this operation can be conveniently carried out

without removing or dismantling the motor simply by running the car over a pit, such as is commonly found between car tracks in the car yards or barns of trolley companies. The features of the patent which are claimed by the counsel of the complainant to be fundamental are concisely stated by them as follows:

"(1) That in his motor the field-magnet is made to inclose and protect the armature and itself to constitute the support for the armature bearings;

"(2) That the two halves of the field-magnet are hinged together, the upper half being the base or foundation of the whole and supporting the lower half, which may be swung downwardly from it on the hinge;

"(3) That the lower half is independent of the axle bearings upon which the upper half is sleeved and its dropping does not disturb the axle bearings; and

"(4) That means are provided whereby the armature may be supported by either the upper or the lower section, as may be desired, when the lower section is swung down."

And to show what can readily be accomplished in the way of inspection and removal of parts in dealing with the motor of the patent in suit, I quote, at the risk of repetition, a single passage from the testimony of one of the complainant's experts:

"A car equipped with the Schmid motor of the patent in suit can be merely rolled over a pit, and then a man in the pit can inspect or remove the lower field-magnet coils by merely dropping one edge of the lower shell, leaving the armature suspended in the upper shell. With no further manipulation, he can inspect the armature by rotating it to bring the different sides into view from underneath. By merely dropping down the lower half together with the armature, the field coils of the upper shell can be inspected and removed without the need of lifting out the heavy armature. As to the armature itself, it can be lowered part way together with the lower half of the field-magnet when it will come into a position where it can be easily and conveniently rolled out of its bearings in the lower shell and carried away. These operations can take place without the necessity of removing any of the dirty and heavy parts through the inside of the car."

The evidence shows the great utility of the patent in that from 80 to 90 per cent. of the motors constructed by the complainant company since 1894, approximately from 30,000 to 35,000, have been of this type. It is true that the evidence shows that some modifications thereof have been made, but the substantial features of the patent have been followed during that period by the complainant in the construction of by far the larger part of its electric motors of less than 75 horse power. The patent in question undoubtedly made a very considerable advance in the art. In entering upon an examination of the prior art, it may be said that of the numerous patents cited as anticipations of the one under consideration many are so obviously dissimilar that particular reference thereto seems unnecessary. Such only of them therefore as seem reasonably pertinent will be discussed. A prior patent to Schmid, No. 442,459, of 1890, for a double reduction motor, is no longer in use. It was of the open bipolar double reduction gear form of motor, and not of the closed type with single reduction gearing. Its magnet was of the horse-shoe style and essentially different from the two-part field-magnet of the patent in suit. Its upper section was not supported by the car truck, nor was its lower hinged to and supported by the upper section, nor was there any means provided whereby

the armature might be supported by either section when the lower section was swung downward. It had its foundation in a heavy rectangular frame surrounding the motor. The armature could be inspected but not removed from above, although from below it could both be inspected and removed, but to remove one of the field-magnets it was necessary to take the structure apart, an operation which consumed much time and labor. It is impossible to see how this patent can be considered as anticipating the construction of the patent in suit.

Still another patent to Schmid No. 498,577, of 1893, is cited. The fundamental structure of this motor likewise consists of a heavy rectangular framework outside of the motor wherein are provided bearings for the armature and also for the car axle. This framework, and not the car axle, supported the motor, and constituted one of the heavy and expensive appendages with which the patent in suit sought to dispense. The lower branch of the field-magnet, moreover, is not hinged to the upper half, as in the patent in suit, but to an outside framework, which framework is supported on the car truck. The upper field-magnet coils were accessible from the top by raising the upper half of the field-magnet shell, and the lower field-magnet coils were accessible from below, but the armature had to be dealt with separately and was only removable from underneath. Access to the motor, when in place, could only be had from above by means of a trapdoor in the car floor. In the Bassett patent, No. 457,102, of 1891, the upper part of the motor is rectangular in form and the lower semicircular. The motor casting was divided longitudinally through the centre. The two parts of the frame were hinged together, but the upper half could only be swung upwardly, and, unless the car body were first removed, the motor could only be gotten at through a trapdoor in the floor of the car. The motor was accessible from above, but not from below. Furthermore, it was the lower half of the motor which was supported on the truck, while the upper half was supported by the lower. It does not appear, certainly not clearly, that the lower section was hinged to and supported by the upper and adapted to swing downwardly as claimed by defendant's expert. Bassett, the patentee, was a witness for the defendant, and testified:

"That the motor was suspended from the bottom half of the field frame. The motor was therefore arranged to raise the upper half of the field frame through the trap in the car or to swing it up on the hinges. The armature could then be lifted out if desired."

It appears, moreover, that the lower section was not only not supported from the upper section and adapted to swing downwardly, but, if it were, there is apparently no means provided for holding the armature in the upper half while it was being done, nor, again, does either half of the frame appear to be independent of the axle bearings, as in the patent in suit.

The Blackwell patent, No. 470,817, of 1892, is radically different from the patent under consideration. It does not have a field-magnet constructed in two sections within the terms of the patent in suit. The armature is not supported from the upper but from the

lower pole piece, and, when that is removed, the armature drops with it. Furthermore, it has no hinge or swing movement, but, if opened for inspection or repair, the lower pole piece would have to be blocked up from beneath. It does not, and cannot without reconstruction, perform the function of the Schmid patent.

In the Mailloux patent, No. 457,357, of 1891, the motor is supported in a manner essentially different from that of the patent in suit. It has no hinge or hinge movement, and is therefore incapable of performing the swinging downward movement of that patent. There is no provision for retaining the armature in the upper section when the lower is removed. Moreover, the field-magnet is not composed of two parts. The complainant's expert says that of all the motors examined by him he finds this the most inaccessible and difficult to handle, and that it would be practically impossible to get out the upper field coils without a thorough dismantling of the structure.

The Bassett patent, No. 527,927, of 1894, is claimed by the complainant to be too late to be relevant in this case, but, waiving that, it is also essentially unlike the Schmid patent. The motor is supported by the lower half of the frame, and it is this which constitutes the foundation of the motor, while the upper half is the movable part. The motor is approached from above; that is, through the platform of the car, and not from below. No means is shown whereby, even if the lower half frame of the motor were capable of being swung downwardly, the armature could be supported in the upper half.

The Angell patent, No. 486,176, of 1892, is for a journal box intended to be used generally for shaftings. It provides no means for upholding the armature in the upper half of the journal, nor does it show a motor with a two-part field-magnet, the upper part of which is supported by the truck of the car and the lower part supported by, and hinged to, the upper part.

As already intimated, many other patents have been cited as anticipating one or another of the claims of the patent in suit. They are, however, all clearly and readily distinguishable from it, notwithstanding which they serve to show that the problem which Schmid overcame had long been recognized, and its solution attempted by workers in the art. None of them, however, accomplished it, certainly not in the simple and effective way in which it was accomplished by Schmid.

Another patent, No. 546,560, issued to Sidney H. Short September 17, 1895, for an electric locomotive, should, before leaving this branch of the case, be specifically mentioned. This is the second of the two patents in suit, and is claimed by the defendant to fully anticipate the Schmid patent. The complainant, while not admitting this, insists that it is immaterial because Schmid's invention was made some time before April 23, 1894, the date of the filing of the application for the Short patent. The Schmid patent was applied for May 10, 1894, and was issued, as already appears, August 30, 1898. Hence it will be seen that the Short patent has priority over Schmid, both in date of application and issue. Upon the proposition that Schmid made his invention prior to the filing of the Short application, the burden

of proof is upon the complainant, and the proposition itself must be established by clear and convincing testimony. Turning to the evidence supporting it, it will be found to consist in the testimony of several witnesses and in reference to, and extracts from, the books of the complainant, and other memoranda and documents. The proofs upon the point are of a character which cannot be intelligently abbreviated or summarized; hence nothing of that nature will be attempted. It is deemed sufficient to say that they are in kind and amount such as cannot be disregarded, and, in the absence of serious contradiction, must be considered as satisfactorily establishing the point to which they were directed, and this, notwithstanding the fact that Schmid himself was not called as a witness. This omission was criticised by defendant's counsel, but hardly with justice, since it appears that he has resided in France since 1897. In my judgment the evidence upon this point establishes that Schmid made his invention some time in the spring of 1892, and that a motor substantially embodying it was shipped from the complainant's factory on June 1st of that year.

I think upon the whole case that the Schmid patent is valid. It shows both utility and invention, and was not anticipated. Coming, then, to the question of infringement, I do not understand either from the brief or oral argument of defendant that this is denied. Nor was it denied by the defendant's expert. The defendant's motor has a field-magnet constructed in two sections and divided horizontally like the complainant's, the upper section of which is sleeved upon the axle at one end and supported by the car truck; while the lower section is supported by the upper and hinged to it at one end, and removably fastened thereto at the other independently of the axle bearing in such a manner that it may swing downwardly. Furthermore, the motor is provided with means whereby the armature may, at will, be supported in either section when the lower section is swung downwardly. The pole coils and armature are of the same type, and, in general, the motor is in all respects substantially like that covered by the claims in issue of the Schmid patent in suit. It seems unnecessary as this feature of the case is presented to discuss the matter in any greater detail than has already been done.

The only question remaining for consideration is whether the defendant is responsible for the infringement, inasmuch as the infringing motor was one of several manufactured by the Bullock Electric Manufacturing Company, which were installed on the cars of the Toledo, Port Clinton & Lakeside Railway Company in Ohio in 1904. It appears from the proofs, however, that the defendant in its own name, and by an advertisement paid for by it, advertised the infringing motor. There is also evidence showing that the motors manufactured by the Bullock Company, and supplied to the above-mentioned railroad company, were installed by men who worked under the direction of an engineer of the defendant company, and that payment for the equipment was made to the defendant. Again, it appears that the defendant has acquired the plant of the Bullock Company, and has since then paid all of the large bills of that company. There is ad-

ditional evidence which might be referred to were it necessary to establish the responsibility of the defendant for the acts of the Bullock Company. As to the claims in issue of the Schmid patent, the complainant is entitled to a decree.

There remains for consideration the Short patent, already referred to. It contains 19 claims, of which 3 only, namely 7, 8, and 15, are relied on. They are as follows:

"7. The combination with a motor casing constructed with end trunnions, said casing and trunnions being divided or formed in detachable sections, of a hook formed in one section of the casing, a perforated lug on the other section, and an eye bolt for connecting together such sections and forming a hinged joint between them, substantially as set forth.

"8. The combination with a two-part motor casing, one part having an up-turned hook cast on one side and perforated lugs on the opposite ends, the other parts having perforated lugs cast on its ends, and on one side, of an eye bolt for connecting the adjacent parts of the casing, and bolts for securing their ends, substantially as set forth."

"15. The combination with the divided motor casing having divided trunnions formed on its opposite ends, of journal bearings encircling the journals on the armature shaft, and means for detachably securing the journal bearings to the upper sections of the divided trunnions, substantially as set forth."

The claims involved deal chiefly with the particular form of hinge and the particular means provided for supporting the armature in the upper section of the field-magnet when the lower section is dropped. So far as the form of hinge is concerned, Short simply adopted and used an old form of hinge which after all was little more than a hook and eye. Schmid in the patent already considered, after speaking of his particular form of hinge, says:

"But it is clear that any one skilled in the art may devise various forms of hinge adapted to this purpose."

The main feature of this hinge is in its mechanical form. Its function is purely mechanical. I fail to see that it is adopted and used in a way that involves anything in the nature of invention. As to the trunnions and perforated lugs specifically mentioned in the claims in issue, and relied upon to show invention, it is unnecessary to pass upon them, notwithstanding their validity is seriously attacked; for the reason that the defendant's device does not have these elements or any equivalent thereof. The claims in question have not therefore been infringed. My views accord with those of the defendant's expert on this portion of the case. The defendant's structure does not show any trunnions or their equivalent, having the function of the trunnions of the Short patent, and the same may be said of the perforated lugs. The defendant's device has no lugs.

As to this patent, the bill will be dismissed. The costs will be divided between the parties.

AMERICAN STREET FLUSHING MACH. CO. v. ST. LOUIS STREET
FLUSHING MACH. CO. et al.

(Circuit Court, E. D. Missouri, E. D. June 17, 1910.)

No. 5,208.

1. PATENTS (§ 318*)—INFRINGEMENT—PROFITS RECOVERABLE—STREET FLUSH-
ING MACHINE.

The only invention disclosed by the Ottofy patent, No. 795,059, for a street flushing cart, is in the combination with other elements, all of which are old, of a nozzle of such construction and position as to throw the water in a flat sheet nearly parallel with the surface of the street in a forward and lateral direction so as to loosen up the dirt and force it away to the sides of the street, and on an accounting an infringer is liable only for the profits realized from the use of such improved nozzle, over what he might have made by the use of other nozzles that did not infringe.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.*]

Accounting by infringer for profits, see note to *Brickill v. Mayor, etc., of City of New York*, 50 C. C. A. 8.]

2. PATENTS (§ 312*)—INFRINGEMENT—PROFITS RECOVERABLE—IMPROVEMENT
PATENTS.

In an accounting for profits a defendant has made by the use of an infringing device which is a mere improvement upon what was known before and was open to defendant to use, the complainant has the burden of proof to separate or apportion the profits made from the patented and unpatented features.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 312.*]

In Equity. Suit by the American Street Flushing Machine Company against the St. Louis Street Flushing Machine Company and William Ratican. On report of master, and exceptions thereto by defendants. Exceptions sustained.

See, also, 156 Fed. 574, 84 C. C. A. 340.

C. V. Edwards and L. Frank Ottofy, for plaintiff
Carr & Carr and Johnson & Richards, for defendants.

DYER, District Judge. This cause was begun in this court in 1905. It was tried by my predecessor, who entered an interlocutory decree in favor of complainant and referred the matter of accounting to Byron F. Babbitt, as master. An appeal was allowed to the Circuit Court of Appeals from the decree here entered in September, 1906. The decision of this court was affirmed, and the master proceeded to take testimony, and thereafter on the 9th of December, 1909, made his report and filed a transcript of the evidence taken. The master's report concludes as follows:

"In view of all the foregoing, and by way of summary, I make the following findings and recommendations:

"First. I find that the defendant St. Louis Street Flushing Machine Company has realized from its sales of infringing street flushing machines profits in the aggregate sum of \$4,950, the allowance of which amount to complainant is respectfully recommended.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Second. I find that the defendant William Ratican has realized on account of his individual infringement of complainant's patent rights profits in the sum of \$15,039.03, the allowance of which to complainant herein is respectfully recommended.

"Third. In the absence of any testimony showing, or tending to show, that complainant has sustained any actual damages by reason of defendant's infringement, I find that complainant is entitled to no damages, as such, and that its recovery is limited to the profits severally realized by said defendants, and as hereinabove set forth.

"Respectfully submitted,

Byron F. Babbitt, Special Master."

Exceptions were duly filed to this report, by both the complainant and the defendants. It is this report and the exceptions thereto that is now before the court for consideration.

The Court of Appeals very tersely stated in its opinion (156 Fed. 574, 84 C. C. A. 340) the controversy between complainant and defendants. The court says:

"This was a suit to enjoin infringement of United States letters patent No. 795,059, granted July 18, 1905, to complainant, the American Street Flushing Machine Company, as assignee of L. F. Ottofy, the inventor. * * *

"Taking the claims and the specifications together, we find the invention is for a device for scouring and flushing streets, consisting of and resulting in forcing water under pressure from a tank located on a moving cart connected by pipe to a nozzle or nozzles having narrow elongated delivery apertures, extending downward from the tank and to a position near the surface of the street forward of the rear wheels, and so adjusted that the water is forced out of the apertures in a flat sheet nearly parallel with the surface of the street in a forward and lateral direction, so as to loosen up the dirt and simultaneously force it away to the sides of the street and into the gutters, without injury to the surface of the street. There is no claim that any of the elements of the patent are new. The tank, the water under pressure, the nozzle, the delivery apertures, and the means of adjustment are all old; but the contention is that the particular combination of these elements in the patent produces a new and useful result, and is patentable. The new and useful result claimed is the effective loosening up of dirt and material on the street and washing them off into the gutter by one action without injury to the street."

The court further says:

"Practically the only contention, aside from that of want of patentable novelty, now for consideration, is that the invention of the patent is limited to a narrow compass. This is entitled to serious attention. The state of the art when Ottofy entered the field was well advanced. The numerous patents pleaded as anticipations and given in evidence disclose the art of street flushing and washing, and the kindred art of street sprinkling had been much exploited by inventors. The field had been thoroughly worked. The mechanism employed was simple, and nothing abstruse or obscure was involved. Streams operating forwardly and laterally had been produced before; but no broad flat stream operating nearly parallel to the surface of the street as to perform the function of a shovel in scouring and flushing the street had ever been produced. In view of the prior art, the novelty and merit of the present patent rest exclusively in the employment of means and in the combination of elements to produce this flat nearly parallel stream. The patent, therefore, is not a pioneer or primary one in any sense, and the owner is not entitled to much range of equivalents."

The master recommends that judgment be entered against the defendants separately, as follows:

"Against the St. Louis Street Flushing Machine Company for \$4,950, and against William Ratican for \$15,039.03."

The first of these recommendations is based upon the profits derived by the company from the sale of 14 street flushing machines, manufactured by it, and sold to various parties. The entire machine, including the nozzle claimed to have been infringed, was manufactured by the defendant. The master is of opinion that the complainant is entitled to all of the profits derived from the sale of the machine, without regard to the value of the particular nozzle infringed. There was no evidence offered by either side (so far as I have been able to discover from the record) to show the profits that came to the defendant from the use of this improved or patented nozzle over what he might have made by the use of other nozzles that did not infringe the patent of complainant. The claims of complainant's patent did not and could not cover the entire machine and to ascertain the profits to defendant, growing out of the use of the patented device, proof must be offered.

In the case of *Brown et al. v. Lanyon Zinc Co.* (recently delivered by the Circuit Court of Appeals for this Circuit) 179 Fed. 309, the court says:

"The chief complaint directed against the accounting, and the only one which merits particular mention, is that an erroneous standard of comparison was used in measuring the profits realized by the defendant from this infringement. At the outset it is well to observe that the invention in suit did not cover the entire furnace of the Ropp type, as used by the defendant, but only a part of it, consisting of the supplemental chamber wherein the rabble operating mechanism was housed and protected from the direct action of the heat, dust, and fumes while it actuated the rabbles in the main chamber by means of an arm extended through a slot in the intervening wall or floor, and that, although the defendant's use of this improvement was a wrongful use of the plaintiff's property, its use of other parts of the furnace was a lawful use of its own property; that is, of what was open to use by all alike. Therefore, the plaintiffs' interest in the profits derived from the use of the entire furnace was confined to such as arose from the patented feature, the supplemental chamber, and the remaining profits rightfully belonged to the defendant. That is well settled. In *McCreary v. Pennsylvania Canal Co.*, 141 U. S. 459, 463 [12 Sup. Ct. 40, 42 (35 L. Ed. 817)], it was said: 'There is no doubt of the general principle that, in estimating the profits defendant has made by the use of the plaintiff's device, where such device is a mere improvement upon what was known before, and was open to the defendant to use, the plaintiff is limited to such profits as have arisen from the use of the improvement over what the defendant might have made by the use of that or other devices without such improvements.' This is a familiar doctrine announced by this court in a number of cases. *Seymour v. McCormick*, 16 How. 480 [14 L. Ed. 1024]; *Mowry v. Whitney*, 14 Wall. 620 [20 L. Ed. 860]; *Littlefield v. Perry*, 21 Wall. 205 [22 L. Ed. 577]; *Elizabeth v. Pavement Co.*, 97 U. S. 126 [24 L. Ed. 1000]; *Garretson v. Clark*, 111 U. S. 120 [4 Sup. Ct. 291, 28 L. Ed. 371]."

In the case of *Westinghouse Electric Manufacturing Co. v. Wagner Electric & Manufacturing Co.*, 173 Fed. 366, 97 C. C. A. 621, the Court of Appeals (Eighth Circuit) quoted *Garretson v. Clark*, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371, as follows:

"The patentee must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative."

The Court of Appeals then said:

"And upon this question the burden of proof is upon complainant. If he fails to carry this burden, he is entitled only to nominal damages."

The court further said:

"Here the appellant failed to prove by reliable or tangible evidence that the entire value of the infringing transformer as a marketable article was properly and legally attributable to appellant's patented combination embodied therein, and so, in the light of the decisions above cited, and many others, which we have examined, announcing the same rule, we think that the appellant is entitled to recover nominal damages only; in other words, that as part only of the profits made by the appellee are attributable to the appellant's combination, the balance being attributable to the presence of the infringing device of elements not included in that combination, and as the appellant failed to make proof of how much of the total profits was due to the presence of its combination in the infringing device, there is nothing upon which more than a nominal recovery could be grounded."

It seems to me that the principle announced in those various decisions disposes of the question in this case.

Many exceptions are made to the report of the master in this case, but in the view the court takes it is unnecessary to pass upon them.

The report and recommendations of the master upon this branch of the case are set aside, and a judgment for nominal damages only will be entered. A judgment for \$1 and costs will be entered against the defendant company.

The recommendation of the master that judgment be entered against William Ratican for \$15,039.03 is based upon the profits derived by him from the city of St. Louis on a contract for sprinkling the streets. This amount is found by the master after making certain allowances for the pay of drivers, feed for horses, shoeing, etc. No allowance whatever was made for the use of the machines and the horses that drew them, nor for interest on the capital invested, nor for rent, etc., etc. The total allowance made aggregates \$3.94 per wagon. The contract the defendant had with the city was for \$6 per day. This left, according to the master's report, a profit of \$2.04 to the defendant on each machine. I cannot approve of this finding or the recommendation of the master. The principles of law before referred to as applicable to the judgment recommended against the company are equally applicable to the finding and recommendation against Ratican. The report and recommendation is set aside and judgment for \$1 and costs will be entered against the defendant Ratican.

While disagreeing with the master in his report and conclusions, it is but fair to say that the report shows much hard work and careful thought upon his part.

It appears from the master's statement that he has received from the complainant and defendant the sum of \$400; the defendants contributing thereto the sum of \$150. The master will be allowed the sum of \$2,000 for his services. From this amount the sum of \$150 paid to him by the defendants will be deducted, and the remainder, to wit, \$1,850, will be taxed as costs to be paid by the defendants.

SIMPLEX ELECTRIC HEATING CO. v. LEONARD et al.

(Circuit Court, S. D. New York. May 9, 1910.)

1. PATENTS (§ 328*)—CONSTRUCTION AND INFRINGEMENT—ELECTRIC INSULATORS.

The Morford patent, No. 490,034, for an improvement in electric insulators, which consists generally in embedding electric conductors in an enamel of insulating material that is made to adhere to the device that is to be heated by or otherwise used in connection with an electric current, and which serves to insulate the conductors while connecting them to the device, in view of the prior art and the amendment of the specification required by the Patent Office, is not a primary one, and the claims must be limited to an enamel which excludes glass in any form and which in its use acts as an insulator for the conducting wires from the plate or support and also to imbed such wires in such a way as to secure them thereto. As so construed, *held* not infringed.

2. PATENTS (§ 112*)—INFRINGEMENT—PRESUMPTION FROM GRANT OF LATER PATENT.

The grant of a patent raises a presumption that the device described and claimed therein is not an infringement of an earlier patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 162-165; Dec. Dig. § 112.*]

In Equity. Suit by the Simplex Electric Heating Company against H. Ward Leonard, the Ward Leonard Electric Company, and the Carpenter Enamel Rheostat Company. Decree for defendants.

See, also, 148 Fed. 1023.

Duncan & Duncan, Frederick S. Duncan, and Harry L. Duncan, for complainant.

Edwards, Sager & Wooster, Clifton V. Edwards, and Lawrence K. Sager, for defendants.

HAZEL, District Judge. The bill charges the joint infringement by the defendants of patent No. 490,034 of January 17, 1893, issued to Thomas E. Morford and the Enamel Insulator Company for electric heater or improvement in electric insulators. The specification states:

"The invention, stated generally, consists in embedding electric conductors in an enamel of insulating material that is made to adhere to the device that is to be heated by or otherwise used in connection with an electric current and which serves to insulate the conductors while connecting them to the device."

To establish the validity of the said patent and its infringement by the defendants and as an absolute bar to the main defenses interposed herein, the complainant chiefly relies upon a prior litigation between the former owners of the Morford patent and the Carpenter Enamel Rheostat Company brought for the infringement of the Morford patent. The complainant claims that the defendant H. Ward Leonard practically owns and controls the Carpenter Enamel Rheostat Company and the Ward Leonard Electric Company, and that he personally instigated the infringements of the patent in suit by which he and his codefendants profited. There is evidence tending to show that on Jan-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

uary 7, 1896, the Carpenter Company assigned to the defendant Leonard the Carpenter patent No. 447,023, which was involved in the prior litigation for infringement of the Morford patent, and that he gave back to the assignor an exclusive license to manufacture rheostats and resistance units. Afterwards, in the year 1896, the Carpenter Company sold its machinery and tools to the Ward Leonard Electric Company of New Jersey, which was organized and controlled by the defendant Leonard, who owned a major portion of its capital stock, had charge of the affairs of the corporation, and was its president. Said company was afterwards succeeded by the Ward Leonard Electric Company of New York, of which the defendant Leonard is president and manager, and associated with others owns its capital stock; Leonard owning the major portion thereof. There were numerous legal propositions argued at the bar relating to the personal liability of the individual defendant, the effect of the former adjudication as concluding the defendants to deny the validity of the Morford patent and its infringement by them, to the title of complainant in the Morford patent, estoppel by complainant to bring the action, laches, and to the introduction of improper and irrelevant testimony, but it is only deemed necessary to pass upon the scope of the claims in controversy and whether the rheostats and resistance units manufactured by the Ward Leonard Electric Company infringed the patent in suit.

In the suit pending in the United States Circuit Court for the district of Connecticut, involving the Carpenter patent and to which the defendant H. Ward Leonard was in privity, it was adjudicated that the claims of the Morford patent were valid and infringed. The court did not hold that the Carpenter patent was invalid, or that it was for the identical invention described in the Morford specification and claims. This was practically decided by Judge Wallace in *Leonard v. Simplex Electric Heating Co.* (C. C.) 145 Fed. 946, who had before him a plea interposed by the defendants to the bill which averred infringement of the Carpenter patent by the complainant in this action. Such being the situation, the scope of the claims in controversy may properly be ascertained for the purpose of determining whether the resistance units and rheostats manufactured by the defendants are an infringement thereof. Said claims read as follows:

"1. In an electro-heating apparatus, the combination, with the heated-surface plate and the resistance, of a coating of enamel or its equivalent securing the resistance to, but insulating it from said plate, substantially as set forth.

"2. In an electro-heating apparatus, the combination, with the plate to be heated and the resistance, of a coating of adhesive enamel or its equivalent for securing the resistance to, but insulating it from said plate, substantially as set forth.

"3. In an electrical apparatus, the combination with a supporting body and an electric conductor, of a coating of enamel or its equivalent securing the conductor to while insulating it from the body, substantially as set forth."

Claims 1 and 2 in terms are limited to an electric heating apparatus of metal or other material, while claim 3 is without any limitation, and broadly includes the combination of elements in an electric apparatus. The Patent Office at first rejected claim 3 on the ground that the antecedent art disclosed the invention, but on appeal the board of examin-

ers allowed it, requiring the patentee, however, to incorporate a restricted definition of the words "of enamel or its equivalent" in the specification. Acquiescing in this action of the Patent Office the specification says:

"In using the term 'enamel' I refer to any of the adhesive substances commonly employed to produce on the surface of metallic and other objects an adherent coating or film usually called an enamel, and which is made permanent by heating it after its application; but I prefer to use such substances as are commonly applied to iron-ware in the manufacture of cooking utensils, generally known as granite-ware. However, I do not regard as equivalents glass or such other vitreous substances as have not the capability of requisite adhesion to the body they coat, and the property of expanding and contracting with it sufficiently to avoid breaking of the insulation."

Such disclaimer must be taken as a substantial admission that the use of enamel as a coating on an apparatus for embedding layers or strands of wire in which glass or its equivalents are used to form the inclosing material was old at the date of the invention in suit. The action of the Patent Office was principally based upon the English patent No. 85 of 1882, which specifies glass and shows how it may be treated as the equivalent of enamel. In such patent the wires are coated with vitreous material to insulate one from the other, but the examiner held that it does not secure the conductor to the conducting body. The disclaimer in suit makes clear I think that what the patentee intended was to include enamel which contains no glass or glass ingredients, and to thereby differentiate his invention from that of the prior art. The legal effect of the disclaimer was to narrow claim 3 to the precise method of manufacture and to enamel having the restricted meaning given it in the specification.

There were other patents of the prior art such as the patent to Newton, No. 119,093, not cited by the examiner, which shows that it was not new to cover a conductor in an electrical apparatus with an insulating material of glass or of a material in which glass was an ingredient. The defendants also cite the patents to Paige, No. 394,207, to Alberger, Nos. 201,477 and 211,681, and to Arbogast, No. 220,907, from which it appears that the combination of the claims as literally expressed was old. Giving due consideration to the proceedings in the Patent Office, the object of the patentee as stated in his specification, and the evidence, I conclude that the patent was not a primary one, and the claims must be limited to an "enamel" which excludes glass in any form and which in its use acts as an insulator for the conducting wires from the plate or support and also to imbed such wires in such way as to secure them thereto.

The resistance tubes manufactured by the Ward Leonard Electric Company are of porcelain. The wire is wound around them, and, to prevent its deterioration, they are covered by a coating of glass. The resistance tubes are in no sense heating apparatuses, nor have they heated surface plates within the meaning of claims 1 and 2. The tube is not a conductor and the coating placed thereon does not perform the office of securing the conductor thereto while at the same time operating as an insulator as in complainant's device, nor are the rheostats of the defendant's manufacture an infringement of the Morford

patent. The insulating coating of the rheostats apparently acts as an insulator between the iron and the wire, but it does not hold the wire in place. It is of a vitreous substance, having various ingredients, and it is subjected to treatment before it is applied to the iron. That the coating is one of glass is not disputed. It does not perform the function of attaching an insulating resistance wire to the supporting plate or insulating it therefrom, nor are the plates or supports heated to make them useful as a heating apparatus. According to the defendants' proofs, the rheostats and resistance units were manufactured by the defendant under patents No. 535,532 to Delany, for an enamel to hold the conductor, and Nos. 576,202 and 691,949 to Leonard, for a so-called ground coat, which the evidence shows was not strictly enamel and which is given a glazed coating. It has been held by the Supreme Court in *Pavement Co. v. City of Elizabeth*, 4 Fish. Pat. Cas. 189, Fed. Cas. No. 312, that the grant of letters patent under circumstances such as here presented raises a presumption that the later patent is not an infringement of the earlier. This rule has frequently been followed and applied. *Boyd v. Janesville Hay Tool Co.*, 158 U. S. 260, 15 Sup. Ct. 837, 39 L. Ed. 973; *Kokomo Fence Machine Co. v. Kitselman*, 189 U. S. 23, 23 Sup. Ct. 521, 47 L. Ed. 689; *Union Match Co. v. Diamond Match Co.*, 162 Fed. 148, 89 C. C. A. 172.

As the essential elements of the claims in suit as they are herein construed are not found in the defendant's articles of manufacture, it follows that a decree may be entered dismissing the bill, with costs.

ACME-KEYSTONE MFG. CO. v. DEARBORN et al.

(Circuit Court S. D. New York. June 8, 1910.)

1. PATENTS (328*)—INFRINGEMENT—SEWING MACHINE.

The Dearborn patents. No. 639,669, No. 679,553, and No. 705,326, relating to blind stitch sewing machines, construed, and each held infringed.

2. WORDS AND PHRASES—"BLIND STITCHES."

"Blind stitches" are stitches which enter the cloth without going entirely through it, and show on one side only.

In Equity. Suit by the Acme-Keystone Manufacturing Company against Charles A. Dearborn and Barnet Grossbard, copartners as the American Blind Stitch Machine Company. Decree for complainant.

See, also, 167 Fed. 568.

Hillary C. Messimer, for complainant.

Harry E. Knight (William E. Knight, Charles C. Gill, and David J. Newland, of counsel), for defendants.

HAZEL, District Judge. This action involves the alleged infringement by the defendants, Charles A. Dearborn and Barnet Grossbard, copartners of three United States letters patent, Nos. 639,669, dated December 19, 1899, 679,553, dated July 30, 1901, and 705,326, dated July 22, 1902, and issued to the defendant Charles A. Dearborn, who thereafter assigned such patents to the complainant. They relate to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sewing machines, and specifically for making stitches in cloth which enter the cloth without going entirely through it and show on one side only—blind stitches, so called. This type of sewing machine is largely used to sew hems in garments, generally at the bottom of trousers and skirts. In order to perform the sewing operation the cloth is folded to form a ridge or rib through the upper part of which ridge the needle enters but does not pass through to the under side thereof. The thread is caught up from the needle as it passes through the ridge by the aid of a so-called looper in its forward movement, and the stitch held while the needle passes through the ridge. The loop of thread which is formed on the off side of the needle is carried in the prongs of the looper by a swinging or rocking motion across the line of the seam to enable the needle to pass through it in its successive forward and backward movements. As the stitching progresses the cloth is automatically moved towards the stitching point, and the swinging movement of the looper enables it to take the loop from the needle at one side of the stitching and shift it to the other. The validity of the said patents and claims is not in controversy, the principal question for decision being whether the machines manufactured by defendants are infringements thereof.

In patent No. 639,669, the issue is very narrow, and evidently depends upon whether the defendants have adapted in their machine the looper of claim 1, and if in operation it performs the same function in co-relation with the needle to make the stitch. In reading the specification it will be noticed that the patentee by his adaptation designed a new path or cycle for his looper so that interference between the needle and looper would be prevented when the machine was in operation. Claims 1 and 2 in controversy are substantially alike. The former reads:

"1. In a sewing-machine, the combination with a feeding mechanism, of a needle arranged to reciprocate horizontally or approximately so, and transversely to the line of feed, mechanism for operating said needle, a looper-rod provided with a looper located above the work-support and presser-foot and co-operating with said needle and the acting portion of which looper is eccentric to the longitudinal axis of said looper-rod, and mechanism for operating said looper-rod to cause the same to have a forward longitudinal movement to carry the looper forward above the work at one side of the line of stitches to take a loop from the needle above the work, then an axial or rocking movement to carry the looper across the line of stitches to the other side thereof, and then a longitudinal receding or rearward movement above the work to enable the looper to present the loop to the needle, and then a second axial or rocking movement to carry the looper again across the line of stitches to its first position, from which it may again move forward to take another loop, substantially as set forth."

In the latter portion of the claim beginning with the words "and mechanism for operating said looper-rod," etc., is found the feature which defendants claim differentiates their machine from that of complainant; i. e., that their looper is without an axial or rocking movement to facilitate taking the loop from the needle. Defendants claim that they have made a patentable departure from the patent in suit by substituting a suspended rock arm which causes the looper without rocking or axial movement to proceed forward and backward. But

the proofs show that the function of the defendants' looper in its reciprocating movement in combination with the needle, the operating mechanism, the feeding mechanism, the looper and looper shaft or rod is practically the same as the looper of claim 1. It has a forward movement above the sewing material and to one side thereof and forms a loop from the needle. The mechanism carries the looper laterally across the line of stitching to the opposite side thereof without the looper turning, and then it recedes to allow the needle to stitch the cloth and slidably returns to the initial position preparatory to moving forward to perform another stitching operation. There is no longer room for doubt as to complainant's claim that the defendants' looper has substantially the rocking movement required by the claim, inasmuch as the expert witness for the defendants when recalled for further testimony corrected his earlier deposition and admitted that the rear part of the defendants' looper has this feature. That the entire looper has not a more marked rocking movement is unimportant in view of the fact that the same result is achieved by rocking the rear portion of the looper which causes the forward part to sway or slide so as to catch up the thread from the loop and carry it across the line of the stitching. It makes no difference that the looper of the defendants' machine is of different form and when in operation slides or moves in its entirety across the seam and does not actually turn or rock to perform the function. The essential thing the patentee had in mind was to carry the looper to and fro across the line of stitching without interfering with the needle or with taking the thread therefrom. I think claims 1 and 2 are entitled to a construction broad enough to include a looper substantially operating to cause "the rear portion of the same to have an axial or rocking movement to carry the looper across the line of stitches to the other side thereof," and so construed the exhibit machine of the defendants infringe them.

Dearborn Patent, No. 705,326.

Claims 3, 12 to 17, inclusive, and 20, 22, and 23 are in controversy. It is enough to set forth claim 3, which is typical of all the claims in issue except claim 20, which does not include the presser foot. It reads:

"3. In a blind-stitch sewing-machine, the combination of suitable stitch-forming mechanism, and a stationary presser-foot, with a ridge-forming rib constructed and arranged to engage the work beneath the presser-foot, and an upper feed device constructed and arranged to engage the upper exposed face of the work adjacent to said ridge-forming rib, substantially as set forth."

The contention of the defendants is that the claims are strictly limited to a stationary presser foot, but I think that the depressible foot of the defendants' machine is nevertheless the equivalent in operation of this feature in complainant's machine. From reading the specification and claims it becomes evident that the patentee believed in the practicability of a rigid and firmly positioned presser foot for sewing machines of the type under consideration. Indeed it is fairly shown that a presser foot to successfully perform the required function must be rigid and stationary, while one readily flexible and yielding is un-

suit for the purpose intended. The device of the defendants is pivoted to the feed frame, and may be depressed in a downward direction, but it is normally maintained stationary by a stop device and performs the precise functions of the claims in suit. Its downward yielding action to pressure of the cloth is claimed to "aid in making a better blind stitch," but the testimony on this point is meager, and as it was given by the patentee, who now endeavors to limit the scope of the claims to avoid infringement, is unpersuasive. The other claims in issue are concerned with the feeding mechanism in combination with the presser foot already mentioned. Claim 20 does not include the presser foot, and therefore the element of the feeding mechanism alone requires attention. The evidence shows that in the complainant's machine a part only of the under feed mechanism is located on the inside line of stitches, and such part is made to yield without relation to the work table while the yielding of the outside portion is dependent thereon. In defendants' machine the entire feed mechanism yields independently of the table, and the parts are made to yield separately. Such indicated differences in construction, however, are thought unimportant as no new result is attained thereby. Whatever differences of construction there exist in the machine in evidence manufactured by the defendants relate to minor details, and the same result is obtained as in complainant's machine by substantially similar instrumentalities.

Dearborn Patent No. 679,553.

Claim 2 which alone is involved reads as follows :

"2. In a sewing machine, the combination of suitable stitch-forming mechanism, with a stationary presser-foot, a yieldingly-mounted feed-frame, a ridge-forming rib adjustably mounted in said feed-frame and adapted to engage the work beneath the presser-foot, and a feed device yieldingly mounted upon said feed-frame, and independent of the ridge-forming rib, substantially as set forth."

In view of the foregoing decision on the earlier patents the contention is narrowed to the question of whether the ridge-forming rib in defendants' structure is capable of adjustment. The defendants urge that the scope of the claim must be narrowed to a stationary presser foot and a ridge-forming rib adjustably mounted on a yielding feed frame. The patent is an improvement of patent No. 705,326, and no sufficient reason is found in the record to deprive the claim in issue of a fair construction. The defendants in their machine have a presser foot which responds to the claim, and they have adapted a ridge-forming rib which concededly in the machine introduced in evidence by them, though not in complainant's exhibit, defendants' machine, is capable of adjustment, and accordingly infringement of claim 2 is established.

From the foregoing, it will be observed that all the claims in issue are thought to be infringed by the defendants' exhibit, defendants' machine; and the complainant is therefore entitled to the usual decree for injunction and accounting, with costs.

CHADELOID CHEMICAL CO. v. CHICAGO WOOD FINISHING CO. et al.

(Circuit Court, S. D. New York. August 3, 1910.)

1. EQUITY (§ 125*)—SERVICE OF PROCESS—OBJECTIONS—PLEA.

An objection to service of subpoena on a foreign corporation by serving on a stenographer who was not the corporation's agent, while otherwise sustainable, will not be allowed, where not raised by plea to the jurisdiction.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 304; Dec. Dig. § 125.*]

2. PATENTS (§ 287*)—INFRINGEMENT—SALES—GOODS.

A sale of goods made by defendant's agent, involving an infringement of complainant's patents, to defendant's customers, who were pressing for quick deliveries, not on his own account, and out of the ordinary course of business, constituted an infringement by defendant.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 457-459; Dec. Dig. § 287.*]

3. CORPORATIONS (§ 662*)—FOREIGN CORPORATIONS—"PLACE OF BUSINESS."

Defendant's agent maintained an office in New York, paying his own rent and stenographer, from which defendant's wares were advertised without protest. Defendants used such office as their own when they wished to press slow debtors. They permitted the agent to advertise and represent that he was their Eastern agent, and from this office many sales were made, though most of the sales were concluded at the corporation's home office at Chicago. *Held*, that the corporation had a "place of business" in New York, and was therefore subject to suit there.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2568-2570; Dec. Dig. § 662.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5390-5392.

Foreign corporations doing business in state, see notes to *Wagner v. J. & G. Meakin*, 33 C. C. A. 585, and *Ammons v. Brunswick-Balke Collender Co.*, 72 C. C. A. 622.]

In Equity. Action by the Chadeloid Chemical Company against the Chicago Wood Finishing Company and others. On plea to jurisdiction. Denied.

See, also, 173 Fed. 797.

Duncan & Duncan, for complainant.

Wm. R. Davis, for defendants.

HAND, District Judge. I should sustain this plea, because Miss Baldwin was not the agent of the defendant company in any case, did the plea itself raise that question. Since it does not, and since this would leave the merits undetermined, I shall disregard that perfectly good objection to the service of the subpoena.

There is proof of acts of infringement in the occasional small sales made here by Olmstead out of the goods shipped to him. (Olmstead, XQ92-95.) It makes no difference that these are out of due course, because they were clearly made on behalf of the defendant, who was credited with the proceeds. *Chic. Pneumatic Tool Co. v. Phil. Pneumatic Tool Co.* (C. C.) 118 Fed. 852. They were not sales made by Olmstead on his own account, but avowedly to customers of the defendant, who were pressing for quick deliveries. However, the sales

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

made from Chicago were not infringements. I accept as authority *West. Elec. & M. Co. v. Stanley Elec. M. Co.* (C. C.) 116 Fed. 641, though earlier, as against *West. Elec. & M. Co. v. Stanley Elec. M. Co.* (C. C.) 121 Fed. 101, as preferable on principle.

There remains the question of what is "a regular and established place of business." *Thomson-Houston Elec. Co. v. Bullock Elec. Co.* (C. C.) 101 Fed. 587, is not helpful, for the facts are different and much stronger for the jurisdiction. Yet I think that the facts are enough here to sustain the bill. I do not decide that a regular and established office, to which salesmen repair and which is maintained by them out of their earnings, is a "place of business"; for there is much more than that in the case. The very facts which constitute infringement show that Olmstead's office was known by the defendants to serve on occasion as a place of distribution. That was, therefore, one of its purposes. But I rely especially on the representations as to the character of Olmstead's relation to the business. Many of these emanated from Olmstead himself; but they were all known to the defendant, and passed without protest. I suppose no one would suggest that if the defendant had paid the rent it did not have a place of business, because all orders had to be sent to Chicago for acceptance. In short, one may have a place of business without selling goods there. It is true that Olmstead paid his own rent and his own stenographer, but that is not conclusive.

The question is whether the defendant had accepted his office as a place of business of their own—of such business as they might wish to do in the East. There seems to me no reasonable doubt that they did. They permitted it to be so advertised without protest. They used it when they wished to press slow debtors. It was the place where, at least in the case of the "Yankee Cleaner," their exclusive agents did business, and where they must naturally expect inquiries to come and be answered. In the face of their own advertisements, and of the representations that they allowed Olmstead to make, that he was their Eastern agent, they cannot with a good grace now deny that they had any business in the East at all, merely because most of their sales were concluded at Chicago. Certainly there was business—that is, a necessary part of the transactions they were carrying on—that took place in New York. It took place regularly at one place, which was permanently established for the purpose. Even if they committed no act of infringement there, it would still be a place of business within the act, which clearly differentiates between the two. *Chic. P. Tool Co. v. Phil. P. Tool Co.*, *supra*; *Gray v. Grinberg*, 159 Fed. 138, 86 C. C. A. 328.

I agree that the defendant's maintenance of this suit does not waive a plea to the jurisdiction. The complainant fails to distinguish between jurisdiction and estoppel; but the distinction is fundamental.

Plea overruled, with costs. Defendant to answer by the next rule day.

(SAYRE et al. v. BONNEY VEHSLAGE TOOL CO.

(Circuit Court, D. New Jersey. May 24, 1910.)

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—TICKET PUNCH.

The Cottrell patent, No. 698,820, for a ticket punch, *held* not anticipated, valid, and infringed.

In Equity. Suit by Louis A. Sayre and Howard C. Condit, partners as L. A. Sayre & Co., against the Bonney Vehslage Tool Company. Decree for complainants.

The bill was filed for the infringement of letters patent No. 698,820, issued to L. A. Sayre & Co., dated April 29, 1902, for a ticket punch invented by Herbert Cottrell. The punch was one of the kind known as edge and central ticket perforators, and the fulcrum was between the handle and the punch.

Testimony was taken on both sides and the anticipatory devices claimed were a punch made under the patent to F. P. Becker, No. 572,625, dated December 8, 1896, and also an edge and central perforating punch pivoted at one end, and not in the middle.

Edward Q. and George M. Keasbey, for complainants.
Will C. Headley, for defendant.

CROSS, District Judge. This case as presented requires but brief consideration. The patent upon which the bill of complaints is founded is No. 698,820, dated April 29, 1902. The bill alleges that it is owned by the complainants, has been infringed by the defendant, and prays the usual relief in such cases. The defendant in its answer, while admitting infringement, set up by way of anticipation of the complainants' invention a single patent in the prior art and alleged prior use of the complainants' device by several parties who are specifically named, but did not set forth the times and places of such alleged use. The defendant submitted no proof in support of the defenses just indicated, nor did it cross-examine the complainants' witnesses, but did introduce some evidence from which infringement can be deduced. The patent in suit is for a ticket punch, concerning which the patentee says in his specifications:

"The object of my invention is to produce a combination ticket punch in which the punch and die members have the double function of edge and central ticket perforators, thus combining the operations of two punches in the simple members of a single punch. To do this, I form the punch-carrying member of the ordinary shape for hand-pressure, but having a pivot as a fulcrum for a bifurcated portion, comprising a punch-lever of small radius and a punch-lever of larger radius. I also form the die-carrying member of like shape for hand-pressure, but having a pivot-hole on the central line between two ticket slots and dies, the upper and shorter one being adapted for perforating the edge of tickets and the lower and longer one for perforating the central portion of tickets. These dies correspond with the radius of and articulate with the two punches of the punch member."

It contains a single claim. The complainants' expert, who was the patentee, but has no present interest in the patent, having assigned the same to the complainants before its issue, clearly distinguishes between this patent and the one set up in the answer as an anticipation. It is unnecessary to consider the evidence in detail or to rely wholly upon

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the expert's testimony, since a superficial comparison of the two devices shows that the patent alleged to be an anticipation is not such in fact, nor was it cited as such by the examiner in the Patent Office. The complainants' invention, although somewhat similar, is nevertheless essentially different, and its utility is clearly manifested by the evidence.

Upon the question of prior use, no evidence whatever was presented. Under the pleadings and evidence, I cannot do otherwise than hold the patent valid and infringed by the defendant.

A decree will accordingly be entered for the complainants, with costs.

FRAZER v. ROHR.

(Circuit Court, S. D. New York. August 3, 1910.)

No. 3,183.

1. PATENTS (§ 235*)—INFRINGEMENT—SCOPE OF PATENT.

A patent for an invention designed to give to spectators at an amusement place a false impression of the courage and skill of a bicycle rider, the movements of the wheel being, in fact, mechanical, cannot be used to prevent a rider who has the courage and skill so simulated from exercising the same.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 235.*]

2. PATENTS (§ 328*)—INFRINGEMENT—AMUSEMENT RAILWAY.

The Frazer patent, No. 811,211, for an amusement railway, *held* not infringed.

3. WORDS AND PHRASES—"AMUSEMENT RAILWAY."

The phrase "amusement railway" includes those devices in which a car or other vehicle moves along a track in startling and surprising evolutions or through imitation scenery for the gratification of the occupants.

4. WORDS AND PHRASES—"RAILWAY."

The phrase "railway," when used in connection with a patent for a pleasure car moved by an independent means of locomotion, may not necessarily include a vehicle traveling on a pair of fixed rails, but it does denote that the vehicle travels in a predetermined course rigidly controlled to that course independently of the will of the occupant. A bicycle following a groove, and not controlled by the sides, is a railway within the meaning of the patent laws.

In Equity. Suit by Anne E. W. Frazer against Charles Rohr. Decree for defendant.

Bernard Cowen and Albert V. T. Day, for complainant.

James H. Griffin, for defendant.

HAND, District Judge. The sole question in this case is of infringement. Taken word for word, the defendant's device is covered by claims 1 and 3, except for the initial phrase: "In an amusement railway." Upon the argument, counsel insisted that the reason for these words was the somewhat arbitrary division in the Patent Office which classified their patented apparatus among "amusement railways." However the Patent Office may find it convenient for its own

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

purposes to classify inventions, I may not assume that in the words of a claim they are adopting any esoteric meaning, but I should assume that they use words in the ordinary sense which they bear to the public at large. The phrase, "amusement railway," includes those devices which have for a number of years been customary at places of popular and cheap amusement, such as Coney Island, and in which a car or other vehicle moves along a track in surprising and startling evolutions or through imitation scenery for the gratification of the occupants. So far as I understand the phrase, its application to the patentee's invention is in any event somewhat of a stretch from its usual connotation; still, the analogy is apparent enough between the patent and such devices as the "loop the loop" and others of the kind especially when one remembers that the patent would include a car for several occupants moved by any independent means of locomotion. The phrase "railway," when used in this connection, may not necessarily include a vehicle traveling on a pair of fixed rails, and, indeed, it could not have been so used here, but it certainly does denote that the vehicle travels in a predetermined course rigidly controlled to that course independently of the will of the occupant. Thus in the patent the bicycle is immovably fixed to the ring, C, and cannot move outside of its plane. It is further rigidly limited in its course to the groove in the "hollow plate, A." In these respects it is quite like a railway, and may, with a little stretch of language, be said to move on and along with the "rail," C. This use of the term clearly indicates that in the mind of the patentee there was no suggestion of a vehicle freely moving over all parts of the track, A, and retained in position on it only through the skill and adeptness of the rider. The invention was indeed designed to give the false appearance of such skill without the necessity of getting a rider who in fact could do so difficult a feat, and it would attribute to the patentee a wholly spurious imagination to assume that she contemplated any feat of the kind which the defendants have taught themselves. By inventing a machine which dispenses with courage and skill, she is now seeking to prevent them in the exercise of their own courage and skill.

Therefore the defendant's device is not a railway of any kind and cannot, without wholly departing from the obvious intent of the patent, be made to fall within the scope of the patent. No one can look at the two devices and fail to feel the essentially unreasonable character of the complainant's contention. Her machine is at best a delusive trick to beguile spectators into supposing that they are seeing a desperate and amazing feat, when in fact the rider has nothing to do but hold onto his seat—no doubt a sufficiently unpleasant necessity. The defendants rely wholly upon their dexterity and self-command, employing no secret devices, and deluding no one into an exaggerated belief of their prowess. Even were the verbal aptness of the claims more perfect than it is, I should not enjoin them from getting the profits of their past patience and training.

Bill dismissed.

COLLINS v. DUNLAP & CO.

(Circuit Court, S. D. New York. August 10, 1910.)

PATENTS (§ 238*)—INFRINGEMENT—WOMAN'S HOOD.

In the Collins patent, No. 944,176, for wearing apparel consisting of "a convertible head covering and neck piece comprising an arched portion of soft material and a collar," the collar is an element of each of the two claims, and the patent is not infringed by an article having no collar.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 376; Dec. Dig. § 238.*]

In Equity. Suit by Clara C. Collins against Dunlap & Co. On motion for preliminary injunction. Motion denied.

George R. Simpson (G. L. McGill, of counsel), for complainant.
Howson & Howson, for defendant.

LACOMBE, Circuit Judge. The object of the invention is to provide a woman's convertible headgear and neck piece capable of being used for automobile, evening and theater wear, being readily converted into a neck piece and with equal facility restored to its original use. The patent has not been adjudicated, and complainant apparently relies on some testimony as to acquiescence.

The article looks very much like the old-fashioned "calash" or collapsible hood of some generations ago, but it may be that there are some novel and ingenious details of construction. These need not now be inquired into. The patent may for the purposes of this motion be taken at its face value. The article is composed of a body portion, an arched formation extending over the head, made of silk or other suitable material gathered and stitched in any manner desired by the user, and supported on light wires located between the covering and the lining. The wires are adapted to be folded together or to be separated. When separated, they stretch the silk so as to produce a hood of arched formation. There is also a depending portion which latter surrounds the neck of the wearer and is drawn together at its lower edge and secured with fastening ties. This depending portion called the collar piece was not made particularly prominent in the specification as originally filed, and in the four claims then presented there is found no reference to it. The application being rejected on reference to British patent to Fenwick No. 17,592, December 3, 1888, the specifications were amended so as to describe the collar piece as a functional element of the alleged invention. Thus it is asserted that the sustaining wires are "secured to the collar piece and in order to convert the article into a neck piece the ties are loosened to relax the collar."

The claims now read:

"1. As an article of manufacture, a convertible head covering and neck piece comprising an arched portion of soft material and a collar, a collapsible frame secured to said collar and designed to normally support said material in the form of a hood or head cover or, when said collar is loosened, to col-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lapse and allow said material to fall upon the shoulders of the wearer to form a neck piece.

"2. As an article of manufacture, a convertible head covering and neck piece, comprising an arched portion and a collar, a series of approximately parallel sustaining wires in such arched portion and secured to said collar at spaced apart points, said wires permitting such arched portion to collapse and rest on the shoulders of the wearer and cover the back of the neck, and ties secured to the ends of said collar."

It is quite apparent from this quotation that the "collar" is an element of each of these claims. Inspection of the alleged infringing article shows that it does not contain the "collar" of the patent.

The motion for preliminary injunction is denied.

GILLETTE SAFETY RAZOR CO. v. WOLF.

(Circuit Court, S. D. New York. August 15, 1910.)

PATENTS (§ 326*)—SUIT FOR INFRINGEMENT—VIOLATION OF INJUNCTION.

It is not a defense to a proceeding to punish a defendant for violation of an injunction against infringement of a patent that he had instructed his employes to observe the injunction, and that the violation was by one of them without his knowledge.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 613-619; Dec. Dig. § 326.*]

In Equity. Suit by the Gillette Safety Razor Company against Charles W. Wolf. On motion to punish defendant for contempt for violation of injunction. Motion sustained.

Clifford E. Dunn, for complainant.

Isidor Buxbaum, for defendant.

LACOMBE, Circuit Judge. Complainant is the owner of a patent for safety razors, which it manufactures and sells under certain restrictions as to the price at which they shall be resold at retail; notice of such restrictions being affixed to the cases in which the goods are sold by it. It also sells razor sets to the United Cigar Stores Company put up in a distinctive manner with notice of restriction against any sale, such goods being merely redeemed as premiums by the original holders of certificates issued by the Cigar Stores Company. On June 2, 1910, complainant obtained an injunction forbidding defendant from selling or offering for sale razors or razor blades at less than the fixed price, and from selling or offering for sale or in any manner dealing in so-called "Premium razors" which had been manufactured for the Cigar Stores Company. This injunction was on the same day served upon defendant.

It being alleged that he subsequently, on June 2d, violated this injunction and defendant denying such allegations, it was sent to a special master to take proof and report. The master has reported that at one of the defendant's branch stores a sale at cut prices was made by one of his employes on the day named. Nothing is shown upon which the correctness of this report could be questioned. It is further al-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

leged that defendant while the master had the matter before him again violated the injunction (on July 7) and a motion to punish for this second violation has been argued on affidavits. It seems to be quite clearly established.

The defendant's contention is that, upon being served with the injunction, he at once issued orders to his employes to be careful not to sell any razors or blades at cut prices, and not to offer any premium goods; that the sales complained of were contrary to his orders, and resulted from the carelessness of some individual employé. But, as was said in *Christensen Engineering Co. v. Westinghouse Air Brake Co.*, 135 Fed. 774, 68 C. C. A. 476, even if defendant "be acquitted of any deliberate violation of the order of the court, having given instructions not to sell such (articles), nevertheless it is thought that an intelligent defendant should take such steps as will enforce obedience to its instructions on the part of its employés."

Under all the circumstances, defendant expressing regret for the occurrences and promising in the future not to deal in or have anything to do with any of the articles manufactured by complainant, a nominal fine only, \$25, will be imposed, since defendant is obligated to pay the master's fees and stenographer's bill. The fine will go to the complainant.

VICTOR TALKING MACH. CO. v. HOSCHKE et al.

SAME v. SONORA PHONOGRAPH CO.

(Circuit Court, S. D. New York. August 15, 1910.)

PATENTS (§ 326*)—INFRINGEMENT—PRELIMINARY INJUNCTION.

Motions to punish a defendant for contempt for violation of an injunction restraining infringement of the Berliner patent, No. 534,543, for an improvement in talking machines, by organizing a corporation which manufactures and sells a modified form of the infringing machine, and for a preliminary injunction against the corporation, denied, to await final hearing.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 613-619; Dec. Dig. § 326.*]

In Equity. Suits by the Victor Talking Machine Company against William H. Hoschke and others, and same against the Sonora Phonograph Company. On motions to punish for contempt and for preliminary injunction. Motions denied.

See, also, 158 Fed. 309, 169 Fed. 894.

LACOMBE, Circuit Judge. The suits are brought upon the Berliner patent, which has been so often before the courts—No. 534,543—and present the old question whether or not the stylus is moved through the groove by the action of the groove itself, or whether it operates by means of a mechanical feed. The machine of defendants in the first suit was considered by Judge Hough, who held:

"Defendant's machine in every material feature is complainant's, and so is the disk obtained from defendant for use in that machine. The only differ-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ence between the two machines is that defendant's has within its free arm a spring tending to press the stylus against the inner wall of any groove with which it may be engaged, and causing arm and stylus, when disengaged from any groove, to pass the stylus point through the arc of a circle whose radius is the free arm."

This machine was enjoined. Subsequently Hoschke with others incorporated the Sonora Phonograph Company, which makes a modification of the first machine. Contending that the modification effects no substantial change, complainant asks to enjoin the corporation and to punish Hoschke for contempt.

The modification is a simple one and easily described. The free arm is moved inward towards the center of the disc not by a spring, but by means of a threaded rod, with which the pivot end of the free arm engages. In the old machine if the groove did not act to hold back the stylus the spring would sweep the free arm through the arc of its travel quickly. In the new machine that movement is regulated by the threading on the rod. Whether the stylus is in a groove or out of it the rate of movement of the arm is the same. It would seem that, when the number of threads on the rod are exactly proportioned to the number of circles on the disc, the arm and the stylus at its end would move so that the point would be fed by the threading as it should be properly to produce the tune. As shown in a sample machine obtained by complainant and made an exhibit, there is considerable play given to the stylus point relatively to the free arm, more play than seems necessary to effect proper operation, if the machine acts as defendants contend. But if, for example, there are 96 threads to an inch on the rod and the same number of grooves to an inch on the disc, it would seem that the machine might fairly be found to act by "mechanical feed." The question is a close one and can better be determined at final hearing after further experiments have been made, notably, as suggested by the court upon the argument, one with the stylus fixed rigidly on the free arm.

The motions are denied.

VICTOR TALKING MACHINE CO et al. v. LEED & CATLIN CO.

(Circuit Court, S. D. New York. June 1, 1910.)

PATENTS (§ 314*)—INFRINGEMENT—DEFAULT.

Where, in a suit for patent infringement, defendant made default after the taking of full proofs, the court will not pass on the questions arising in detail on the theory that the decision would be of use in case of subsequent infringement, as the basis of a preliminary injunction, but will only go over the case sufficiently to dispose of the actual controversy.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 550; Dec. Dig. § 314.*]

In Equity. Suit by the Victor Talking Machine Company and another against the Leed & Catlin Company. Decree for complainants.

Horace Pettit, for complainants.

Louis Hicks, for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HAND, District Judge. This case comes on for final hearing upon the defendant's default after taking full proofs. Upon the argument sufficient of the facts were produced to justify the usual final decree. The counsel for complainant wishes the court to consider and pass upon the questions which arise in detail, upon the theory that it will be of use in case of subsequent infringement as the basis for a preliminary injunction. That is, however, not the rule in this circuit. In *Hayes v. Leton* (C. C.) 5 Fed. 521, Judge Benedict declined to follow an adjudication which was taken by default. It does not appear in that case whether the defendant defaulted on his proofs or only upon the final hearing; but in *American Electric Novelty Co. v. Newgold* (C. C.) 99 Fed. 567, Judge Lacombe declined to treat a prior adjudication as binding upon preliminary injunction when the decision had been submitted on pleadings and proofs of plaintiff but without argument or brief by defendant. In that case Judge Wheeler had upon final hearing examined the record and decided that the bill was valid and that there had been infringement. His memorandum is reported in *American Electrical Novelty & Manufacturing Co. v. Acme Electric Lamp Co. et al.* (C. C.) 98 Fed. 895. In *Société Anonyme Du Filtre Chamberland Systemè Pasteur et al. v. Allen et al.* (C. C.) 84 Fed. 812, Judge Hammond, in the Sixth circuit, declined to regard an adjudication as having the usual weight when the defendant had contested it up to final hearing but abandoned it.

It therefore appears that an adjudication, however careful, under these circumstances would not benefit the complainant, and I must decline to examine the record in the light of possible objections to the patent, or to go over the case with more particularity than is necessary simply to dispose of the actual controversy.

Let the usual decree pass.

NELSON v. BOLDT et al.

(Circuit Court, E. D. Pennsylvania. July 21, 1910.)

No. 662.

1. WITNESSES (§ 268*)—CROSS-EXAMINATION—SCOPE.

Where, in an action for damages against the proprietors of a hotel for refusing to furnish plaintiff accommodations, plaintiff testified in chief that he was in the business of athletics and looking after his real estate, he was properly questioned on cross-examination as to whether his business was not that of a prize fighter, and whether in his prize fighting career he had not violated the laws of various states relating to such subject.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 268.*]

2. INNKEEPERS (§ 9*)—DUTY TO RECEIVE GUESTS—REFUSAL OF ACCOMMODATIONS.

While an innkeeper owes a duty to travelers applying for accommodations and tendering reasonable payment therefor to receive and accommodate them, he may lawfully refuse to receive boisterous, intoxicated, or objectionable characters and persons who are violators of the criminal laws,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexer

and are not law-abiding citizens, such as prize fighters, etc., without being liable to such persons for damages.

[Ed. Note.—For other cases, see *Innkeepers*, Cent. Dig. § 10; Dec. Dig. § 9.*]

At Law. Action by Oscar Battling Matthew Nelson against George C. Boldt and another. On plaintiff's motion for a new trial. Denied.

The court charged the jury, in part, as follows:

"Innkeepers owe a certain duty to the traveling public which they are required at all times to perform, and, if they violate the duty or refuse to perform it, they are answerable in damages to any person who suffers injury as a result therefrom."

"When a traveler presents himself at an inn, it is the duty of the innkeeper to accommodate him if he be a fit person to be admitted and receive accommodation; it being the innkeeper's duty to receive into his house all strangers and travelers who may call for entertainment, provided he has rooms, and they tender him a reasonable sum for the accommodation demanded. The innkeeper, however, can refuse to admit any one, if he pleases, rendering himself liable in an action for any injury the stranger may sustain. If he refuses to entertain a stranger or a traveler for a good reason, he is not liable for damages, as the law only requires him to entertain fit persons."

"It is also the duty of an innkeeper to protect his guests against the intrusion of boisterous, objectionable characters and persons intoxicated, and such persons may be rejected. Where objection to admitting a guest is based on the fact that the guest is committing a breach of the peace, or is intoxicated, the innkeeper's justification may be determined by the court as a matter of law, but when the question is as to the guest's character or reputation, and his standing as a reputable person, the question is for the jury; that if the jury believed that plaintiff was not a law-abiding citizen, but at the time was engaged in a business which was in violation of the laws of the various states of the United States, then the jury would be authorized in finding that he was not such a proper person as was entitled to enforce a legal right to be admitted to a hotel in the state of Pennsylvania, and defendants would be justified in refusing to give him such accommodations as he demanded at that time, it being no answer that other hotels would accommodate him."

The evidence reviewed by the court to the jury indicated that plaintiff, while claiming to be engaged in athletics and looking after real estate, had in fact represented himself in his own biography as the champion light-weight prize fighter of the world up to February 22, 1910. It also appeared that he had engaged in nearly a hundred hotly-contested battles which were such as to be prohibited by the laws of the state of Pennsylvania and of other states, by which such contests are made a criminal offense. The court thereupon charged that it was for the jury to say whether a violator of the criminal laws of the various states, such as the evidence showed plaintiff was, would be a reputable person to be admitted to a hotel in Pennsylvania under the law as previously stated, and that, if the jury conclude that he was not, he could not recover.

E. Waring Wilson, for plaintiff.

Henry S. Drinker, Jr., and Abraham M. Beitler, for defendants.

HOLLAND, District Judge. This was a suit instituted by the plaintiff against the defendants, owners and managers of the Bellevue-Stratford Hotel in Philadelphia, to recover damages for having been refused lodging and accommodation at the hotel. On August 2, 1909, the plaintiff secured a room at the Bellevue-Stratford through his agent, Mr. Robinson, which he occupied until the morning of August 3d. While Mr. Nelson and his agent, Mr. Robinson, were at breakfast, his satchels were removed from his room to the baggage room,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and, when he applied for a room for the following night, the clerk refused to assign him one. He left the hotel and secured a room at the St. James, Thirteenth and Walnut streets, about one square away. Next day he brought suit for damages against the Bellevue-Stratford, and the case was tried in this court on the 6th of April, 1910, and a verdict rendered in favor of the defendant. Motion and reasons for a new trial were filed in due time by the plaintiff, the reasons being five in number, which, however, raise only two questions. The first question to be considered is raised by the third ground for a new trial, which is as follows:

"The learned judge erred in not confining the cross-examination of plaintiff to such matters as had been stated in the examination in chief, and to such questions as might tend to show bias and interest, and in permitting defendant to lead out new matter constituting his own case under the guise of cross-examination."

The plaintiff had been examined by his counsel in his own behalf, and had testified as follows:

"Q. What is your business? A. Athletics is my business, and I have a lot of real estate in six different states to the extent of about \$250,000, and I have to look after that.

"Q. Do you do newspaper work? A. Considerable; yes, sir. I have been corresponding for a dozen different papers for the last five years, doing special work."

Upon an objection by the defendant's counsel to the amount of real estate he owned, Mr. Wilson, counsel for plaintiff, insisted that he wanted to show Mr. Nelson's business. The witness further testified, in answer to questions submitted to him by his counsel, as follows:

"Q. Have you ever been convicted or accused of any crime or misdemeanors of any kind? A. No, sir.

"Q. Or disgraceful conduct? A. No, sir.

"Q. You have never been accused of any of those things? A. No, sir; never.

"Q. What are your personal habits with respect to drink, especially what was your condition at this time?

"By Mr. Beitler, Counsel for Defendants: That is a matter of defense, if this man was in bad condition. We do not intend to allege he was in bad condition. We do not intend to allege he was not sober.

"By Mr. Wilson, Counsel for Plaintiff: I thought the burden was upon me to show that he was a proper person.

"By Mr. Beitler: I do not intend to allege that he was not sober.

"Mr. Nelson, the Witness: I always travel in the best of company, and mix with the best people in the world."

This was part of the testimony of the plaintiff, offered in chief, for the purpose of sustaining his claim for damages against the defendant; they having refused to admit him to the hotel.

Upon cross-examination the defendant's counsel endeavored to show that Mr. Nelson was not in the business of athletics and looking after his real estate. He was questioned as to whether or not his business was not that of a prize fighter, instead of one engaged merely in athletics. He was further cross-examined on the question as to whether he had ever been convicted or accused of any crime or misdemeanor of any kind, and in the examination on this point he volunteered the assertion that he had never "knowingly violated any

law of any state of the Union, or had ever been arrested." He further stated, "I never violated the law in my life in any state." He was then further questioned as to whether or not it was unlawful to fight prize fights in certain states of the Union, and the law of the state was read to him, after which he was asked whether or not he knew of the existence of that law at the time he fought his prize fight, for the purpose of contradicting him and showing that he had knowingly violated the law of different states. The examination was very extensive because of the varied career of the plaintiff and because of the great number of fights in which he took part.

It seems to me that this was proper cross-examination in view of the position assumed by the plaintiff's counsel that it was his right to establish the plaintiff's fitness to be a guest at the hotel, and offered evidence as to his business and standing, and that he had been a law-abiding person. He was properly cross-examined upon his answers in chief in regard to these matters.

The only other questions raised by the assignments of error are to the charge of the court as to the right of all persons to be admitted to a hotel. We still think the view of the court taken at the trial and expressed in the charge to the jury is a correct exposition of the law.

The motion and reasons for a new trial are overruled.

SPRUNT et al. v. HURST-STREATOR CO.

(Circuit Court, D. South Carolina. March 2, 1910.)

GAMING (§ 12*)—CONTRACTS FOR FUTURE DELIVERY.

Where, at the time cotton was sold for future delivery, it was the intention of the parties to actually deliver and receive the cotton, the fact that the purchaser, on being unable to get the actual cotton, accepted a payment in cash, did not render the transaction a gambling one.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 22; Dec. Dig. § 12.*]

At Law. Action by Alexander Sprunt and another against the Hurst-Streator Company. On motion to direct a verdict for plaintiffs. Motion granted.

Stevenson & Matheson and Edward McIver, for plaintiffs.
W. P. Pollock, for defendant.

BRAWLEY, District Judge. I think that the case of Springs v. Carpenter, reported in 154 Fed. 487, 83 C. C. A. 327, is conclusive as to my duty in this case. There is a motion on behalf of the defendants that the court direct a verdict in favor of the defendants in the cause of action, and that it should further direct a verdict in favor of the defendants for the sum of \$1,687.50, the amount paid in money on the 25th of October. The case of Springs v. Carpenter was tried before me at Greenville. It arose out of a transaction on the New York Cotton Exchange. I was of the opinion then, and my opinion

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

has not changed since, that 9 out of 10, I may say 99 out of 100, of the transactions upon the New York Cotton Exchange are gambling contracts; that they are nothing more than wagers upon the future price of cotton, and although in form, by the rules of the New York Cotton Exchange, there was an agreement actually to deliver and actually to receive the cotton, yet as a matter of fact I do not believe that in 1 case out of 100 there was ever an intention to receive or to deliver actual cotton. Consequently I left that question for the jury to say whether it believed there was an actual, bona fide intention to deliver cotton; and the jury found in that case, and I think properly found, that there was no such bona fide selling and buying of actual cotton, and that it was a wagering contract, void at common law, void under the very stringent statute of South Carolina. I am in thorough sympathy with the object of that legislation, and would, so far as I could, do what Chief Justice McIver said was the intention of the legislation in this case, uproot this gambling in future contracts. That case was carried to the Court of Appeals, and the facts in it are much stronger on the side of the defendant than any of the facts proved in this case, and the Court of Appeals decided that it was the duty of the court, on the testimony in that case, to direct a verdict for the plaintiff.

Now, this suit here is on a contract of May 17, 1909, between the Hurst-Streator Company on the one part, and Alexander Sprunt & Son on the other part. The testimony is, and it is a matter of notoriety, even without testimony to satisfy me of the truth of it, that Alexander Sprunt & Son are large dealers in actual cotton in the city of Wilmington, which is probably the nearest port to Cheraw in the state of South Carolina; that they were buyers and exporters of cotton in large amounts; that they had their agents all through this country, who bought cotton for them, and made contracts for them for future delivery of cotton. There is nothing in the law of South Carolina, and there is no law anywhere that I know of, which makes illegal or immoral transactions of the kind set forth in this contract. A contract for the future delivery of cotton is as valid as any other contract, provided it is a bona fide contract, and if the parties intend on the one part to buy, and on the other part to sell and to deliver, the actual cotton. Now, on its face, and in all the circumstances which have been detailed in the testimony, there is not a doubt in my mind that this was a bona fide transaction; that Sprunt & Son intended to buy, and that Hurst-Streator Company, who were dealers in cotton, intended to sell, and that they intended actually to deliver, the 300 bales of cotton mentioned in this agreement. The same is true as to the other two contracts, 100 bales each, one dated in May, and the other in June. There is testimony as to what occurred at the time when the contracts were entered into. Certain changes, certain interlineations, were made in the printed form of the contract at the suggestion of the defendant here, Hurst; and those interlineations were made by E. H. Duval, who was the clerk of his father, M. W. Duval, the agent of Sprunt & Son. Those interlineations were approved by Sprunt & Son, through their agent, M. W. Duval. All of them tend

to confirm what appears upon the face of the printed form of the contract, that there was an expectation at the time on the part of the defendants, Hurst-Streator Company, to deliver the actual cotton. Later, in the autumn of that year, in September and October, actual cotton was delivered in conformity with this contract to the extent of about 115 bales. A little later still, according to the testimony, the agent of Sprunt & Son called upon Hurst-Streator Company to deliver more cotton to them, actual cotton. He was informed by the defendants that they had the cotton on hand, mixed up with other cotton, and that it would take some time to separate it; and this agent of the plaintiff went to Chesterfield, to the defendants, talked with them about the cotton which was in the yards of the defendants, and endeavored to secure the 100 bales that he had been informed was on hand, and offered to assist in having it delivered to the railroad station in accordance with his contract, but some days elapsed before that was accomplished, and at the request of the defendants, acquiesced in by Duval, the agent of the plaintiffs, a settlement for that 100 bales was made in money, and \$1,687.50 was paid on that account. It was for the money so paid that this counterclaim was set up, and the court is asked to direct a verdict in favor of the defendants for that amount.

The court must refuse to give such direction. It would not hesitate to direct a verdict for that amount if it believed that this was, which is contended for by defendants, a gambling transaction; but believing, as it does, that it was the bona fide intention of the parties, at the time the contract was made, to deliver the cotton, the actual cotton, the mere fact that the plaintiffs, after that time, late in October, after vainly endeavoring to obtain the actual cotton, failing to receive it, accepted payment in cash, does not throw any light upon what the intention of the parties was at the time the contract was entered into. What was the intention of the parties at the time, then, must govern, and if they intended then—that is, on May 17th—a bona fide transaction, if it was the intention then on the part of the defendants to deliver, and on the part of the plaintiffs to receive, actual cotton, as expressed in this contract, then it does not vitiate it because afterwards, when they were unable to get the actual cotton, they accepted payment in cash. It would be otherwise if in the inception there was any evidence that this was a mere gambling transaction. I believed in the case of *Springs v. Carpenter* that that was a gambling transaction; but in that case the court held that, notwithstanding the defendants' claim, it was a gambling transaction, there was no evidence sufficient to go to the jury to establish the invalidity of the contract, and therefore it was the duty of the court to direct a verdict.

Now, if there was any conflict of testimony, if there was any room for a reasonable doubt, as to what this contract was, I should prefer to submit that question to the jury, and upon the inception of the case that was the inclination of my mind, to let the jury decide whether this was a bona fide transaction, or whether it was a gambling contract; but reviewing the testimony, endeavoring to recall all that was said and all that was done, I cannot see that there can be any other than one conclusion.

Feeling that it would be my duty to set aside the verdict if the jury should find in favor of the defendants, which I doubt that it would, but, if it did, it would be my duty to set it aside, I feel that it is my duty to direct the foreman to find a verdict for the plaintiffs for the amount claimed.

Defendants note exception to the court's refusal to direct a verdict for the defendants, and also to its granting the motion to direct a verdict for the plaintiffs. Case settled. No appeal taken.

Ex parte GEORGE.

(District Court, N. D. Alabama, S. D. July 23, 1910.)

1. ALIENS (§ 54*)—DEPORTATION—SUFFICIENCY OF WARRANT.

A warrant of arrest of an alien for deportation, charging that he had been induced or solicited to migrate to this country by an offer or promise of employment or in consequence of an oral agreement to perform unskilled labor in this country, was sufficient, especially where unobjected to on the hearing and criticized for the first time after deportation was ordered and collaterally on a writ of habeas corpus.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 54.*

Importation of contract labor, see note to *United States v. Parsons*, 66 C. C. A. 133.]

2. ALIENS (§ 50*)—DEPORTATION—"CONTRACT LABORER"—EVIDENCE.

An alien upon promise to employ him on arrival at this country at stipulated wages in a definite occupation, made by one who advanced him money for his passage, secured by mortgage on his property, and who accompanied him on his journey, came to this country, went to work for such person at the stipulated wages, and designated occupation, repaid the advance out of his wages, and continued in the employment of the person who made the promise and advance for a year. *Held*, that he was a contract laborer, expressly excluded by Immigration Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898 (U. S. Comp. St. Supp. 1909, p. 447).

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 108-110; Dec. Dig. § 50.*]

Petition by Harry George for a writ of habeas corpus. Writ discharged, and petitioner remanded to custody.

William Vaughn and J. W. Davidson, for petitioner.
J. H. Montgomery, Asst. U. S. Atty.

GRUBB, District Judge. This was a petition for a writ of habeas corpus, upon which the writ was issued to the sheriff of Jefferson county, Ala., in whose custody the petitioner was. The sheriff produced the body of the petitioner, and returned that he was holding him under a warrant issued by the Secretary of Commerce and Labor for his deportation to Greece, the country from which he had emigrated to this country about two years and nine months before the proceedings were instituted. The return of the sheriff set out the original warrant of arrest issued to the immigration inspector by the Secretary, the proceedings and evidence introduced at the hearing before the immigration officer, and the warrant for petitioner's deportation. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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petitioner was not represented by counsel at the hearing, though advised of his right to be so represented, and made no objection to the proceedings there had.

The warrant for arrest set out two grounds as justifying his deportation: (1) That he had been convicted of or had admitted committing a felony or a misdemeanor involving moral turpitude; and (2) that he had been induced or solicited to migrate to this country by an offer or promise of employment or in consequence of an oral agreement to perform unskilled labor in this country.

The facts developed before the immigration officer, as shown by the return to the writ, were without conflict, being derived entirely from the admissions of petitioner on his examination before the officer on the hearing. His testimony as to the first charge was that some two years before he left Greece he was tried and convicted at Tripoli of a felonious assault and sentenced to four months' imprisonment; that his assault consisted of his act in striking in a quarrel another Greek with a large piece of firewood. At the same time the brother of petitioner stabbed the same person with a knife. The assault, as well as the conviction, was admitted by petitioner. His testimony on the hearing in relation to the second charge was that he left Greece under these circumstances. The owner of a shoe shining establishment in Birmingham, Ala. agreed to employ him in his establishment if he came to America, and pay him \$20 per month, to lend him the money needed for his trip, taking as security for the loan a mortgage on petitioner's land in Greece, the loan to be repaid from his wages when employed. The lender and the petitioner came to this country on the same steamship, and petitioner came to Birmingham and went to work for the lender, continued in his service for a year, and out of his wages repaid the loan.

Objection was made to the sufficiency of the warrant, for the first time, upon the hearing of the petition, upon the ground that it did not set out the charges, justifying deportation, with sufficient certainty. Possibly the first ground relied on by the United States is insufficiently alleged in the warrant, in that it does not show what the felony or misdemeanor relied upon for deportation was or when or where committed, and consequently does not identify the offense relied on so as to enable petitioner to meet the charge. If petitioner had committed more than one offense, the warrant would not apprise him which one was relied on by the government. *U. S. v. Sibray* (C. C.) 178 Fed. 150. It is also a question of doubt under the evidence whether the assault which petitioner admits having committed and been convicted of constituted a felony within the meaning of section 2 of the immigration act of February 20, 1907 (Act Feb. 20, 1907, c. 1134, 34 Stat. 898 [U. S. Comp. St. Supp. 1909, p. 447]). It certainly does not constitute a misdemeanor involving moral turpitude. It is not necessary to decide either of these questions, in view of the patent sufficiency both in matter of averment and proof of the second ground for deportation set out in the warrant, viz., that petitioner was a contract laborer, within the meaning of the second section of the act. The warrant charges that he was induced or solicited to mi-

grate to this country by offers or promises of employment and in consequence of an agreement to perform labor in this country. The petitioner was fully apprised by the warrant that his deportation was sought by the government because of a promise made to him or an agreement made with him to perform labor in this country, which induced his immigration. There could be no room for doubt on the part of petitioner as to the identity of the transaction relied on by the government, since he could have received but one such promise and made but one such agreement. The warrant was sufficient as to this charge, certainly when unobjected to on the hearing and criticized for the first time after deportation was ordered, and collaterally upon a writ of habeas corpus. The warrant charges each of the elements of the ground of deportation relied on, and is not void.

The evidence shows without conflict that the petitioner was within the excluded class, called "contract laborers." Upon a promise to employ him upon his arrival in this country at stipulated wages in a definite occupation, made by one who advanced him money for his passage, secured by a mortgage on his property, and accompanied him on his journey, he came to this country, went to work for such person at the stipulated wages and at the designated occupation, repaid the advance out of his wages, and continued in the employment of the person who made the promise and advance for a year.

The writ is discharged, and the petitioner is remanded to the custody of the sheriff to await the execution of the warrant of deportation. In the event of an appeal from this order discharging the writ, the petitioner may be enlarged pending the appeal upon executing a recognizance with sufficient surety in the sum of \$500 for appearance to answer the judgment of the appellate court. Rev. St. § 765 (U. S. Comp. St. 1901, p. 596); Supreme Court Rule 34 (6 Sup. Ct. iii); *In re McKane* (C. C.) 61 Fed. 205.

In re PINSON & CO. et al.

(District Court, N. D. Alabama, S. D. August 6, 1910.)

No. 10,376.

1. BANKRUPTCY (§ 58*)—ACTS OF BANKRUPTCY—PREFERENCE.

Where an alleged bankrupt, while insolvent and within four months prior to the filing of the petition, paid to his wife in settlement of an alleged indebtedness the proceeds of certain fire insurance policies received in settlement of a loss on his stock of goods, he thereby committed an act of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 78, 79; Dec. Dig. § 58.*]

2. BANKRUPTCY (§ 69*)—PARTNERSHIP—ESSENTIALS TO ADJUDICATION—"CONTINUANCE OF PARTNERSHIP."

Bankr. Act July 1, 1898, c. 541, § 5, subd. "a," 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), authorizes adjudication of a partnership during the continuance of the partnership business, or after its dissolution and before final settlement. *Held*, that the continuance of a partnership within such section meant its actual status as a firm, as distinguished from a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

status created by estoppel against a partner, and that it was therefore essential that the partnership should exist as such, or that its affairs should be still unsettled at the time of the filing of a petition, in order to subject it to adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 51; Dec. Dig. § 69.*]

3. BANKRUPTCY (§ 69*)—DISSOLVED PARTNERSHIP—ESTOPPEL.

The bankruptcy law provides no method of distribution by which creditors of a partnership without notice of dissolution and who could thereby claim an estoppel would alone participate; the proper method in such a situation being to administer the property as individual property, set aside the bankrupt's exemption, and remit the creditors entitled to claim an estoppel to the state court, to subject the property to their claims.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 52; Dec. Dig. § 69.*]

4. BANKRUPTCY (§ 69*)—PARTNERSHIP—ADJUDICATION—"UNSETTLED AFFAIRS."

The affairs of a partnership are "unsettled" so as to subject it to bankruptcy adjudication, as authorized by Bankr. Act July 1, 1898, c. 541, § 5, subd. "a," 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), so long as the partnership debts are unpaid.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 51, 52; Dec. Dig. § 69.*]

5. BANKRUPTCY (§ 69*)—PARTNERSHIP—DEBTS—"FIRM DEBTS."

Debts which are binding on partners only by estoppel as to creditors without notice of dissolution are not "firm debts," the nonpayment of which will authorize bankruptcy adjudication against the firm.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 69.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1864-1886; vol. 8, p. 7628.]

6. BANKRUPTCY (§ 74*)—PARTNERSHIP—DISSOLUTION—UNPAID DEBTS.

Where, at the time a bankruptcy petition was filed against a dissolved partnership, its outstanding indebtedness, excluding such as was created subsequent to the dissolution and which became that of the partnership only by estoppel in favor of such creditors as had no notice of its dissolution, was not shown to amount to \$1,000, the adjudication would be denied.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 74.*]

In the matter of M. A. Pinson and Pinson & Co., alleged bankrupts. On petition for adjudication. Granted as to Pinson, and denied as to the firm.

Thompson & Thompson, for petitioning creditors.

Perdue & Cox, for bankrupt.

GRUBB, District Judge. This cause comes on for hearing upon the prayer of the petition for an adjudication. The evidence is without conflict that the bankrupt, M. A. Pinson, within four months of the filing of the petition committed an act of bankruptcy, in that he paid to his wife, in settlement of an alleged indebtedness and while he was insolvent, the proceeds of certain fire insurance policies, the indemnity for a loss on his stock of goods, and an adjudication against him is granted.

The inquiry as to whether the firm of Pinson & Co. is subject to adjudication for the same act of bankruptcy depends upon whether,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

up to the time of the filing of the petition in bankruptcy, there had been a continuation of the partnership business, or had been no final settlement of its affairs. The evidence shows that the firm was dissolved as between the partners in December, 1909. One of the partners, M. A. Pinson, bought out his partner and continued the business until the petition was filed. The petitioning creditors contend that, in the absence of notice of the dissolution, the bankrupt firm is estopped to deny on the hearing, as against subsequent creditors having no actual notice, the continued existence of the firm up to the time of the filing of the petition in bankruptcy, and that an adjudication of the firm should follow, though the partnership had been dissolved in December and its affairs so settled up that less than \$1,000 of firm indebtedness remained outstanding at the time the petition was filed. They also contend that debts created by the continuing member of the firm after its dissolution were by estoppel firm debts.

The bankruptcy act (Act July 1, 1898, c. 541, § 5, subd. "a," 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424]), provides that "a partnership, during the continuation of the partnership business or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt." It is essential that (1) the existence of the partnership or (2) the fact that its affairs are still unsettled at the time of the filing of the petition be shown by the petitioning creditors.

(1) The existence of the partnership within the meaning of this section is its actual status as distinguished from a status created by estoppel against the former partner. If it has been dissolved by the partners *inter sese* before the filing of the petition, it is not thereafter an existing partnership, and the proceedings in bankruptcy cannot be said to have been instituted "during the continuation of the partnership business," nor can debts created thereafter by the continuing partner be considered partnership debts. The jurisdiction of the bankruptcy court to adjudicate and administer attaches only upon a showing of an actually existing partnership, constituting a legal entity at the time of the filing of the petition. *In re Kenney* (D. C.) 97 Fed. 554; *Lott v. Young*, 109 Fed. 798, 48 C. C. A. 654; *Jones v. Burnham*, 138 Fed. 986, 71 C. C. A. 240; *In re Beckwith* (D. C.) 130 Fed. 475; *Buffalo Mining Co. v. Lewisburg Dairy Co.* (D. C.) 20 Am. Bankr. Rep. 279, 159 Fed. 319. It may well be that some of the creditors whose claims were created after dissolution had actual notice thereof, while others had not. The estoppel would therefore work in favor of a part only of such subsequent creditors. The administration of the partnership estate in bankruptcy, however, is single and for the benefit of all general and unsecured creditors equally; and all such creditors in the event of a partnership adjudication would be entitled to treat the property of the former partnership as partnership assets, if any of them had that right. In that event, the continuing member could not claim the former partnership assets exempt as against any of his creditors. This result would be manifestly unfair to the bankrupt, as to those creditors having actual notice of the dissolution of the partnership, in that it would deprive him of the right to claim as exempt property which, as to such creditors, would be his individual property and so subject to his claim of exemption. The bankrupt law

provides no method of distribution in which creditors without notice and who could thereby claim the estoppel would alone participate. The proper method to protect such creditors and at the same time do the bankrupt no injustice would seem to be for the bankruptcy court to administer the property as individual property, set aside the bankrupt's exemption in it, remitting those creditors, who alone have the right to claim the estoppel, to the state court to subject such property to their claims as in the case of creditors who hold the bankrupt's waiver of exemption.

(2) The act also provides for the adjudication of a partnership, so long as its affairs are unsettled. If there are outstanding firm debts at the time of the filing of the petition in the requisite amount, a proper case is made for adjudication, the other elements being present, though the partnership has long ceased to do business; otherwise, not. The partnership affairs are unsettled within the meaning of this section so long as partnership debts are left unpaid. Debts which are binding on the partners only by estoppel as to creditors without notice of dissolution are not firm debts. The administration might be of no avail if there were no assets, partnership or individual, for distribution; but the jurisdiction of the court to adjudicate would exist nevertheless, and it would be properly exercised for the purpose of affording opportunity to the firm creditors, through the appointment of a trustee, to discover such assets. *Holmes v. Baker & Hamilton*, 20 Am. Bankr. Rep. 252, 160 Fed. 922, 88 C. C. A. 104.

As the proof fails to show that the petition was filed during the continuation of the partnership business, as herein defined, or that the outstanding indebtedness at that time, excluding such as was created subsequent to the dissolution and which became that of the partnership only by estoppel in favor of such creditors as had no notice of its dissolution amounted to \$1,000, the adjudication of the partnership is denied.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.

(Circuit Court, S. D. New York. August 13, 1910.)

Nos. 2-9, 2-33, 2-33, 3-37.

RECEIVERS (§ 150*)—EXPENDITURES—PETITION TO ENFORCE PAYMENT—ATTORNEY'S FEES.

Franchise taxes having been assessed against various street railway companies leased to the M. company, the latter brought certiorari to correct the same as exorbitant in the name of each lessor; the lessee paying all the legal expenses and disbursements in connection therewith. A receiver having been appointed for the M. company, he continued such proceedings until notice that the lessor should take charge of the same, which they did by substituted attorneys. Notwithstanding this, the receiver and their counsel continued negotiations which finally resulted in a basis of settlement. *Held* that, pending determination of the question whether the lessors or the M. Company was liable for such taxes, petitions to require the receiver to pay the legal expenses and disbursements incurred by the lessors after taking charge of the proceedings pursuant to the notice would be denied.

[Ed. Note.—For other cases, see *Receivers*, Dec. Dig. § 150.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suits by the Pennsylvania Steel Company against the New York City Railway Company and others, by the Farmers' Loan & Trust Company against the Metropolitan Street Railway Company and others, by the Guaranty Trust Company against the Metropolitan Street Railway Company and others, and by the Farmers' Loan & Trust Company against the Metropolitan Street Railway Company and others. Petitions for directions to receivers of the Metropolitan Street Railway Company to pay certain legal expenses and disbursements incurred and expended by the Broadway & Seventh Avenue, the Forty Second Street & Grand Street Ferry, and the Thirty-Fourth Street & Crosstown Railway Companies in proceedings to reduce franchise taxes assessed against the various companies. Denied without prejudice.

Byrne & Cutcheon, for complainant.

Dexter, Osborn & Fleming, for receiver of New York City Ry. Co.

Masten & Nichols, for receiver of Metropolitan Ry. Co.

J. Parker Kirlin, for Metropolitan St. Ry. Co.

LACOMBE, Circuit Judge. The railroad franchises and property of these three companies were leased some years ago to the Metropolitan Street Railway company; the lease providing that the lessee should pay all taxes, assessments, and charges which might be lawfully imposed in respect of the demised property or any part thereof. In each successive year since 1900 the state officers under a statute then passed assessed the property of these roads for so called "special franchise" tax. The lessee (Metropolitan Street Railway), believing the amounts of such taxes to be exorbitant, brought a proceeding by certiorari each year to correct the same. Such proceedings were brought in the name of each lessor, but the lessee retained counsel and paid all the legal expenses and disbursements connected therewith. The receivers did likewise when they succeeded the Metropolitan Company. Meanwhile the unpaid special franchise taxes accumulated to a very large sum which the city and state officers were threatening to collect by sale of the property, or forfeiture of the franchise, and which receivers and their counsel were endeavoring to adjust on some fair basis with such officers. In view of the threatened sale, receivers advised each lessor company that in their opinion it was advisable and proper to give them notice to take immediate charge of the proceedings. All this will be found set forth in the opinion of this court on an application of the New York and Harlem Railroad and other companies, which is reported in 176 Fed. 471. Despite the notice, receivers and their counsel continued negotiations with the state and city officers, and finally agreed with them upon a basis of settlement on which all these franchise taxes have since been adjusted.

Upon receipt of the notice the several petitioners retained counsel who were substituted as attorneys in their several certiorari proceedings and rendered services in connection with the efforts of the state and city officers to collect exorbitant franchise taxes. The present application is for an order directing receivers to pay such counsel the amounts of their bills for such services.

By reference to the opinion above cited it will be seen that the mortgage bondholders of the Metropolitan raised the point that under the terms of the leases a newly devised tax, such as this franchise tax was not to be paid by the lessee but by the lessor. Of course, if the lessee is under no obligation to pay the tax, it is under no obligation to pay for legal expenses which result in a reduction of the tax. This court held that, in view of the practical construction which both lessor and lessee had given to the leases for many years, these taxes were a burden on the latter. But it is understood that this decision has not been acquiesced in, and that it is still an open question whether lessor or lessee should pay the tax. Until that question is decided, such an application as the present one is premature. If it be finally held that the lessee should pay the tax, it will be quite in order to determine whether receivers should pay these bills for legal services, although they did not themselves retain the counsel. But, if it be finally held that the lease impose no such obligation on the lessee in the matter of special franchise taxes, it would manifestly be improper to direct the receivers to pay indebtedness incurred by the lessor for services of counsel whom it retained to protect its own interests.

The petitioners are denied without prejudice to their representation when the question as to liability for franchise taxes shall be finally decided.

In re GRIFFIN.¹

(District Court, N. D. Georgia. May 27, 1910.)

No. 473.

BANKRUPTCY (§ 384*)—COMPOSITION—CONFIRMATION—OBJECTIONS—FRAUD.

Under Bankr. Act July 1, 1898, c. 541, § 12, 30 Stat. 549 (U. S. Comp. St. 1901, p. 3426), providing that the judge shall confirm the composition of a bankrupt with his creditors, if satisfied that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would bar his discharge, and section 14b, as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1909, p. 1310), providing for the denial of a discharge, on proof that the bankrupt has obtained property on credit from any person on a materially false statement in writing, made to such person to obtain such property on credit, proof that the bankrupt had made a false written statement of his assets to a creditor objecting to his proposed composition for the purpose of obtaining goods on credit, which he was successful in doing, required denial of the composition, though it would prevent creditors from getting as much as they otherwise would.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 384.*]

In the matter of M. M. Griffin, bankrupt. Application for confirmation of composition, to which the Silvey-Smith Hat Company filed objections. Objections sustained.

Smith, Hammond & Smith, for objectors.

McLaughlin, Jones & Jones, for bankrupt.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

NEWMAN, District Judge. The above bankrupt, M. M. Griffin, has applied to the court for the confirmation of a composition, which he has offered to his creditors and which has been accepted by a majority in number and amount. Objection is made to the confirmation of the composition by the Silvey-Smith Hat Company for the following reason:

"Because said bankrupt obtained the property on credit from them upon a materially false statement in writing, made to them for the purpose of obtaining such property on credit; such statement being made on June 28, 1909, and being, as therein shown, made 'for the purpose of obtaining credit,' and standing 'good as to each purchase now and hereafter, unless there should be a material change, in which case [I or we] will notify them before making purchases from them.' Copy of said statement is hereto attached and made a part hereof, marked 'Exhibit A.' On such statement these objectors sold said bankrupt goods from time to time, and at the time the petition in bankruptcy was filed said bankrupt was and is indebted to these objectors on account of such purchases, as shown by statement of account hereto attached and made a part hereof, marked 'Exhibit B,' to which reference is prayed as often as may be necessary. Said statement was materially false, in that said bankrupt represented therein one house and lot located in Manchester, Georgia, of the value of \$1,000, as among his assets. Said house and lot was at the time the property of said bankrupt's wife, and is still her property."

It appears, from the written statement of the bankrupt made to the objectors, which is in evidence, that among other assets shown by the statement, which amounted in all to \$3,450, he claimed to have a house and lot located in Manchester, Ga., where he was doing business, of the value of \$1,000. He now acknowledges that he did not own this house and lot, but that it belonged to his wife. That this was a material statement is clear, and that it was untrue is now equally clear.

Section 14 of the bankrupt act of July 1, 1898 (30 Stat. 550, c. 541 [U. S. Comp. St. 1901, p. 3427]), as amended in 1903 (Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1909, p. 1310]), makes one of the grounds of objection to discharge:

"(3) Obtained property on credit from any person upon a material false statement, in writing, made to such person for the purpose of obtaining such property on credit."

Section 12 of the act provides:

"The judge shall confirm the composition if satisfied that * * * (2) the bankrupt has not been guilty of any of the acts, or failed to perform any of the duties, which would be a bar to his discharge."

It may be that to sustain the objection will prevent the creditors from getting as much as they would if the composition was accepted, but this cannot be considered in passing upon this objection. As Judge J. B. McPherson, in the District Court for the Eastern District of Pennsylvania, in a case very much like this (*In re Godwin*, 122 Fed. 111), said:

"It is very likely that the creditors may loose by the defeat of the proposed composition; but this consideration cannot be allowed to influence the court in deciding whether the bankrupt has been 'guilty of any of the acts, or failed to perform any of the duties, which would be a bar to his discharge.' Bankr. Act July 1, 1898, c. 541, § 12, cl. 'd' (U. S. Comp. St. 1901, p. 3427). I agree with the learned referee that the testimony establishes the fact satisfactorily that the bankrupt has committed one of the offenses specified in sec-

tion 14, cl. 'b.' He has 'with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy destroyed, concealed or failed to keep books of account or records from which his true condition might be ascertained.' This being so, I think the act requires me to refuse approval of the composition, without regard to the question whether the creditors would be benefited thereby; and the fact that only one creditor is actively objecting, while a large majority is in favor of taking what the bankrupt offers, is of no importance in the present inquiry."

The objection must be sustained, and the confirmation of the composition refused.

CANTRELL & COCHRANE, Limited, v. WITTEMANN et al.

(Circuit Court, S. D. New York. August 15, 1910.)

INJUNCTION (§ 228*)—VIOLATION—LABELS.

Complainant obtained an injunction against defendants W. restraining the infringement of ginger ale labels; defendants being sued as a partnership. After the final decree and the injunction was issued and served, the partnership was dissolved and a corporation formed, which took over all the assets and liabilities of the firm. Defendant R. had actively managed the business of the partnership, but after the corporation was formed, though a director, he had only 200 of the corporation's 1,000 shares of stock, and had nothing to do with the manufacturing or selling end of the business, and did not know of the label complained of as a violation of the injunction as having been made by the corporation. *Held*, that defendant R. was not guilty of contempt by the corporation's use of the alleged infringing label.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 491; Dec. Dig. § 228.*]

Action by Cantrell & Cochrane, Limited, against Jacob F. Wittemann and others as partners, under the firm name of the Wittemann Lithographic Company. On motion to punish Rudolph A. Wittemann for contempt. Denied.

Wetmore & Jenner, for complainant.

Straley, Hasbrouck & Schloeder, for defendant.

LACOMBE, Circuit Judge. The suit was begun in 1903 to restrain defendants from selling and offering for sale labels for ginger ale bottles which so closely resembled complainant's well-known labels as to be likely to deceive purchasers of ginger ale. It was contended by defendants that a label similar to complainant's had been used by domestic ginger ale manufacturers before the introduction of defendant's. Testimony was taken and complainant so fully established the priority of its label that defendants abandoned their defense, and consented to the entry of a final decree which enjoined them from designing, manufacturing, selling, or offering for sale "any label or labels so closely resembling the label of complainant as to be likely to deceive purchasers of ginger ale, or any label containing the characteristic and distinguishing features of complainant's label and particularly the labels, a specimen of which is attached to the decree."

The label now complained of has some points of difference from

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the one which defendants were selling when this injunction was issued, although upon inspection and comparison with complainant's it presents so close a resemblance that one unfamiliar with the conditions of the trade and uninformed by proof might very well reach the conclusion that it is "likely to deceive purchasers of ginger ale" and so within the prohibition of the injunction. But it will not be necessary now to decide any questions raised as to similarity or dissimilarity of these labels, for the reason that the defendant who is now before the court has a sufficient defense to this particular motion. Rudolph A. Wittemann is the only defendant who has been served with the order to show cause; Jacob F. Wittemann being at present in Europe.

As has been stated, the suit was brought against two partners doing business under a firm name. Since the final decree was entered and injunction issued and served, this partnership was dissolved (July, 1908), and at the same time the corporation of Wittemann Bros. was formed, and all the business assets and liabilities of the partnership were assigned to the corporation. While the partnership continued, Rudolph A. Wittemann was the active manager of the business, but, when the corporation was formed, he was, as he swears, "stripped of all authority and of all participation in the active management of the business." He has had nothing to do with the manufacturing or the selling end of the business, and, until the papers on this motion were served upon him, he did not know that the label now complained of had been made by the company. There are only three stockholders of the company and articles of incorporation require that there shall be three directors. Therefore, he has been, and now is, a director, but out of the 1,000 shares of stock, which have been issued, he holds only 200. He has only attended two meetings of the board of directors since the organization of the company was completed.

Under these circumstances, he cannot be held to have violated this injunction merely because the corporation has made and sold labels which may fall within its prohibition.

The motion is denied.

HOLCOMB & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. June 28, 1910.)

Nos. 5,046-5,052.

CUSTOMS DUTIES (§ 37*)—CLASSIFICATION—BEAD FRINGES—EJUSDEM GENERIS —"ORNAMENTS, TRIMMINGS, AND OTHER ARTICLES IN PART OF BEADS."

Bead fringes, which consist of beads strung on a cord or webbing and are used to decorate lamps as trimmings and shades, are not removed by the doctrine of ejusdem generis from the provision for "ornaments, trimmings, and other articles * * * in part of beads," in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 408, 30 Stat. 189 (U. S. Comp. St. 1901, p. 1673).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 37.*]

On Application for Review of Decisions by the Board of United States General Appraisers.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

There were also cases entitled in the names of C. M. Horch, of Horstmann, Von Hein & Co., of the Ideal Gas & Electric Company, of the Will & Baumer Company, of the H. Hohenstein Company, and of G. Hirsch's Sons. The Board of General Appraisers affirmed the assessment of duty by the collector of customs at the port of New York on the various importations in question.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

D. Frank Lloyd, Asst. Atty. Gen. (Edwin R. Wakefield, Sp. Atty. of counsel), for the United States.

HAZEL, District Judge. The merchandise, consisting of beads strung on a cord or webbing and known as "bead fringes," is thought to come within the description of "ornaments, trimmings, and other articles not specially provided for in this act, composed wholly or in part of beads or spangles made of glass," etc. Act July 24, 1897, c. 11, § 1, Schedule N, par. 408, 30 Stat. 189 (U. S. Comp. St. 1901, p. 1673). They are used to decorate lamps as trimmings and shades, and I think the phrase "other articles" is broad enough to include such beads attached to a cord. *Hirsch v. United States*, 167 Fed. 309, 93 C. C. A. 61.

The importers argue that glass beads used for trimming lamps come under the doctrine of *ejusdem generis*, which keeps the importation from coming within the scope of paragraph 408; but, as intimated, said paragraph, though failing to specifically name the articles, contains a description of the things included therein which is sufficient to identify the articles in question.

The case of *United States v. Benziger*, T. D. 30,386, recently decided by the Circuit Court of Appeals, is readily differentiated on the ground that the rosaries, the articles there in question, were not used for ornamental purposes. In view of what has been stated, the doctrine of *ejusdem generis* has no application.

The decision of the Board is affirmed.

STATE OF MARYLAND, to Use of PRYOR et al., v. MILLER et al.

(District Court, D. Maryland. June 21, 1910.)

1. NAVIGABLE WATERS (§ 38*)—IMPROVEMENT—RIGHTS ACQUIRED.

Code Pub. Gen. Laws Md. 1904, art. 54, § 48, gives to the proprietor of land bounding on navigable waters of the state the exclusive right to make improvements into the water in front of his land, and declares that such improvements shall pass to the successive owners of the land, to which they are attached as incident to their respective estates. *Held*, that the right under such section to make improvements in navigable waters is a mere privilege of acquiring property by reclaiming it from the water, and that until the improvement is completed no title passes to the adjacent owner.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 228-238; Dec. Dig. § 38.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. COURTS (§ 259*)—ADMIRALTY JURISDICTION—STATE LAW.

A state has no power by legislation to restrict the jurisdiction of the federal courts in admiralty.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 795, 796; Dec. Dig. § 259.*]

3. NAVIGABLE WATERS (§ 1*)—ADMIRALTY (§ 4*)—WATERS NAVIGABLE IN FACT—JURISDICTION.

Waters navigable in fact are navigable in law, and are within the jurisdiction of federal courts of admiralty, regardless of the title to the soil under the water.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 7; Dec. Dig. § 1;* Admiralty, Cent. Dig. §§ 38-68; Dec. Dig. § 4.*]

4. ADMIRALTY (§ 21*)—WRONGFUL DEATH—MARYLAND STATUTES—ENFORCEMENT.

Code Pub. Gen. Laws Md. 1904, art. 67, §§ 1, 2, creating a cause of action for wrongful death, and providing for assessment of damages by a jury, is not for that reason unenforceable in the federal courts of admiralty sitting in that state by a libellant to recover for wrongful death happening in consequence of a negligent obstruction in the navigable waters of the state; the right of trial by jury not being indispensable to the enforcement of the right conferred.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 219; Dec. Dig. § 21.*]

Jurisdiction of torts, see note to Campbell v. H. Hackfeld & Co., 62 C. C. A. 279.]

5. WHARVES (§ 20*)—OBSTRUCTION—BULKHEAD—SUBMERGED PILES—NEGLIGENCE.

Defendants M. purchased certain land on a navigable portion of the P. river, a short distance east of the corporate limits of Baltimore, and there constructed an amusement park. They then started the construction of a timber bulkhead from each end of the shore line, to run into the river about 600 feet. Prior to the accident, the south bulkhead had been nearly completed, and work had been begun on the west bulkhead; four rows of piles having been driven northward which had not been cut off, and at the time of the accident were standing 7 feet above the water. On the north bulkhead for 175 feet from the shore, these piles had been cut off and the platform completed, but for the next 200 feet they had been cut off but not capped, and for the remaining 200 feet further out the piles were still standing as driven, projecting 2 to 6 feet above the water. The piles had remained in this condition for a considerable time, during which rowboats and small vessels approaching the resort had grounded on the submerged piles. On the day of the accident, libellant drove his launch to the resort to attend a picnic, and while taking certain of the picnickers for a ride in the launch, without any knowledge or warning as to the submerged piles, ran his launch on to them, causing injury to the launch and injury to and death of certain of its occupants. The water over the submerged piles was apparently clear, and defendants M. took no precautions to disclose their presence or warn libellant of the danger, though they had opportunity to do so. *Held*, that the accident was not caused by libellant's incompetent navigation, but by the negligence of defendants M., for which they were liable.

[Ed. Note.—For other cases, see Wharves, Cent. Dig. §§ 35-43; Dec. Dig. § 20.*]

6. NAVIGABLE WATERS (§ 19*)—"HIGHWAYS"—WATER COURSES—NEGLIGENT OBSTRUCTION—CITY'S LIABILITY—STATUTES.

Acts Md. 1908, c. 148, confers power on the city of Baltimore to provide for the improvement of the P. river, to remove therefrom anything detrimental to navigation, and to regulate the erection and maintenance of bulkheads, etc., therein. The act also authorized the city to provide for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the appointment of officers necessary to execute such powers, and to impose fines and penalties for breach of any ordinance in conformity with the act. Pursuant thereto, an ordinance was adopted directing the harbor board to require all defective wharves or bulkheads to be rebuilt or repaired within a reasonable time, to be prescribed by notice, and imposed a fine of \$10 a day on any owner failing to comply therewith. *Held*, that navigable water within the corporate limits of a city and over which the city is given control is not a "highway" in the same sense as a city street, and that the city's mere omission to perform its duty imposed by such act to inspect a bulkhead in the P. river, which was dangerous to navigation, did not render the city liable for injuries to libellant's launch caused by grounding on certain of the submerged piles belonging to the bulkhead, nor for injury to and death of passengers on the launch caused by the same accident.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 19;* Municipal Corporations, Cent. Dig. § 1806.]

For other definitions, see Words and Phrases, vol. 4, pp. 3291-3306; vol. 8, p. 7678.]

7. NAVIGABLE WATERS (§ 19*)—OBSTRUCTIONS—INJURIES.

County commissioners of a county, by reason of being required to keep its roads, bridges, and highways free and unobstructed, were not responsible for injuries resulting from the grounding of a launch on submerged piles in a navigable river within the county, negligently permitted to constitute an obstruction to navigation.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 19;* Counties, Cent. Dig. § 210.]

8. DEATH (§ 95*)—DAMAGES—CHILDREN.

Where a child 19 years of age received \$4.50 a week as a machinist's apprentice, \$3.50 of which he paid to his father, who furnished him board, lodging, and clothing, and did other work at home of a pecuniary value, his father was entitled to recover \$700 for his wrongful death under the Maryland law, limiting the parents' damages to such pecuniary benefit as they might reasonably have expected from the son prior to his coming of age.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 120; Dec. Dig. § 95.*]

9. DAMAGES (§§ 97, 99*)—INJURIES—MARRIED WOMAN.

A married woman injured by the grounding of a launch on certain submerged piles was confined to her bed for nearly four weeks after the accident, and, while somewhat hard of hearing before, became very deaf thereafter. Her eyesight also appeared to be injured, and she was greatly shocked by fright from being in the water a considerable time before she was rescued. She had previously been a strong healthy woman and had done the family housework, including the family washing; but since became exceedingly irritable and unwilling to talk upon any other subject than the accident and religion. *Held*, that she was entitled to an allowance of \$1,000, and her husband to an allowance of \$500.

[Ed. Note.—For other cases, see Damages, Dec. Dig. §§ 97, 99.*]

10. DEATH (§ 95*)—WRONGFUL DEATH—AMOUNT ALLOWED.

Decedent, a woman 43 years of age, wrongfully killed, left a husband 46 years old and eight children, aged from 12 to 18. She had previously done all her family work except the laundry without a servant, and since her death the house had been cared for by E., a daughter of 15. *Held*, that the husband was entitled to recover \$3,000 and the daughter \$500; the other children being regarded as having suffered no pecuniary loss.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 120; Dec. Dig. § 95.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

11. DEATH (§ 95*)—OF CHILD—AMOUNT RECOVERED.

Where a bright healthy boy 10 years of age was killed as the result of a collision between a launch and certain submerged piles, the father was entitled to recover against the owner of the piles \$1,500.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 120; Dec. Dig. § 95.*]

In Admiralty. Libels by the State of Maryland, for the use of James V. Pryor and others, against Andrew Miller and another; the Mayor and City Council of the city of Baltimore, and Henry P. Mann and others, constituting the Board of County Commissioners of Baltimore County. Decree for complainants as against defendants Miller and wife, and dismissed as to the other defendants.

Robert H. Smith, Raymond S. Williams, Arthur L. Jackson, Henry W. Fox, Jacob S. New, Edward B. Eisenbrandt, and Philip B. Watts, for libelants.

Morris A. Soper, Edgar Allan Poe, Edward H. Burke, James J. Lindsay, and Arthur D. Foster, for respondents.

ROSE, District Judge. On August 5, 1909, the gasoline launch Oukid struck on submerged piles in the Patapsco river. It sunk. Five persons then on board were drowned. At least one claims to have been severely and permanently injured.

By the law of Maryland:

"Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the persons who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured. * * * Every such action shall be for the benefit of the wife, husband, parent and child of the persons whose death shall have been so caused, and shall be brought by, and in the name of, the state of Maryland for the use of the person entitled to damages, and in every such case the jury may give such damages as they think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought. And the amount so recovered * * * shall be divided among the above-mentioned parties in such shares as the jury by their verdict shall find and direct." Code Pub. Gen. Laws Md. 1904, art. 67, §§ 1, 2.

Original and intervening libels have been filed by the state of Maryland to the use of James V. Pryor and Annie M. Pryor, parents of Frank S. Pryor, and to the use of Abraham Brown, husband of Katherine E. Brown, and to the use of Charles L. Brown, Ralph A. Brown, Eleanor M. Brown, and Edgar K. Brown, children of Katherine E. Brown, and to the use of George Thomas Leach and Eva C. Leach, parents of Willard T. Leach; Frank S. Pryor, Katherine E. Brown, and William T. Leach being three of the persons who lost their lives by the sinking of the launch. Joseph C. Houck and Mary A. Houck, his wife, were also libelants claiming to recover, the latter for injuries suffered at the time of the accident, and the former for the loss of the service and companionship of his wife thereby occasioned. James G. Pryor, the owner of the launch, was also a party to the libel seeking to recover for the damage to it.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

I find from the evidence the facts to be as follows: One of the respondents, Andrew Miller, is now, and for a number of years has been, a builder of wharves and bridges. Some years ago he bought a tract of some eight acres of land lying along the north shore of the Patapsco river in Baltimore county about two miles east of the corporate limits of Baltimore City. He had the deed for this property made out to his wife, who is an invalid and has been such for a number of years. Since the land was conveyed to her he testifies that he has managed it as he saw fit. He has not accounted to her for its rents or profits because he has spent much more than they amounted to upon it.

More than three years before the accident he decided to build a timber bulkhead from each end of the shore line of his land. These bulkheads were each to be about 600 feet long and were to run out into the river substantially at right angles with the shore line. It was his intention at some time to connect the off shore ends of these bulkheads with each other by the construction of another bulkhead in a direction which would be substantially parallel to the shore line.

For convenience, that one of these bulkheads which ran into the river from the southwestern corner of the Miller land will be called the "South bulkhead," that which ran out from the Northwest corner the "North bulkhead," while the third or connecting bulkhead will be called the "Western."

He expected some time to fill in the space inclosed by these three bulkheads and the shore line so as to make such space fast land. When this was done his shore would be carried out about 600 feet. Some eight acres would be added to its area. Apparently this filling in was to be postponed until some indefinite time in the future. In the meanwhile his plan was to construct the North and the South bulkheads and a part of the West. There would thus be left a space unobstructed by piling. Through this space his pile drivers could be towed to and fro and timber and other materials could be brought into and taken out of the sheltered lagoon or harbor formed by the construction of a North and South and a part of the West bulkheads. Such a sheltered place would be of value to him, as his shore was otherwise much exposed to the wind and waves. For the purpose of storing his timber and other material within the lagoon, he planned to erect platforms standing out in its waters.

The law forbade the construction of wharves, piers, or bulkheads on the Patapsco river within four miles of Baltimore City without a permit from the harbor board of Baltimore City, which permit he obtained in the summer of 1906.

Miller testified that he intended to employ his men and machinery in doing this work when he was not using them in his business of building wharves and driving piles for other people. The work at this shore therefore proceeded probably much more slowly than would otherwise have been the case.

By the early summer of 1909 the South bulkhead had been completed, or nearly so. Two or more rows of piles had been driven for its entire length. They had all been cut off and capped. For more than half the distance a completed platform had been built on them.

Work had begun on the West bulkhead. Beginning at the West end of the South bulkhead four rows of piles had been driven northward for something over half the distance between the North and the South bulkheads. These piles had not been cut off. At the time of the accident they were standing about seven feet above the water. All the piles for the North bulkhead had been driven. For 175 feet, or thereabouts, from the shore they had been cut off and capped. The platform over them was completed. For the next 200 feet, or thereabouts, they had been cut off but had not been capped. On the day of the accident their tops appear to have been from a foot to 15 inches below the water line. For the remaining 200 feet of the North bulkhead—that is, the 200 feet farthest out—the piles were still standing as they had been originally driven. They had not been cut off and projected from two to six feet above the water. The North bulkhead did not run out for the whole distance in one line. At a point about 400 feet from the shore it turned at right angles and ran south for some 40 feet. Then, making another right angle, it continued its westward course. The piles of the North bulkhead which on August 5, 1909, were visible above the water were those which extended from its western end to the bend in its line. Before any of these bulkheads were built, the water, afterwards partially inclosed within them, was part of the Patapsco river. Nothing lay between it and the main ship channel except an expanse of open and navigable water. The respondent Miller offered evidence which showed that that water was still navigable not only at the time of the accident but at the time of the hearing of the case in court. One of his witnesses, a tugboat captain, testified that he supposed he had taken his tug, drawing from 6 to 8 feet of water, into the lagoon 500 times. He said he had been in as late as the latter part of May or the first of June, 1910.

Miller had fitted up his land as a picnic resort. He had equipped it with patent swings, bowling alleys, dancing pavilions, rifle ranges, and the like. During the summer of 1910, and before the accident, it had been frequently rented by him as such a resort.

Miller did not undertake to say how long before the accident the submerged piles in the North bulkhead had been in that condition. The evidence satisfies me that they had been cut off at least six weeks before the date of the accident, and perhaps much longer. During those six weeks a number of boats struck on these piles. In the latter part of June, 1909, Landmark Lodge A. F. & A. M. held a picnic at Miller's shore. Messrs. Robert L. Gill and W. G. Speed, members of the Baltimore bar, went down to the picnic in a launch. They ran on the same piles that afterwards caused the accident. They were moving at half speed at the time. Their launch had a bow four inches thick. They were aground for some while, but their boat was not injured.

On July 4, 1909, George W. Williams attended the picnic of the Canton Methodist Episcopal Church at the same shore. He took some children out in a rowboat and went aground on the same piles. He saw another boat fast on them.

One Charles M. Lubben was the owner of a launch. He had been in the habit of using it for hire in and about the harbor of Baltimore.

One Sunday early in July, 1909, he was called on during a squall to take a baseball club from Wagner's Point to Miller's Park. He had 32 people on board. He ran on these same piles. His launch was jambed between two of them. He made the people on board step to the port side of the launch and keep it fast down on the piles. There were two good swimmers aboard. They jumped overboard with a long line and swam ashore. Three or four rowboats came from Miller's Park and took off the launch all but four or five of those in it. When so lightened it floated off. It was damaged to the amount of \$85. He sent the bill to Miller. Miller says he received it before the fatal accident but paid no attention to it.

On the 16th of July Frederick S. White was at a picnic at the park. He hired a rowboat from Miller to take some children out rowing. He struck on the piles.

The persons killed and injured on August 5, 1909, were members or friends of the Waverly Baptist Sunday School. Miller had rented his grounds for that day to that school. No steamer runs to the shore. The ordinary means of reaching it is by the trolley lines of the United Railways. The cars run within a few yards of the land entrance to the park. This particular Sunday school came to the grounds in the cars. Miller was on the grounds that day. He suggested to the superintendent of the Sunday school to hire all his rowboats for the day so that the school could hire them out at an advance to the persons who wanted to use them. The superintendent did not accept the suggestion. He says he did not care to have anything to do with the boats.

The libellant, James G. Pryor, was a machinist. At the time of the accident he was about 28 years old. He knew how to build gasoline engines for use in motor boats. He had built or helped to build two or three before undertaking to build one for a boat of his own. He bought the hull of the launch for \$65. He built an eight horse power gasoline engine. He installed that engine in the launch which he fitted up in other ways. He says that the launch in all cost him \$261. In this figure he includes the time he spent on it at the price he received for his labor as a machinist. He testifies that he could not have bought an engine of the same power and as well constructed for less than \$325 to \$350. He lived in the vicinity of the Waverly Baptist Sunday School. Various members of his family were connected with the school. He took his immediate family and friends down to Miller's shore on his launch. He entered the lagoon from its west side; that is to say, through the opening which Miller had left there for the purpose of affording water ingress. His launch was 27 feet long with a 6-foot 6-inch beam. Its cockpit was 14 feet long by 5 feet nine inches wide. It drew from 18 to 24 inches of water. When he arrived at the shore, he saw two other launches tied up within the lagoon. One of them belonged to Miller. It appears to have been a launch of about the same length as Pryor's. It had a cabin on it and was heavier in construction. Shortly after Pryor reached the grounds, he invited the superintendent of the Sunday school and a number of other persons to go out with him for a short trip on the water. The invitation was accepted. He took the launch out through the opening of the West

bulkhead and returned the same way. When he came back with his first load he invited others to go. On the second and fatal trip there were on board 18 persons; 11 of these were adults and 7 children. The latter ranged in age from an infant in arms to boys and girls of about 15. Pryor says the launch had seats for two more; that it was not overcrowded; that he had previously had 21 full grown men in it at one time. There was scarcely any wind, and the water was smooth. When this party started out, Miller was on the wharf about to get into his own launch. Miller did not say anything to Pryor, and neither then nor at any other time told him or anybody connected with the Sunday school anything about the submerged piles.

The persons who went out in the Pryor launch boarded it at a platform in front of the bathhouses. A breakwater extends north and south in front of the bathhouses and at about right angles to the platform on which it stands. It was necessary for the launch to run south to the end of the breakwater. It then turned west around its southern end. It had then to lay its course for some distance in a northerly direction substantially parallel to the shore line. It had to do this because directly in front of the breakwater and about 200 feet out from it was a large platform upon which Miller had piled old timber. When the launch had gotten by this platform, there appeared to be straight ahead an opening in the North bulkhead about 200 feet wide. Beyond the opening to the west, or riverward, there was piling projecting above the water. From the shore a platform ran out. The length and character of this platform would not have been very perceptible to one in the launch; the view of it being in part obscured by another platform standing out in the waters of the lagoon, upon which latter platform was piled old timber.

There was, of course, another apparent way to get out of the lagoon. Pryor could have gone out through the opening in the West bulkhead. He had been through that three times before. The west opening was further off. To go through it involved a sharp change in the course and would carry the launch farther from the shore. Pryor thought there was open water ahead. Like the other persons at previous picnics who became entangled in the piles under the water, he did not suspect their presence.

At the request of the proctors for the libelants and respondents, I, in their company, visited the scene of the accident. It seems to me that Pryor did what many, if not most, men under the circumstances would have done.

He says he was making from four to six miles an hour. He was steering the boat. His younger brother, himself an apprentice machinist who had served four years at his trade, was managing the engine. The first warning he had of danger was when the launch struck the piles. It rebounded from them and then again went forward against them. The engine was at once stopped. The water began to run in through a hole in the side of the bow. After the launch was raised, this hole was found to be about 14 inches long. At one end it was from 4 to 6 inches wide. It tapered to a point. Pryor called to those in the launch to come forward. He wanted to keep the bow of

the launch down on the piles so that the piles would prevent its sinking, but when the water ran in the women and children crowded away from it to the stern of the boat. He then called to his brother to help him tear off the awnings. He succeeded in getting most of them off when the stern went down, and those in the boat were thrown into the water.

Some persons were out in the lagoon in rowboats. They at once started towards the launch. Other persons on shore got into other rowboats and came out to help. Two of the rowboats bound on this mission themselves went aground on the piles, and delay was thus caused.

When the Oukid struck on the piles, Miller in his own launch was in the lagoon and headed for the opening in its Western bulkhead. When his attention was called to the accident, he kept on through that opening and turned around the seaward side of the South bulkhead to get to the scene of the accident. His engine refused to work, and it was some time before he reached the spot.

Five of those in the launch were drowned. Two of them were adults, Mrs. Brown and Frank S. Pryor. Three were children. Mrs. Houck, one of the libelants, was in the water for some time. She was in a serious condition for some hours after the accident. She was confined to her bed for several weeks thereafter. She claims to have been permanently and seriously injured.

Under these circumstances, respondents say that this is not a case of admiralty and maritime jurisdiction: First, because the place in which the accident happened is not within the admiralty jurisdiction; and, second, that the admiralty has no jurisdiction to enforce the liability imposed by the Maryland form of Lord Campbell's act. These contentions will be considered in the order in which they have been stated.

Section 48 of article 54 of the Code of Public General Laws of Maryland gives to the proprietor of land bounding on any of the navigable waters of the state the exclusive right of making improvements into the waters in front of his land, and declares that such improvements shall pass to the successive owners of the land to which they are attached as incident to their respective estates.

The Millers say that by virtue of this provision of law the water where the launch sank was no longer public water, but was their private property. A number of Maryland cases were cited in support of this contention. I do not think that any of them sustain it.

Under the Maryland law the right to make improvements in navigable waters is a mere privilege of acquiring property by reclaiming it from the water. Until the improvement is completed no title is acquired by the adjacent owner. *Western Maryland T. R. Co. v. Baltimore City*, 106 Md. 567, 68 Atl. 6; *Giraud v. Hughes*, 1 Gill & J. (Md.) 249; *Casey v. Inloes*, 1 Gill (Md.) 430, 39 Am. Dec. 658; *Hawkins Point Lighthouse (C. C.)* 39 Fed. 86.

The contention of the Millers in this respect is untenable for another reason. It is not in the power of any state to say that the admiralty shall not have jurisdiction over any waters which but for that legisla-

tion would be subject to that jurisdiction. *Workmen v. New York City*, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314.

The waters in which the accident happened were navigable in fact. Tugboats drawing from six to nine feet of water habitually make commercial use of those waters. Being navigable in fact, they are navigable in law. *The Daniel Ball*, 10 Wall. 563, 19 L. Ed. 999.

It is immaterial who has the title in the soil under water which is navigable.

In *Panama R. R. Co. v. Napier Shipping Co.*, 166 U. S. 280, 17 Sup. Ct. 572, 41 L. Ed. 1004, the accident occurred in a slip between two piers. The piers and the slip were the private property of the respondents. It was held the admiralty jurisdiction extended over such waters.

The dry dock in which the steamship *Jefferson* was at the time salvage service was performed on her was private property, yet the steamship was within the admiralty jurisdiction. *Steamship Jefferson*, 215 U. S. 130, 30 Sup. Ct. 54, 54 L. Ed. —.

But, secondly, it is said that the Maryland form of Lord Campbell's act does not give any right which can be enforced in admiralty. Mr. Burke, the junior advocate for the respondent Miller, has submitted a very learned and ingenious argument in support of this contention. He says that the Maryland act provides that the jury may give such damages as they may think proportioned to the injury, and that the jury shall direct in what proportions the amount recovered shall be divided among the parties. He argues that participation of the jury is an essential part of the process given by the Maryland act. The courts of admiralty have no juries. Therefore he says the right given by the Maryland statute cannot be enforced in the admiralty.

There is no question that a jury trial under the Maryland statute may be waived in the Maryland courts. Wherever Lord Campbell's act has been adopted in any form in any of our states, the right of action given has been a right of action at common law. By all, or nearly all, of the state Constitutions, the parties to an action at common law are entitled as of right to a jury trial. The language of the Maryland statute makes the participation of a jury no more and no less essential to the giving of the relief sought than do the constitutional provisions in other states. That in a proper case, where some form of Lord Campbell's act is law, recovery may be had in admiralty for injuries resulting in death, is now settled law.

In a number of cases extending over a series of years this court has held itself competent to give such relief. I have no question that under the allegations and proof this case is one of admiralty jurisdiction.

In passing on the merits it will be convenient to consider first whether the deaths and injuries were caused by the wrongful act, neglect, or default of the Millers. Her advocates at the hearing conceded that Mrs. Miller is liable if Mr. Miller is. She allowed him to manage the property as he saw fit. The neglect and default of Miller to give warning that there were submerged piles at the place of the accident was its proximate cause. It is true that the respondents have

offered testimony of experienced tugboat captains to the effect that when they see a line of capped piles running out from the shore, and then apparently clear water and beyond a line of piles standing above the water, they suspect that there may be submerged piles between the capped shore piles and the high standing seaward piles. I do not question this evidence. A vessel as large as a tugboat would scarcely run the risk of going close to shore in unknown waters when those on board saw that piling operations had been going on in the vicinity. Miller testifies, as do several persons in charge of the city's wharf and pier construction, that they are not in the habit of marking piles during the time which elapses after those piles have been cut off below the water line and before they are capped. They say that if high piles be left at the seaward end of the row it is sufficient notice that there may be danger inside them. I do not think that this evidence has much relevancy to the question in hand. Miller used his shore for a special and particular purpose. The standard of care to which he must be held is in large part fixed by the nature of the use to which he was putting his property. He had fitted up his grounds as a picnic resort. He rented them for that purpose and derived a revenue therefrom. He was bound to consider the probable use to which the persons who frequented the shore at his request would naturally put his grounds and the waters adjacent thereto. He kept rowboats for hire. That was a representation that his lagoon was safe for rowboats. I do not think that it was. It is true that none of the rowboats which ran on the piles were upset. It does not follow that they were not thereby put in danger of upsetting. There are a great number of power boats now in use. The keeper of any picnic shore near a large city like Baltimore must know that people would sometimes come to that shore in power boats and launches. He knew that power boats had come in before. He says that he had told some of these boats to keep out. He does not claim that he ever told anybody connected with this boat to stay away. He admits he was standing on the wharf at the very moment the Oukid started on its fatal trip. The bill which he admits he received from Lubben warned him that there was danger. He kept his own launch in the lagoon. It was at the wharf at the time Pryor's boat started on its last trip. He must have known that many persons perfectly competent to run power boats in moderate weather were not experienced navigators used to the management of large vessels.

I feel that in not giving some warning that this stretch of apparently open water was not safe, as it appeared to be, he was negligent, and greatly so.

The fact probably is that Miller knew a great deal more about wharf and bridge building and pile driving than he did about keeping a picnic resort. He doubtless thought that if he furnished the grounds and provided some amusements on them he had done all that was incumbent on him. He knew the piles were there. It does not seem to have occurred to him that everybody else would not know it as well. His mind and attention were concentrated on his pile driving work. He says himself that after the accident somebody told him that all on

the launch had been saved. He testifies that he made no further inquiry and sailed some miles away on his launch to visit a place where his men were at work. I do not mean that he gave no thought to the picnic business. As to some of its details he was very careful and methodical. A couple of days after the accident at which five persons connected with the Waverly Baptist Sunday School were killed in front of his grounds, the school received from him a bill for \$2.20 for broken dishes.

I doubt not that he has worked very hard for all he has. I regret to be called on to pass a decree which may perhaps bear heavily upon him. I cannot escape from the conclusion, however, that the accident happened because he did not take some precautions which he could have taken and should have taken.

The respondents contend that the libellant, James G. Pryor, brought about the accident by careless and incompetent navigation. I do not feel that this criticism is well founded. Mr. Pryor seems to have been perfectly competent to manage his launch in good weather and smooth water. I do not think that the launch was overcrowded, bearing in mind the condition of wind and weather. The accident happened because the launch ran on the piles which stove a hole in its bottom. It really makes in this case very little difference whether Pryor was or was not in fault. Miller, from my point of view, certainly was. It is admitted that Pryor's negligence, if there was any, could not be imputed to the other persons on the launch. It is relevant merely with reference to his claim for the damage done his launch.

The libellants say that the mayor and city council of Baltimore, which is the corporate title for the municipality of Baltimore City, is liable. They say chapter 148 of the Acts of 1908 of the General Assembly of Maryland conferred upon the city of Baltimore "power to provide for the preservation of the navigation of the Patapsco river and tributaries. * * * To provide for the improving, cleaning and deepening of said river and tributaries and the removal therefrom of anything detrimental to navigation or health, * * * and to authorize the erection and maintenance of, and to make such regulations as it may deem proper, respecting wharves, bulkheads, piers and piling, and the keeping of the same in repair so as to prevent injury to navigation or health."

The act further empowers the city to "provide for the appointment of such officers and employes as may be necessary to execute the foregoing powers and to impose fines and penalties for a breach of any ordinance passed in conformity with the act."

By municipal ordinance approved April 10, 1909, the harbor board, one of the municipal boards, was directed to require all private wharves or bulkheads that are decayed or defective, or likely to be injurious to navigation or to health, to be rebuilt or repaired within a reasonable time to be prescribed in a written notice not less than 30 days, to be served on the agent, owner, or occupier of such wharf or bulkhead, and imposed a fine of \$10 a day on any such agent, owner, or occupier who failed to comply with the requirements of the notice.

It was admitted that the city made no inspection of Miller's work

while it was in progress, and that it was not its practice to make any inspection of like constructions beyond observing whether they did or did not extend beyond the pier-head line.

If the city is charged by the act of assembly with any duty to keep safe navigation of the portion of the river included within the exterior lines of Miller's bulkhead, and if the ordinance above referred to has been passed in partial discharge of that duty, no attempt has been made by the city to enforce said ordinance with relation either to Miller's bulkhead or to other bulkheads or constructions of a similar kind.

More than half a century ago the Court of Appeals of Maryland declared:

"It is a well-settled principle when a statute confers a power upon a corporation to be exercised for the public good, the exercise of the power is not merely discretionary but imperative, and the words 'power and authority' in such case may be construed 'duty and obligation.'" Mayor & City Council of Baltimore v. Marriott, 9 Md. 174, 66 Am. Dec. 326.

In that case the city was held liable to an individual who had slipped on the ice which had been allowed to accumulate on one of the city's sidewalks. There was a city ordinance which required the removal of snow and ice. The city had made no attempt to enforce it. The principle stated in Marriott's Case is still the recognized law in Maryland.

A municipality which does not prevent boys from making a practice of coasting on its streets is liable for injuries occasioned by their sleds. Taylor v. Mayor of Cumberland, 64 Md. 68, 20 Atl. 1027, 54 Am. St. Rep. 759.

When it allowed "cows armed with dangerous horns and equipped with annoying bells" to wander in its streets, it was liable for injuries occasioned to a passer-by who was "violently horned, tossed, thrown, and trampled upon." Cochrane v. Frostburg, 81 Md. 54, 31 Atl. 703, 27 L. R. A. 728, 48 Am. St. Rep. 479.

It is liable to a foot passenger knocked down by a bicycle when it had permitted bicycle riders, in spite of a municipal ordinance to the contrary, to ride on the streets and sidewalks at an immoderate rate of speed. Hagerstown v. Klotz, 93 Md. 437, 49 A. 836, 54 L. R. A. 940, 86 Am. St. Rep. 437.

The libelants assert that a submerged obstruction in navigable water is in itself a nuisance. They rely on Harmond v. Pearson, 1 Campbell, 515. In that case Lord Ellenborough said:

"It is a peremptory law of navigation that, when any substance is sunk in a navigable river so as to create danger, a buoy should be placed over it for the safety of the public."

The same rule was laid down in Philadelphia, Wilmington & Baltimore R. R. Co. v. Philadelphia & Havre De Grace Steam Towboat Co., 23 How. 217, 16 L. Ed. 433.

Their contention, therefore, may be briefly summed up as follows: The submerged pile was a nuisance. The city was given power to compel its removal. The city did not exercise reasonable diligence or any diligence whatever to cause the pile to be removed, and is liable.

It will be noticed that all these Maryland cases are cases in which

the city failed to keep its streets and highways free of nuisance. A similar rule has been applied to county roads and bridges. *County Commissioners of Anne Arundel County v. Duckett*, 20 Md. 468, 83 Am. Dec. 557.

The language in which the principle is stated, it is true, is broad enough to render the city liable for things other than those which affect the use of its streets; but I do not find in any of the authorities cited, or with which I am familiar, that in point of fact this liability for the simple nonuse of powers given to it has in point of fact ever been extended beyond the class of cases above mentioned.

Ordinarily the law is said to be that municipal corporations are not liable for either negligent omissions or commissions in the performance of duties for which they receive no pecuniary profit, but which are imposed upon them as mere governmental agencies to which, however, there is one well-established but anomalous exception, and that is the rule which holds municipal corporations liable for permitting their streets and highways to be defective or out of repair. *Gullikson v. McDonald*, 62 Minn. 278, 64 N. W. 812.

Municipal liability for not keeping its streets safe extends in Maryland further than is stated in the case above mentioned. But the Maryland courts do recognize that there is a distinction and that for the nonexercise of some of its powers the city is not liable.

The Court of Appeals has said:

"The power to pass health ordinances like these is derived from what is known as the police power of the state, and it was delegated to be exercised, not for the benefit, or in the interest of, the city in its corporate capacity, but for the public good. Commissioners and other officials acting under such ordinances and enforcing such regulations perform duties and occupy positions similar, in legal effect, to that of police officers, and it is well settled that such officers appointed by a city are not its agents or servants, so as to render it responsible for their unlawful or negligent acts in the discharge of their duties." *Boehm & Loeber v. Mayor & City Council of Baltimore*, 61 Md. 265.

The city certainly cannot in every case be held responsible to individuals for injuries they may suffer by its failure to use all the powers which it has. For example, an Iowa city was sued by one who said that the agents of the city had called on him to assist in moving a coffin in which was the corpse of one who had died from smallpox. He was not told that the case was a smallpox case. He communicated the disease to his two children, and they died from it. He sought to hold the city liable. The court said:

"The consequences of the doctrine contended for would be startling and alarming. The sections of the laws referred to by him authorize a city, in the same language that the powers are conferred, which were exercised in this case, to maintain a police organization, fire companies, and employ a physician for the poor. The principle which would hold the defendant liable for the negligent acts here complained of would compel a city to respond in damages for the neglect of its police to suppress a riot, the failure of its firemen to arrest a conflagration, and the negligence of its physician in prescribing for a patient. * * * The true doctrine in that the powers conferred in the sections we have been considering are of a legislative and governmental nature for a defective execution of which the city cannot be held liable." *Ogg v. City of Lansing*, 35 Iowa, 498, 14 Am. Rep. 499.

I do not feel that a court of admiralty would be justified in extending the principle laid down by the Court of Appeals of Maryland in *Marriott's Case*, *supra*, to nuisances other than those which affect the city's streets and highways in spite of the somewhat broad language in which the highest court of Maryland has stated the principle under which it holds that the city is responsible for permitting nuisances in its streets.

The libelants say that they do not ask any extension even in the application of the doctrine of *Marriott's Case*. They say that navigable water is a public highway, and that if the city is responsible for not exercising powers given to it for the purpose of keeping its highways free of nuisances it is responsible for not exercising the power it has to keep the waters of this lagoon free of nuisance. The authorities, however, are to the effect that navigable water within the corporate limits of the city or over which the city is given control is not a highway in the same sense as is a city street. As has been said, "the obligation to keep streets and highways in a safe condition for public use cannot be invoked against" a municipality, "for, while the river is a highway for the passage of vessels, that portion of it which happens to be embraced within the boundaries of a city is not one of its ways so as to burden it with the duty of removing obstructions and keeping it safe for navigation." *Coonley v. City of Albany*, 132 N. Y. 149, 30 N. E. 382.

The law of Ohio required the city to cause all public highways to be kept open and in repair and free from nuisance. The libelant's vessel struck on a snag or other submerged obstruction in the harbor of Cleveland. The Circuit Court of Appeals for the Sixth Circuit, speaking through the mouth of then judge, now Mr. Justice Lurton, said that, while a harbor is in one sense a highway, it is not a highway in the sense that its streets, alleys, and roads are, and that it knew of no principle of maritime law by which a municipality is responsible for the navigable character of the waterways within its limits. *Faust v. City of Cleveland*, 121 Fed. 810, 58 C. C. A. 194. See, also, *Goodrich et al. v. City of Chicago*, 20 Ill. 447.

The only case which I can find in which a municipality has been held liable for not removing an obstruction in navigable waters is that of *Winpenny v. Philadelphia*, 65 Pa. 137.

The law made it the duty of the city councils to keep the navigable waters within the city of Philadelphia forever open and free from obstruction. The court there said that were it not for the mandatory language of the statute there would be no such liability.

I am therefore of opinion that the city is not liable in this case.

There is, if anything, still less ground for imposing liability upon the county commissioners of Baltimore county. They are sued because, as the local governing body of Baltimore county, they are under obligations to keep its roads, bridges, and highways free and unobstructed.

I shall proceed to state my conclusions as to the amount which the libelants should recover against Andrew and Kunigunda Miller.

Frank S. Pryor was 19 years of age. He received \$4.50 a week as a machinist apprentice. He paid \$3.50 of it to his father. His father

furnished him with board, lodging, and clothing. He did work around the house of a pecuniary value. If he had lived ten months longer he would have completed his time as an apprentice and would have become a journeyman. He would then have received \$2.25 a day for the first six months, \$2.50 a day for the second six months, and after that not less than \$2.75 a day.

The law of Maryland limits the amount which parents can recover for the death of their minor child to such pecuniary benefit as they can reasonably expect from him before he attains the age of 21 years. *Agricultural Ass'n v. State*, 71 Md. 86, 18 Atl. 37, 17 Am. St. Rep. 507.

In this case I shall allow them \$700.

I shall allow James G. Pryor \$100 for injury to his launch.

Mrs. Mary A. Houck was 55 years of age. Although her head was for the most part kept above the water, it was some time before she was taken out of it. The fright and exposure made her seriously, and for some hours critically, ill. She was confined to her bed for nearly four weeks after the accident. She had been a strong, hearty woman, who did all the family work, including the washing. It is admitted that before the accident she was somewhat hard of hearing. She and her family say that immediately after it she grew very deaf and still remains so. They say that her eyesight before August 5, 1909 was good; that since then it has become bad. They claim that, whereas, she was formerly a normal person of agreeable manners and disposition, she has since become exceedingly irritable. They assert that she is unwilling to talk on any subject except religion and the accident. There is some claim that she no longer can do the household work to which she had been accustomed. I saw her on the stand and heard her testimony and that of the witness who deposed as to her condition. I believe that the accident was a great shock to her. I have no doubt that it aged her, accomplishing in a few minutes what would otherwise in the course of nature have taken some years to bring about. I make an allowance of \$1,000 to her and \$500 to her husband, Joseph C. Houck.

Mrs. Katherine E. Brown was a woman 48 years of age with a husband aged 56 and four children, ranging in age from 12 to 18. She did all her family work, except the laundry. The family kept no servant; a woman being brought in weekly to do the washing. She had some assistance in the spring and fall housecleaning. Since her death the house is being cared for by a daughter, Eleanor M., a girl of 15. I think the husband in this case should have \$3,000 and the daughter Eleanor \$500. I do not find that the other children have suffered any pecuniary loss.

There remains the case of Willard T. Leach, a bright, healthy boy of 10 years of age. Here I am limited by the reasonable expectation of the pecuniary benefit which his parents would receive from him before he arrived at the age of 21 years. It is almost impossible, of course, to make any estimate of what this sum would be. After the best thought that I can give to the question, I have decided to allow \$1,500.

GREENHALL v. CARNEGIE TRUST CO. et al.

(District Court, S. D. New York. August 5, 1910.)

1. WITNESSES (§ 400*)—EFFECT OF TESTIMONY—IMPEACHMENT.

A party calling a witness only vouches for his truthfulness to the extent that he cannot thereafter impeach his general credibility in the formal ways recognized by law; the party being permitted to show that the facts stated by the witness are untrue.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1268; Dec. Dig. § 400.*]

2. BANKRUPTCY (§ 172*)—CORPORATIONS—INTEREST OF BANKRUPT—SALE OF ASSETS—AVOIDANCE.

Where between the passing of a bankruptcy adjudication and the appointment of a trustee the assets of a corporation in which the bankrupt was a large stockholder were sold at the instance of the majority stockholders in such a manner and for such a consideration as to prejudice the bankrupt's estate, and to apply the bankrupt's interest to an indebtedness owing to a single creditor, the sale was subject to vacation by the trustee after his appointment, suing as a stockholder for alleged abuse by the majority.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 220; Dec. Dig. § 172.*]

3. BANKRUPTCY (§ 299*)—ACTION BY TRUSTEE—DEFECT OF PARTIES.

An objection that there was a defect of necessary parties in a suit by a bankrupt's trustee to set aside a sale of the assets of a corporation which was prejudicial to the bankrupt's estate was available only so far as justice could not be done without the presence of the omitted parties, and would not be allowed to prevent relief which could be given as between the parties before the court, which would not affect the rights of the omitted parties.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 448; Dec. Dig. § 299.*]

4. BANKRUPTCY (§ 311*)—CLAIMS—PREFERENCE—VACATION.

Where a trust company, in connection with a sale of the assets of a corporation which was voidable as against the estate of a stockholder, assumed obligations of the stockholder owing to certain creditors, such obligations either directly at law or indirectly in equity became valid until set aside as against the stockholder's estate in bankruptcy on the vacation of the transaction, unless the obligees were aware of the whole situation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 497-500; Dec. Dig. § 311.*]

5. BANKRUPTCY (§ 185*)—AVOIDABLE TRANSFERS—AFFIRMANCE—ELECTION.

Where after a transfer of a corporation's assets, which was voidable as against the estate in bankruptcy of a stockholder, the stockholder's trustee filed a bill to set aside the transfer on the theory that the stockholder, being the owner of all the securities of the corporation, was in fact the corporation itself, and that the conveyance was in fraud of the trustee's rights, and prayed that the purchaser of the assets be compelled to account and refund all moneys and property of the bankrupt received by it to the trustee, and in an amended bill prayed that the assets and securities be returned to the corporation, due to a change in the allegation as to the stockholder's ownership of the corporate stock, the filing of the original bill did not amount to an election by the trustee to affirm the sale.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 239; Dec. Dig. § 185.*]

6. ELECTION OF REMEDIES (§ 10*)—WHAT CONSTITUTES—"ELECTION."

A mistaken assertion of an alleged right cannot be an "election" because an election can consist only in a choice between two inconsistent remedies, existing and not fancied.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 13; Dec. Dig. § 10.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2329-2336.]

7. BANKRUPTCY (§ 302*)—SETTING ASIDE TRANSFER—PLEADING—AMENDMENT.

Where a bankrupt's trustee filed a bill to set aside a transfer of the securities of a corporation in which the bankrupt was a stockholder, and alleged that the bankrupt being the owner of all the securities was in fact the corporation itself, and that the conveyance was in fraud of the trustee's rights, praying an accounting and a refunding to the trustee of all the moneys and property of the bankrupt received by the purchaser, the court was authorized to permit an amendment on it appearing that the bankrupt was only a partial owner of the corporation's stock, so as to allege that fact, and to pray a refundment to the corporation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 456, 457; Dec. Dig. § 302.*]

8. PLEADING (§ 36*)—CONCLUSIVENESS—EFFECT OF AMENDMENT.

Where an original bill has been amended so as to change the allegations and prayer, the original bill, while admissible as an admission, does not constitute an estoppel as against the complainant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 86; Dec. Dig. § 36.*]

9. BANKRUPTCY (§ 390*)—DISCHARGE—RIGHTS AS TO PENDING LITIGATION.

Where a transfer of a corporation's assets was invalid as against the trustee in bankruptcy of a stockholder, and the effect of a vacation thereof would be to resuscitate debts of the stockholder which would have been paid by the purchaser out of the corporation's property had the transfer been sustained, the bankrupt never having been discharged and the time having expired within which a discharge could be granted to him, the court would, upon the transferee's objection, compel his joinder as a party and the litigation of the issue of the payment of such debts as between him and the purchaser.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 627-636; Dec. Dig. § 390.*]

Bill by Charles L. Greenhall, as trustee in bankruptcy of Joseph Fleischman, against the Carnegie Trust Company and others. Decree for complainant.

This is a final hearing of a bill in equity brought by a trustee in bankruptcy to rescind a contract which has been performed and which was executed on March 27, 1909, between the National Center Realty Company, a New York corporation, and one Moorehead, acting in the interest of the Carnegie Trust Company. The National Center Realty Company was the owner in fee of a hotel in the borough of Manhattan, Le Marquis, situated between Fifth and Sixth avenues. This property was incumbered by three mortgages, the first in the sum of \$350,000, the second in the sum of \$29,000, and the third, \$17,740.92. There were also valid liens on the property for taxes, etc., amounting to \$31,660.11, making in all \$428,401.03. The title to the hotel had originally and in March, 1908, been in the bankrupt Joseph Fleischman in fee, and upon that day he conveyed to the company his interest, his wife joining in the deed to release her dower. In the exchange for the property, Fleischman received out of the total capital stock of 600 shares, himself 498, his wife received 100 shares, and 2 shares were given to two persons who by the testimony are said to have paid for them in full. The complainant does not challenge the organization of the company, but asserts that Fleischman

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

remained the owner of 498 shares of stock from that day until his adjudication in January, 1909. By the contract in question Moorehead, acting for the Carnegie Trust Company, was to accept the fee of the property subject to the liens, aggregating \$428,401.03, and was to pay certain indebtedness of Fleischman, as follows: To the Carnegie Trust Company, \$65,672.84, to the Northern National Bank, \$7,768.45, to C. C. Dickinson, \$1,215.13, and a further indebtedness to the Carnegie Trust Company of \$19,490.80. Moorehead was also to pay to the realty company a balance of \$2,451.75. The aggregate of all these payments amounted to \$525,000, which was, in fact, the agreed valuation stated in the contract between the parties. In addition, the National Center Realty Company was to convey all its stock to the vendee, and to get the resignation of the three directors of that company. Included within the terms of the contract and as part of the purchase price were also certain bonds and stocks of a New York corporation known as "Roman Baths," all of which were at that time in the possession or under the control of the Carnegie Trust Company, and a description of which is given below. The National Center Realty Company executed a deed on the 29th day of March, 1909, to Moorehead, and he paid to the realty company the sum of \$626.68, the difference between which and the balance of \$2,451.75 specified in the contract being due to some adjustments of expenses, interest, and the fees of Limburg, counsel for the stockholders other than Fleischman. Moorehead also delivered all of the securities of Roman Baths to Limburg, to be distributed, as will appear later. The proof does not show whether the indebtedness due from Fleischman to Dickinson and the bank has in fact been paid. Fleischman was adjudicated a bankrupt on January 19, 1909, and a trustee was appointed in April, 1909, all the transactions heretofore mentioned being between the date of adjudication and the appointment of the trustee. Moorehead and the Carnegie Trust Company both knew of his bankruptcy and that he had been adjudicated before any of the transactions recited.

Prior to any proceedings in bankruptcy against Fleischman, he had been the owner of substantially all the stock of a corporation known as Fleischman's Baths, owning the lease of a property on the corner of Forty-Second street and Sixth avenue, in the borough of Manhattan. Upon this property he had leased part of a large building, among other purposes, to run Turkish and Roman baths, and had procured much of the money to furnish this property from the Carnegie Trust Company. The documents creating all this indebtedness mentioned the fact that he borrowed the money for the purpose of building the Fleischman Baths. At the time the Carnegie Trust Company lent him this money it took notes of the Fleischman Baths, indorsed by Fleischman. The money so obtained Fleischman used in performance of a contract between himself and Fleischman's Baths, by which he was bound to erect the building and furnish it, and in exchange was to obtain the total issue of stock of those baths, which stock he pledged, in turn, to the Carnegie Trust Company as collateral security for these advances so made by them in the prosecution of the work. Fleischman's Baths also issued a series of bonds, secured by a mortgage, and covering all its property. It does not definitely appear to whom these bonds were issued in the first instance or who became the owner, but Fleischman swears that he, who in some way got possession of them, delivered them to the trust company as substituted collateral for the stock, which he thereupon took back to his own possession. Subsequently the trust company filed a creditor's sequestration bill against Fleischman's Baths in the United States Circuit Court for this district. An order of sale passed in that suit and the property was purchased by one Graham, who paid for it by turning in the bonds. Fleischman's Baths had no property except that which was covered by the bonds, and consequently the whole assets passed to Graham. He thereupon organized a New York corporation by the name of Roman Baths, conveyed the assets to this corporation in return for an issue of stock and bonds, and a part of these he transferred to the Carnegie Trust Company, presumably proportionate to the trust company's holdings in the bonds of Fleischman's Baths, although that fact does not definitely appear. These securities, or at least a part of them, were those which the trust company was to deliver under the contract of March 27, 1909.

At the time of his filing of the petition in bankruptcy against Fleischman, the record ownership of the stock in the National Center Realty Company was as follows: 100 shares in the name of Julia Fleischman, the bankrupt's wife, 498 shares in the name of Fleischman, 1 share each in the name of the two original directors or their assignees. Prior to that time Fleischman, for a valid consideration, had borrowed money of George R. Read & Co., and as collateral security had indorsed and delivered certificates for 298 shares of stock. The 200 shares of stock which he did not pledge to Read he had indorsed and 100 shares he says he had given to his niece, Clara Simon, and 100 to his son, Rudolph Fleischman. Clara Simon testified that he gave her the shares of stock in question because of his unsuccessful investment of other property of hers, the whole management of her pecuniary affairs having been in his hands for some time. The son, Rudolph Fleischman, the bankrupt says, got the shares of stock because of advances to his father in a joint enterprise between them in the florist business. Fleischman also testifies that of the 298 shares of stock which he pledged to Read he had already given 100 to his wife upon her complaint that she had not received enough for her dower in the hotel property at the time of the organization of the National Center Realty Company. On March 29, 1909, at the time of the performance of the contract here in question, the trust company delivered the Roman Baths securities to one Herbert Limburg who distributed them in the same proportion to Clara Simon, Rudolph Fleischman, Julia Fleischman, and Read & Co. as the holders theretofore had of the stock in the National Center Realty Company. George R. Read & Co. gave up that stock which they held as security and took stock and bonds of the Roman Baths in place thereof. The trust company at the same time received all the stock of the National Center Realty Company and the resignation of its directors.

Edmund L. Mooney, for complainant.

Garrard Glenn, for defendant Trust Co.

HAND, District Judge (after stating the facts as above). At the outset I must clear up the confusion which appears to have arisen from the fact that the complainant has called witnesses by whose testimony he does not wish to be necessarily bound. It cannot be too often repeated that to call a witness is not in any sense to vouch for the truth of what he says. It does, at least at law, prevent one from impeaching his general credibility in the formal ways recognized, but that is all. I shall not hesitate, and the master must not, to accept so much, and only so much, of any of the testimony as commends itself as reasonably true, regardless of whether it makes against the defendant or not. Of course, there must always be some evidence as the basis of a judicial conclusion, but the legal methods of inference from the evidence are absolutely dependent upon the usual processes of ordinary thought, and the law has never attempted to regulate them. If the master does not accept the stories of the Fleischmans to contradict the prima facie ownership arising from the stock records, coupled with Fleischman's statements in his schedules and elsewhere, he is free to do so, and I shall do so, if the issue becomes material.

The first and important consideration is whether the trustee as a stockholder in the realty company has been abused by the majority by the sale of its property. I shall disregard the question of whether under the law of New York a corporation may sell out all its assets without the unanimous consent of its stockholders, because I think that from any point of view this sale was voidable as against the trustee in bankruptcy acting in the right of the corporation. The con-

trolling consideration is the actual transaction between the realty company and the trust company. The written contract provides for the payment by the trust company of \$525,000 and the securities of the Roman Baths. Since it is plain that from the point of view of the trustee in bankruptcy there was no cash paid beyond the trivial sum of about \$2,000 and the assumption of about \$428,000 of liens, the defendants are forced to disregard the words of the contract, and to insist that the transfer was in essence of the real property for the Roman Bath securities. In this effort to disregard the words of the contract, which represented the formal reduction of the parties' intent, they have recourse to the testimony of Limburg. I need not consider whether I might from any point of view disregard the contract as written, because Limburg's testimony does not bear out the contention in fact. He says that the cash which the Fleischmans hoped to get to run the Roman Baths was cut down by Dickinson for the very purpose of paying the indebtedness of the bankrupt to the trust company. "His (Dickinson's) only idea in going into this deal at all in behalf of the trust company was to make the trust company whole for the advances they had made. He regarded it as if, instead of offering \$525,000, he was offering \$450,000, whatever the difference might be."

We have, then, a contract in which the vendee offers the equivalent of \$525,000 in cash and certain securities of unknown value. The value of the property had been appraised at \$525,000, but there is no evidence that the vendee did not regard it worth as much more as the value of the Roman Bath securities, whatever that might be, a matter which remains entirely indefinite even yet. The vendee now insists that, since either the securities or a part of the cash consideration must be disregarded, I must disregard the cash consideration in so far as it was illegal. The result would be to assume that the securities made up the deficiency, and that the illegal part of the consideration—i. e., the cancellation of some \$95,000 of Fleischman's debts—was added as a meaningless formality, not as a moving cause for the acquisition of the property. This is a mere inference of the mental attitude of the parties, which the vendee invites, and which I am, therefore, justified in meeting by a counter inference of precisely opposite result. This contract extinguished Fleischman's indebtedness, and so prevented any proof against his estate. Whether the value of that proof was great or small, it was a right of some value, and had the trust company, who were capably advised, supposed that the Roman Bath securities would alone have stood the test as an adequate consideration for the hotel, there was no need of adding anything about the payment of this indebtedness, which at once would direct attention to at least a possible preference so obtained. There is some negative reason, therefore, for asserting that these securities were not in fact worth any such sum. Such evidence is, however, not necessary to the complainant's case because the contract speaks in their favor, and expressly says that the value of \$525,000 is made up by canceling the indebtedness. The least the vendee can do is to put in some affirmative evidence of the value of these securities, so

as to show how they could have made up the necessary balance. This they have not attempted at all.

There is another aspect which is quite conclusive, and under which it appears that the Roman Bath securities were literally no part of the consideration at all. The evidence is not very full, but I think it is enough. The loans in question were all made for the purpose of completing Fleischman's Baths. While this is not expressly stated as to all the money, I think it is fairly inferable from the proof. Fleischman got some \$140,000 or \$150,000 in stock of Fleischman Baths under a contract or contracts by which he was to pay the expenses of making and furnishing Fleischman Baths. This stock he got par for par, and Fleischman Baths could have held him as the eventual obligor under this contract of subscription had they been compelled to pay any part of these expenses. Therefore, Fleischman, and not Fleischman Baths, was the primary obligor. When Fleischman got the money, he procured the indorsement of Fleischman Baths and deposited with the trust company as collateral all the stock as he got it on his contract. The trust company was, therefore, secured by the indorsement of Fleischman Baths and by the stock. Subsequently an issue of bonds of Fleischman Baths came out secured by a mortgage, of a part of which bonds in some way not disclosed Fleischman got possession. These he deposited with the trust company as substituted collateral in place of the stock, which was at once given back to him. It thus appears that the trust company held all the bonds of Fleischman Baths as collateral to secure the loans made by them to Fleischman, upon which Fleischman was the eventual obligor, and they therefore occupied the position of pledgee. I think it fairly inferable from Fleischman's testimony that this status applied to all the bonds of Fleischman Baths which the trust company held at the time of the foreclosure in the Circuit Court suit.

Now, these bonds were foreclosed by a sale of the property in the Circuit Court creditors' suit, and the trust company took over the property by turning in the bonds. Subsequently the property was reincorporated and became the Roman Baths, the trust company retaining of its securities a certain proportion and giving some to the Fleischman family. That sale, however, was not a foreclosure of Fleischman's interest in the bonds, and whatever securities the trust company got in the end in any form they necessarily held upon the same pledge as that under which they had originally held the bonds themselves. The change had affected the form of the property pledged, but not the relation of pledgor and pledgee. If A. assigned to B. as collateral on a loan a bond and mortgage of C., B. still holds the land as collateral after he has foreclosed, just as he once held the bond.

Dickinson's understanding of the relations was quite accurate, and he was capably advised. If he got back the advances, he had no further right to the collateral, and they formed and could form no part of the consideration at all. Fleischman was always entitled to them when he paid his debt. At least, if Fleischman was not, certainly some one other than the trust company was. I think this explanation is

the obvious one of the whole transaction, and shows that the sole consideration for the hotel was the cancellation of Fleischman's debts and the small sum actually paid.

From no point of view, legal, equitable, or speculative, can one fairly look at this transaction except as including a payment of the indebtedness to the trust company, the bank, and Dickinson, nor should I have devoted so much time to it, had it not been the only attempt at a meritorious defense which is raised. Such a bargain was, of course, not tolerable to a court of bankruptcy. However, the defendants are right in saying that this is not an effort to get back the property of the bankrupt estate, because the estate had no property in the Hotel Le Marquis. The theory of this bill is that the trustee here sues as a stockholder who has been abused by the majority. Of course, the other stockholders might consent to the sale for any consideration they wished, including the cancellation of Fleischman's debts, but the trustee in bankruptcy could not, and did not. All parties knew that Fleischman was bankrupt, and that a trustee was imminent. The bill does not try to unravel a transaction made in the interim between adjudication and the appointment of a trustee in which the bankrupt has made an honest effort to preserve his estate for the trustee, nor do I need in the least to invoke the doctrine of the relation back of title, or, as Mr. Glenn calls it, the *ex post facto* title of the trustee. This is not a court of law, and I do not hold the vendees, because the trustee had title *ab initio*. The whole transaction involved the conveyance of property in which everybody knew the bankrupt estate had an interest. They knew its consent was necessary, because the bankrupt whose consent they substituted had lost all his rights, unless, as they suggest, it was to preserve the estate as a kind of *ad interim* trustee in bankruptcy. Instead of accepting a consideration which was of value to the bankrupt estate, they accepted one which wholly disregarded his interests, and excluded him from any share in the consideration. It is idle, under such circumstances, to seek recourse to any purely legal rights. The trustee was the party beneficially interested, in fact, as stockholder, and they sold out the corporate assets for a consideration which was valueless so far as he went. The transaction would have been voidable had the debts so canceled been those of another, but it is in addition positively illegal in that a part of the property represented by the trustee's interest as a stockholder, has actually gone to the payment of one creditor, and has so created an illegal preference. It is therefore plain to me that the trustee might file a stockholder's bill.

It is not necessary, or, indeed, proper, at this time in the suit, to ascertain the quantum of Fleischman's holdings. He sues as a stockholder, and the relief he seeks is that his corporation be restored to the property which was obtained from it. It is only necessary for the trustee here to prove that he is, in fact, a stockholder. It is conceded that he is a holder of 198 shares, a third interest in the corporation, and the contention is plausible that he owns 298 shares and has an equity in at least 100 more, though upon that issue I make no decision. His interest is amply substantial to justify the intervention of a court

of equity, and the pliancy of the other assumed stockholders in accepting the payment of his debts as a part of the consideration, together with Fleischman's own statements ante litem motam, does not incline me to weigh very heavily their willingness to let the bargain stand, in the face of the trustee's acknowledged holdings.

There are but two other objections, both formal, which the trust company raises, which have any show of merit after the contract be once interpreted as I have interpreted it. The first is the defect of necessary parties, which would, of course, be fatal, and, the second, the trustee's election to affirm the bargain by the filing of the original bill.

As to the first objection, it is good only in so far as justice cannot be done without the presence of other parties. It is true, as the case stands, some relief cannot be given which I might give if other parties were present, because their rights cannot be affected while they are out of court. From this it may happen that the complainant will be hampered, or even entirely prevented, from effective relief by the conditions I must impose upon him. If, however, the fulfillment of those conditions will, in fact, maintain in statu quo the rights of any person not a party hereto, then there can be no defect of necessary parties. No one can complain because of the imposition of such conditions but the complainant, and the objection dies in the mouth of the defendants, who alone make it here.

This, therefore, brings up the question directly of the form of the decree, and I will take it up, therefore, at this point. The decree will first provide for the reconveyance to the corporation of the real property and for an account of profits in the meantime. The trust company will likewise assign to the receiver the realty company stock and its distribution among the various holders will have to be a part of the interlocutory proceeding. The restitution will include the redelivery of all the Roman Bath securities. In so far as these have passed into the hands of George R. Read, I cannot direct him to do this, because he is not a party to this suit, and the complainant will have to accomplish this by negotiation. The shares received by the Fleischmans I will direct them to return, since their attorney, Limburg, was aware of all the facts. Any transfer made by them since bill filed may be decided upon if that fact arises. I will not say how far it is affected with notice of a *lis pendens*. Should it prove impossible for any reason to procure the restitution of these shares, I will consider whether some other restitution will not be effective. I do not decide now that the only possible restitution in this case will be in specie. It will depend upon future developments. *Butler v. Prentiss*, 158 N. Y. 49, 63, 52 N. E. 652. If the defendants Fleischman have put it out of their control to restore these securities, I hardly should feel disposed to exonerate the trust company on that account. I regard them as both acting in concert.

The difficulties with regard to the obligations assumed by the trust company to the National Northern Bank and Dickinson are not so great. Those obligations, whether directly at law under *Lawrence v. Fox*, 20 N. Y. 268, or indirectly in equity, became valid till set aside unless both obligees were aware of the whole situation. Of course,

Dickinson was, but, as he is not a party, I cannot pass a decree in regard to him. *Prima facie* the obligation of the bank is good. I see nothing to do but to make it an absolute condition that the complainant secure the trust company for the payment of these obligations. When this is done, the trust company is protected and their original obligation to the obligees will not be affected. The only alternative is to allow them to be added as parties defendant, and that I have already refused to do as to these parties.

The interlocutory decree will therefore provide that the Fleischmans surrender to the receiver their Roman Bath securities, and that the complainant tender the consent of Geo. R. Read & Co. to deliver the shares held by them. The complainant will thereupon tender security to the trust company for its payments to the Northern National Bank and the estate of Dickinson. Upon the performance of these conditions a receiver of the hotel will be appointed and the trust company will assign all shares of realty company stock to the receiver, the relative ownership to be determined. Thereupon an accounting will be had before the special master which should bring in the small cash payment, and upon final decree all the equities will be definitely adjusted, and the deed delivered to the realty company. Should the Fleischmans fail to surrender the Roman Bath securities, the matter will come up on contempt proceedings under the interlocutory decree, which I will refer to the special master.

There remains the question of the trustee's election as evinced by the filing of the original bill. The first bill proceeded upon the theory that Fleischman, being the owner of all the securities of the realty company, was, in fact, the company itself, and that the conveyance to the trust company was in fraud of the trustee's rights. It prayed "that the said trust company may be compelled to account and to refund to your orator all moneys or property of the bankrupt received by it." I can see no affirmance of the contract in this. On its face it seeks a rescission of the whole contract by a redelivery of the real property, just as the present bill does. There is no inconsistency between the redelivery there asked to the complainant personally and a redelivery to the corporation as the amended bill asks. That divergence arose simply from the change between the allegations of Fleischman's total and partial ownership of the corporate stock.

What the trust company relies on is apparently a statement of the complainant personally, made in court, as to the frame of the bill. I confess I did not quite understand that statement when it was made, and I never have since. Apparently his theory was that he could sue to recover that proportion of the indebtedness canceled by the contract which Fleischman's holdings bore to the whole outstanding stock. That position, if I have correctly understood it, was not consistent with either bill, and was not sound in law. The contract was in fact fully performed and the trust company had received the real property in payment of its indebtedness. If the bill tried to get that property back, it was unraveling the transaction, as both bills try to do. All I can say for the third position is that it was wholly anomalous in any case. It seems to rest upon the assumption that it was a part of the contract that the trust company should pay over to the corporation a

part of the indebtedness canceled. Whatever this theory was, it was not in fact an election to affirm the contract, whatever the counsel may have thought who urged it, because the payment it sought to get was not included within the terms of the contract. It makes no difference that arguendo he stated that he did not mean to disturb the contract. What he was asking was something to which he had no right from any point of view. It "was not an election, but an hypothesis." A mistaken assertion cannot be an election because that must be "a choice * * * between two inconsistent remedies," existing, not fancied. *Bierce v. Hutchins*, 205 U. S. 340, 27 Sup. Ct. 524, 51 L. Ed. 828. It is not necessary to determine whether that decision goes so far as to make it only a mistaken choice if the elector is defeated for any cause because it is quite clear that the position here was as fruitless as to seek to impress a lien upon your own title as there.

The next question is of the propriety of the amendment, a question like all others reserved by the defendants with leave, notwithstanding their answer. The equitable grounds for the amendment were ample unless some rule of procedure prevents. *Shields v. Barrow*, 17 How. 129, 144, 15 L. Ed. 158, would certainly stand in the way, but I understand that case to have been overruled in substance, if not formally, by *Hardin v. Boyd*, 113 U. S. 756, 5 Sup. Ct. 771, 28 L. Ed. 1141, which throws the whole matter into the court's hands. The allegations of fact in the old bill may be good evidence upon this hearing against the complainant, but they are nothing more. Certainly they are no estoppel. As evidence they are not worthy serious consideration.

The trust company also raises the question of the restoration of *Fleischman and Fleischman Baths* to the status quo ante. So far as concerns *Fleischman Baths*, the objection is without substance. The corporate entity still exists, but without property of any sort, a mere theoretical personality, and a court of equity may disregard the fact that, though its debts were to be canceled by this agreement, they will not be revived. "*De minimis non curat lex.*" So far as concerns *Fleischman*, the case is somewhat different, because it is not in proof that he has ever been discharged, and it is now too late to apply for a discharge. The result of this decree will be to re-establish against him a debt which is now canceled, or which he may insist that the obligee cancel. This debt would, it is true, have been paid out of property which in no sense belonged to him, and which indeed he had no right to have applied to his indebtedness. Nevertheless the trust company has an interest in the conclusion of *Fleischman* in this decree, so that, when they have parted with the res, he shall not be able to question their debt. As things now stand, the trust company will lose the fund and yet may have to fight the issue of its payment over again with *Fleischman* should they ever sue him on their debt. They have the right to have him brought in. If, however, the defendant insists upon this point, I shall, in spite of my former refusal, permit the complainant to amend again and bring in *Fleischman*. If they do that, they may also bring in *Dickinson's estate*, the *Northern National Bank*, and *George R. Read*. In this way they may succeed in making the restitution less onerous than I have felt obliged to do.

This will put it to the option of the trust company whether they prefer to stand upon the defect and take their chance of getting less restitution, or whether they prefer the decree as it is. In any case I am not disposed to compel this suit to be tried all over again, when the complainant has, as I think, a meritorious case, merely because before the hearing he erroneously dismissed the bill as to a party who has now proved to be a necessary party. Fleischman was fully examined and the facts were all brought out, so that there is extremely little probability that he can have any defense other than what I have already considered. The purpose of a court of equity is to do justice and to relieve from mistakes. If the defendant trust company, who is alone interested, cares to waive the point as to Fleischman within 10 days after the filing of this opinion by written stipulation, a decree may pass; if not, the complainant may file a supplementary bill bringing in the parties indicated, and then the issues as to them may be tried out in the October term. That a decree may be made without Fleischman is clear enough, if the defect is waived, because Fleischman's rights will not be affected by this decree if he is not a party. When sued on the debt, he can still plead payment, and he will be in as good a position to maintain his plea if the trust company has lost the property as if not. This decree will not conclude him, and he can show that the payment was in fact a good payment, just as well in that suit as he could in this. Thus the defect is one which only the trust company may raise, and which they may waive if Fleischman's rights be saved from the decree. He has no interest in the fund itself from any point of view, and its disposition hereafter is indifferent to him. Provided he retains all rights to insist that his debt is paid, he is not hurt. Therefore it is a defect which if not taken by answer or demurrer I could deal with under the fifty-third rule, and, as the case stands, it is personal to the trust company.

LAWRENCE v. SOUTHERN PAC. CO. et al.

(Circuit Court, E. D. New York. July 28, 1910.)

1. CORPORATIONS (§ 202*)—SUIT BY STOCKHOLDER—MUST BE IN RIGHT OF CORPORATION.

A minority stockholder, if allowed to sue for a wrong done to the corporation, must recover, if at all, damages or specific performance which would result in the payment of money or transfer of property to the corporation, and in which all stockholders have their rights.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 777-780; Dec. Dig. § 202.*]

2. CORPORATIONS (§ 210*)—INDISPENSABLE PARTIES—SUITS BY STOCKHOLDERS.

To a suit by a stockholder in behalf of himself and other stockholders to recover an interest in property of the corporation alleged to have been wrongfully and illegally sold, in which complainant claims no rights except as a stockholder and in right of the corporation, the corporation is an indispensable party.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 810; Dec. Dig. § 210.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. REMOVAL OF CAUSES (§ 108*)—LACK OF JURISDICTION OF FEDERAL COURT—ABSENCE OF INDISPENSABLE PARTIES—DISMISSAL OR REMAND "AS JUSTICE MAY REQUIRE."

Section 5 of the federal judiciary act (Act March 3, 1875, c. 137, 18 Stat. 472), as amended by Act March 3, 1887, c. 373, § 6, 24 Stat. 555, and Act Aug. 13, 1888, c. 865, § 6, 25 Stat. 436 (U. S. Comp. St. 1901, p. 511), which provides that, if at any time it shall appear that a Circuit Court is without jurisdiction in a suit brought in or removed into such court, the court shall dismiss or remand such suit "as justice may require," does not give the court power to choose the forum for litigants and dispense with rights created by statute from motives of interest or sympathy with the litigants, and, where the jurisdiction of a state court has been terminated by the action of a party under the removal statute and jurisdiction exclusively established in the federal court over the cause of action and the parties before it, such court cannot remand the cause for lack of an indispensable party, without whose presence it cannot be determined and which cannot be brought in, but must dismiss it, even though such dismissal may deprive the plaintiff of the right to maintain the suit in any forum because wherever brought it will be removable, and then subject to dismissal for the same reason.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 217; Dec. Dig. § 108.*]

In Equity. Suit by Walter B. Lawrence against the Southern Pacific Company, Frederic P. Olcott, the Central Trust Company of New York, the Farmers' Loan & Trust Company, the Metropolitan Trust Company of the City of New York, the Houston & Texas Central Railroad Company, the Texas Central Railroad Company, and the Houston & Texas Central Railway Company. On pleas. Decree of dismissal.

Dittenhoefer, Gerber & James (A. J. Dittenhoefer, H. Snowden Marshall, and David Gerber, of counsel), for plaintiff.

Joline, Larkin & Rathbone (Arthur H. Van Brunt and Henry V. Poor, of counsel), for defendants Central Trust Company of New York, Southern Pacific Company, and Houston & Texas Central Railroad Company.

Turner, Rolston & Horan, for defendant Farmers' Loan & Trust Company.

Parsons, Closson & McIlvaine, for defendant Metropolitan Trust Company of City of New York.

CHATFIELD, District Judge. The facts involved in the present motion are matters of record and are sufficiently set forth in the opinions upon the motions previously decided in 165 Fed. 241, and 177 Fed. 547.

The earlier of these motions was an application to remand to the state court from which the action had been removed, the plaintiff alleging that certain necessary defendants were citizens of the same state as himself. It appeared that these parties were not indispensable, and the motion was denied. The later application was for a dismissal of the action upon affidavits alleging facts from which it was apparent that the present situation was likely to develop, and also setting up the death of one of the defendants whose personal representatives had not sought to have themselves brought in, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

who could not be reached by the process of this court. That motion was disposed of upon the ground that the deceased defendant, or his personal representatives, were not indispensable to a trial of the issues between the other parties to the action, and also that the pleas which had been interposed should be brought on for argument, rather than on motion to anticipate the actual joinder of issues. At the present time the defendants the Southern Pacific Company and the Houston & Texas Central Railroad Company have joined in interposing a plea to the action, based upon the absence of the Houston & Texas Central Railway Company, as service cannot be had in such a manner upon that company as to be valid in the Circuit Court of the United States for this district. The Central Trust Company of New York, one of the defendants which was held to be a proper, but not indispensable, party upon the first motion to remand, has likewise interposed a plea of the same nature, and, a replication to these pleas having been filed by the plaintiff, a hearing has been had at which an agreed statement of facts has been presented. Upon these facts the defendants have moved to dismiss the entire action upon the ground of lack of jurisdiction, while the plaintiff has asked that, if the court does not retain jurisdiction, the action be now remanded to the state court, under the provisions of section 5, Act March 3, 1875, c. 137, 18 Stat. 472, as amended by Act March 3, 1887, c. 373, § 6, 24 Stat. 555, and Act Aug. 13, 1888, c. 866, § 6, 25 Stat. 436 (U. S. Comp. St. 1901, p. 511). It is apparent that the purpose of the various parties is to settle the question of jurisdiction, and to determine the forum (if any) in which this suit can be brought before a discussion of the merits of the case is attempted. The sufficiency of the plea of no jurisdiction, as a matter of law, is thereby raised, and, if the Circuit Court of the United States for this district has no jurisdiction, and if the action be dismissed, a determination of the case upon the merits is plainly unnecessary; while, if the action should be remanded to the state court, a determination upon the merits there should not be embarrassed by expressions of opinion of this court about what would be its decision if the case were before it.

The defendant contends as a primary proposition that the present action is in form what is known as a representative or stockholder's action. The plaintiff alleges in his complaint that he brings suit for himself and for all others who as minority stockholders have been affected by the various transactions in a similar way to himself, and who may come in and share in the burdens and benefits of the action. A number of cases have been cited upon this question, such as *Davenport v. Dows*, 85 U. S. 626, 21 L. Ed. 938, in which Judge Davis said:

"That a stockholder may bring a suit when a corporation refuses is settled in *Dodge v. Woolsey*, 18 How. 340 [15 L. Ed. 401], but such a suit can only be maintained on the ground that the rights of the corporation are involved. * * * A court of equity will not take cognizance of a bill brought to settle a question in which the corporation is the essential party in interest, unless it is made a party to the litigation."

Dewing v. Perdicaries, 96 U. S. 193, 24 L. Ed. 654, *Central Railroad Co. of New Jersey v. Mills et al.*, 113 U. S. 249, 5 Sup. Ct. 456, 28 L.

Ed. 949, and *Swan Land & Cattle Co. v. Frank*, 148 U. S. 603, 13 Sup. Ct. 691, 37 L. Ed. 577, all substantiate this proposition. Various New York state decisions cited and affirmed in *Niles v. New York Central, etc., R. R. Co.*, 176 N. Y. 119, 68 N. E. 142, hold to the same effect. A minority stockholder, therefore, if allowed to sue for a wrong done to the corporation, must recover, if he recovers at all, damages or specific performance which would result in the payment of money or transfer of property to the corporation, and in which all stockholders have their rights as stockholders. In the cases of *De Neufville v. New York, etc., Ry. Co.*, 81 Fed. 10, 26 C. C. A. 306, *Redfield v. Baltimore & Ohio R. R. Co.* (C. C.) 124 Fed. 929, and *Ames v. American Tel. & Tel. Co.* (C. C.) 166 Fed. 820, it was held on demurrer that when the injuries alleged have been sustained, if at all, by the corporation, it should come in and defend its action, or its failure to follow up the alleged wrongs, and the corporation was decided in each case to be a necessary party.

The plaintiff herein attempts to meet the charge that this is a representative action, and that the *Houston & Texas Central Railway Company* (which has not been served) is a necessary party to the suit. He has cited *Rogers v. Penobscot Mining Co.*, 154 Fed. 606, 83 C. C. A. 380, and *Sioux City Terminal R. & W. Co. v. Trust Co. of N. A.*, 82 Fed. 124, 27 C. C. A. 73, in which the courts discuss at length the provisions of section 737 of the Revised Statutes (U. S. Comp. St. 1901, p. 587), and equity rule 47. But these cases do not settle for us the question whether the *Houston & Texas Central Railway Company* is an indispensable rather than a proper party in the present action. In the case of *Rogers v. Penobscot Mining Co.*, supra, a number of citations are given and a clear definition of indispensable and proper parties furnished on page 616 of the report. The conclusion is that the defendants in question were necessary parties under the old chancery rule, but not indispensable parties under the section and rule above referred to, "because a final decree can be rendered herein between the complainants and the defendants, which will completely adjudicate their rights, without binding or injuriously affecting the rights of the defendants not served." Recently in this circuit, in the case of *Kuchler v. Greene* (C. C.) 163 Fed. 91, and again in *Slater Trust Co. v. Randolph-Macon Coal Co.* (C. C.) 166 Fed. 171, the Circuit Court of the Southern District of New York passed upon the question whether a certain defendant was an indispensable party. In the *Kuchler v. Greene* Case the action was against individuals for an accounting of profits as between stockholders, while in the *Randolph-Macon* Case the real controversy was against certain directors, who were being sued for fraud by bondholders who asked for money damages, and, while each case is near enough in its nature to the case at bar to afford some aspects of a representative action, nevertheless the actual relief there demanded would not seem to be the restoration of rights to the corporation itself, to be there devoted to corporation purposes for the benefit of the plaintiff, as is the case in the present action. In *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260, the Supreme Court of the United States said that the rule requiring all persons materially interested to be made parties to an action should yield if the

court is able to proceed to a decree and to do justice to the parties before it, especially when an enforcement of the rule would oust the court of jurisdiction, "and deprive parties entitled to the interposition of a court of equity of any remedy whatever."

Many cases are cited in support of this proposition, and Mr. Justice Story in *West v. Randall*, 2 Mason, 181, Fed. Cas. No. 17,424, again refers to the necessity of such a yielding of rule in the United States Courts, where the limited nature of its authority might otherwise oust the court of jurisdiction. In *Ervin and Others v. Oregon Railway & Nav. Co.* (C. C.) 20 Fed. 577, a corporation was held not to be indispensable as it was not a going concern, when the plaintiffs, who were formerly stockholders, attempted to follow into the hands of third parties assets that had been transferred by the corporation before it ceased to exist. The doctrine asserted in this case is more nearly applicable to the present litigation than any of the other cases cited, and but for the peculiar facts of this case might be taken as a precedent at the present time.

In the present action, however, the charge is that the missing defendant company, which now appears to have but one director within the state of New York, and to be doing no business in that state, to have had no election of directors since 1885, and to have had no meetings of any sort since the decree of foreclosure under which the property was sold, should nevertheless be brought to life, and its directors should sue the other defendants to recover the property which it is charged was illegally transferred or allowed to be transferred for the benefit of certain majority stockholders. And prior to the death of the defendant Olcott there was also present the question as to the ownership of certain land admittedly available as security for an issue of bonds, but, if more than sufficient to secure that issue, apparently originally an asset of this absent defendant corporation.

The plaintiff does not seek to recover a share of the profits of any of the transactions of the corporation or its majority stockholders. He does not seek to obtain damages, nor is there any theory shown upon which he can prove damage to his property, nor as to which an accounting would result in a decree in which compensation could be computed upon the plaintiff's rights as distinguished from his ultimate position as a stockholder in the absent corporation. It would seem to be necessary to hold, therefore, that this action cannot proceed without the presence of the Houston & Texas Central Railway Company as a party thereto. Nor can it be urged that this railway company can be aligned as anything but a defendant, and therefore entitled to representation upon any trial. It is the real party in interest if the sales of its property were invalid, and it is accused of the wrongdoing by which its property was sold.

We therefore must consider what the situation is with this corporation a necessary and indispensable party, which has not been and cannot be served in such a manner in the present action as to give this court jurisdiction over it. This defendant corporation must be brought into this court by proper service, and it appearing that a corporation doing no business within the state, and, having no one who can be served either as officer or director, when engaged in the business of the

corporation (*Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113), cannot be made a party under the jurisdiction of the Circuit Court itself, we must consider what is necessary procedure upon the present application. *Venner v. Great Northern Railway Co.*, 209 U. S. 24, 28 Sup. Ct. 328, 52 L. Ed. 666. In the last-named case the Supreme Court holds that a case is removable to the Circuit Court by the defendant, if it be one of which some Circuit Court of the United States has jurisdiction, for instance, a controversy between citizens of different states (the Circuit Court having determined that it had jurisdiction, and that it had jurisdiction of the subject-matter of the litigation, and having passed upon the compliance with the requirements of equity rule 94, relating to the verification of a stockholder's bill, founded upon rights which can be asserted by a corporation); that the very exercise of such a determination of jurisdiction was an exercise of jurisdiction over the subject-matter of the action; and that the case should proceed in the Circuit Court for a further determination upon the merits.

In the case of *In re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, the differences and difficulties found in the numerous decisions of removal cases are referred to, and the provisions of the various sections of the law—chapter 137 of 1875, as amended by chapter 866 of 1888, and chapter 373 of 1887—are discussed. The court therein explained the case of *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, and held, citing many other cases, that the general description of jurisdiction of United States courts set forth in section 1 of the act of 1888, above quoted, allows the removal of any case into the proper Circuit Court of the United States from a state court, when the Circuit Courts of the United States generally would have jurisdiction of the subject-matter of such an action, or when a controversy between the parties to the suit might be brought in some Circuit Court of the United States, and when the defendants have either waived the right to dispute the jurisdiction of the court of that particular district, rather than that of some other district, or have consented to the choice of districts by bringing removal proceedings on their own behalf. The court says on page 506 of 209 U. S., on page 591 of 28 Sup. Ct., 52 L. Ed. 904:

"So long as diverse citizenship exists, the Circuit Courts of the United States have a general jurisdiction. That jurisdiction may be invoked in an action originally brought in a Circuit Court or one subsequently removed from a state court, and, if any objection arises to the particular court which does not run to the Circuit Court as a class, that objection may be waived by the party entitled to make it. As we have seen in this case, the defendant applied for a removal of the case to the federal court. Thereby he is foreclosed from objecting to its jurisdiction. In like manner, after the removal had been ordered, the plaintiff elected to remain in that court, and he is, equally with the defendant, precluded from making objection to its jurisdiction."

The statement, "The defendant applied for a removal of the case to the federal court. Thereby he is foreclosed from objecting to its jurisdiction," would seem to be an express holding that the application for removal is a waiver of any objection to the exercise of the jurisdiction which some Circuit Court of the United States might have, as

distinguished from the particular Circuit Court to which removal is asked. On page 496 of 209 U. S., on page 587 of 28 Sup. Ct., 52 L. Ed. 904, the court says, also:

"That the defendant consented to accept the jurisdiction of the United States court is obvious. It filed a petition for removal from the state to the United States court. No clearer expression of its acceptance of the jurisdiction of the latter court could be had."

In the present case an exactly similar situation exists. The defendants have not objected to the jurisdiction of the United States court. They have not attempted to appear specially, except for the purpose of removing the case, and they have filed pleas, thereby admitting the jurisdiction of this court over the parties and its right to determine whether it has jurisdiction over the cause of action. *Venner v. Great Northern Railway Co.*, supra, at page 35 of 209 U. S., at page 328 of 28 Sup. Ct., 52 L. Ed. 666.

The statements in the *Moore Case* are broad enough to cover the case of a defendant who has appeared specially, solely for the purpose of removal, and then has objected to the jurisdiction of the Circuit Court of the United States upon the sole ground that the suit could not have been originally brought in that particular district. It would seem to follow that in such a case the right to make an objection of that nature—that is, to the jurisdiction of the court over the parties—had been waived. But the present case goes a step further. It is similar to a motion to dismiss by a defendant who has appeared specially and removed the case upon the ground that the service of the parties has not been of such nature as to allow the action to be maintained in the Circuit Court of the United States under the provisions of section 3 of the act. This section provides that, after removal, the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court. But section 5 of said act further provides that if at any time it shall appear that the suit does not properly belong within the jurisdiction of said Circuit Court, or there has been improper or collusive joinder of parties, that the Circuit Court shall proceed no further therein, "but shall dismiss the suit or remand it to the court from which it was removed, as justice may require." It may be noted here that in some cases the sentence just quoted has been interpreted to mean that, if the court does not appear to have jurisdiction, the suit shall be dismissed, if begun in the Circuit Court, but that it shall be remanded if removal has been had. See *Northern Pac. Ter. Co. v. Lowenberg* (C. C.) 18 Fed. 339. But the words in the alternative, followed by the phrase "as justice may require," which have been quoted above, do not indicate that this sentence was intended to be applied in the respectively consecutive way just indicated, but, on the contrary, when either of the conditions arise, the proper alternative remedy should be applied to that condition. With respect to the question of when an action should be dismissed, if a defendant appeared specially and removed the case, and then claimed that the court had not jurisdiction of the action and could not proceed to final judgment, it is only necessary to refer to such decisions as *Goldey v. Morning News*, supra, where an action was dismissed because the service of the parties was not such as would justify the main-

tenance of an action in the United States court, *Conley v. Mathieson Alkali Works*, supra, *Geer v. Same*, 190 U. S. 428, 23 Sup. Ct. 807, 47 L. Ed. 1122, and many others in the Circuit Courts themselves.

In the present case the alleged defect does not lie in the method of service. It does not lie in a question as to whether the parties now here are properly before the court, nor whether they can object to the court's disposing of the case. Its right so to do is admitted. But the precise objection is that the case cannot proceed to judgment through the lack of an indispensable party, and that the objection on that ground must be considered exactly as if the action had been instituted in the Circuit Court of the United States originally, and upon the trial plaintiff had been confronted with an objection to proceeding in the absence of this indispensable defendant. There would be no answer to such a situation, and in a case at law a dismissal or the withdrawal of a juror, accompanied by the granting of leave to amend or to bring in the party (or in a case tried without a jury similar action in the appropriate way), would be necessary.

The defendants insist that upon the testimony offered, the action being now before the court on a hearing upon the pleas raising these precise questions, and it admittedly being impossible to serve or to obtain the appearance of the missing defendant, no alternative exists other than that the action should be dismissed. Such a decision would leave the plaintiff apparently remediless, for he could not serve the various defendants in any Circuit Court of the United States, and he could not start an action in the state court, as every action of this nature would be subject to removal and a similar dismissal. The effect of this interpretation would be to make the act of Congress not jurisdictional for the sake of removing and hearing the cause, but jurisdictional to the extent of taking the plaintiff from a forum where his case could be heard, and compelling him to litigate in a forum where his case could not be heard, and from which he could not escape with the possibility of bringing his action in any other court.

The two positions are exactly illustrated by the cases of *Goldey v. Morning News*, and *Ex parte Wisner*, above referred to. The language of the court in the *Goldey* Case intimated that wherever an action was brought under such circumstances that the courts had exercised the jurisdiction given by Congress under the Constitution to the extent of providing a method by which the United States court must, if its power were invoked, take charge of the case, such jurisdiction was then exclusive, and should not be relinquished when the parties had not instituted their action by ways which complied with the necessary requirements of the United States Circuit Court. The *Wisner* Case, on the other hand (while holding that the removal statutes had narrowed the jurisdiction of the Circuit Courts, and while applying the rule as to the limitation of jurisdiction as to the particular district of residence, which limitation has since been in effect removed by the case of *In re Moore*, supra), nevertheless held that if the defendant appeared specially for the purpose of removal, and then raised the question of lack of jurisdiction, and if the plaintiff accepted that contention and asked for remand, the remedy should not be dismissal, but that the Circuit Court should have remanded the case; a manda-

mus to that effect being granted. It would seem that in the present case no reason has been shown why the Circuit Court of the United States for this district should not try the action between citizens of different states, involving more than the statutory amount, if they are properly brought into court. An application by the defendant, being a nonresident, for removal into this court, precludes him from questioning the jurisdiction of this court over him, if he was properly made a party; but if the defect in acquiring jurisdiction arose through the service of process, and a suit is sought to be maintained which has been instituted by methods which the Circuit Court of the United States cannot support, dismissal should follow. The corporation in this particular action is an indispensable party, and this court has entire jurisdiction to determine whether or not the suit can proceed with or without this party. We are hence brought down to the necessity of determining what should be done with an action that is not in a condition to proceed for lack of this indispensable party, where all other elements of jurisdiction exist.

The sole question presented in the last analysis upon this motion is whether an action should be dismissed for lack of an indispensable party, when all other elements of jurisdiction over the case are present, and when such dismissal might deprive the plaintiff from maintaining his action in any forum, it being apparent that, wherever brought, the suit might be subject to removal into the United States court, and then to dismissal for the same reason. The statute providing for the removal of causes was intended to give litigants residing in different states an opportunity to remove cases into a forum which would apply the laws relating to the case in a uniform manner without reference to where the court might be held; that is, to free the trial of the action from the legal restrictions or conditions of the courts of either party's home. The provision that after removal the removed case shall proceed as if originally begun in the United States court means that from that time on the rights of the parties provided the case can be considered by the court are to be interpreted according to their actual positions when tested by the standards of the laws of the United States, with reference to their claims for relief. If it were not for the language of section 5, providing for dismissal or remand "as justice may require," there would be no room for argument. The exercise of the power to remand when justice does require has been established by the cases already cited. As such action is an exercise of discretion, appeal does not lie, while from an order of dismissal on ground of lack of jurisdiction, an appeal may be had. *Goldey v. Morning News*, supra, at page 520 of 156 U. S., at page 559 of 15 Sup. Ct., 39 L. Ed. 517, and *Courtney v. Pradt*, 196 U. S. 89, 25 Sup. Ct. 208, 49 L. Ed. 398. In the present instance, if the word "justice" be interpreted to mean the possibility of bringing the various defendants into court, then remand would be the only remedy. If "justice" means a hearing and disposition of the case by a court having jurisdiction of a controversy between citizens of different states, and also jurisdiction over all of the parties before it, with a determination that no judgment against any defendant can be entered, because an indispensable defendant has not and cannot be made party to the suit, then the present

action should be dismissed. None of the cases cited answer this question. The courts have remanded actions to the Supreme Court when improperly removed, when the requisite diversity of citizenship has not been shown, when, in general, jurisdiction in the state court did exist before removal, and this has not been ousted by the exercise of the rights given to parties defendant under the removal statute. But no case has been brought to the court's attention where it has been definitely held that (if the jurisdiction of the state court be terminated by the action of any party under the removal statute, and if the jurisdiction over the cause of action and over the parties before the court be thereby exclusively established in the Circuit Court of the United States for any district) because of hardship alone, or from the standpoint of equitable motives, the legal jurisdiction of the United States court should be done away with by the court itself. The theory that the words "as justice may require" give the court the power to choose the forum for litigants and dispense with rights created by statute from motives of interest or sympathy with the litigants whose cause of action may be nullified because no court can apply a remedy is, it is thought, beyond the jurisdiction of a Circuit Court of the United States.

The question is very similar to that raised in cases where service of the parties has been obtained by methods which will not stand the test of the United States court rules and decisions. Where a party has been sued in a district other than that of his residence, but when the amount involved is sufficient and the parties are citizens of diverse states, it is apparent that some United States court has jurisdiction of such a cause of action, and that the particular parties to the action are within its jurisdiction to the extent of determining whether it will proceed to judgment. But, if the defect be only that the suit has been instituted in a way which the United States courts will not recognize as sufficient to allow the entry of judgment, dismissal is the remedy, rather than to exercise jurisdiction in a case in which the court is not satisfied to allow that judgment to be entered in some other forum, with the sanction of the United States court, upon the very point which it has already determined would not justify a judgment in the United States court itself. Such cases as have been cited establish the proposition that if jurisdiction exists over the subject-matter of the action, but if there is a defect in jurisdiction over the parties, that question of jurisdiction should be determined as if the action had been begun in the United States Circuit Court in the first instance; and the conclusion would seem to be necessary that for this court to send the present action (which is between citizens of different states, which has been properly removed into this district, and which could be determined as between the parties before the court, if no one else were necessary to such determination, and hence in which there is no defect of jurisdiction but simply lack of parties) to a state court for trial, and thereby to hold that such a suit does not properly belong within the jurisdiction of this court, or that there has been improper or collusive joinder of parties, is impossible, and it must be held that the defendants interposing the pleas are entitled to judgment dismissing the action, if the absent party be not brought in within a reasonable time.

COLASURDO v. CENTRAL R. R. OF NEW JERSEY.

(Circuit Court, S. D. New York. July 1, 1910.)

1. REMOVAL OF CAUSES (§ 102*)—GROUNDS OF FEDERAL JURISDICTION—REMAND.

Where an action for injuries to a servant was removed to the federal court for diversity in citizenship, but also involved a construction of Federal Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), under which the suit was brought, it was not subject to remand on it appearing at the trial that the parties were of the same citizenship; federal jurisdiction being shown by the fact that the suit involved the construction of a law of the United States.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 218; Dec. Dig. § 102.*]

2. COURTS (§ 289*)—FEDERAL COURTS—JURISDICTION.

Where a suit brought under Federal Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), involved a determination of the meaning of the phrase "person employed by such carrier in interstate commerce," federal jurisdiction existed, even though the complaint should be dismissed because plaintiff was not a person so employed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 830; Dec. Dig. § 289.*]

3. MASTER AND SERVANT (§ 180*)—INJURIES TO SERVANT—NEGLIGENCE—EMPLOYER'S LIABILITY ACT.

Where plaintiff, a track walker, was injured while assisting certain fellow employes in repairing a switch in a railroad yard by being struck by certain cars, kicked toward him, and from the relative position of plaintiff and his fellow employes the jury could have found that plaintiff was relying on them to look out for trains approaching from that direction, their failure to warn him constituted negligence of fellow servants which, as provided by Federal Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), was an actionable negligence of the railroad company.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 180.*]

4. MASTER AND SERVANT (§ 180*)—INJURY TO SERVANT—RAILROADS—NEGLIGENCE.

Where a trackman was injured in a railroad yard, by certain unlighted passenger cars kicked along the track at night without warning, and the brakeman at the rear, although he saw the lights of the trackman, waited too long before trying to check the train which was running under its own impetus, actionable negligence on defendant's part was shown.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 180.*]

5. MASTER AND SERVANT (§ 228*)—INJURIES TO SERVANT—RAILROADS—CONTRIBUTORY NEGLIGENCE.

In an action under Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), for injuries to a trackman in a railroad yard, by being struck by certain passenger cars, kicked along the track, contributory negligence is no defense.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 228.*]

6. MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT—ASSUMED RISK.

Plaintiff, a railroad trackman, was assisting other employes in the repair of a switch in a railroad yard at night, when he was struck and injured by certain cars negligently kicked along the track without light or warning. There was evidence that plaintiff had never before been called on to mend a switch, and that plaintiff and another employe at the time of the injury were obeying the directions of their foreman in holding lan-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

terms to light him in the work. *Held*, that plaintiff did not assume the risk of such injury under the rule that assumed risk begins only after plaintiff is aware of the master's delinquency.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574–583; Dec. Dig. § 217.*]

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

7. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—OPERATION OF TRAINS—WATCH.

Where a gang of men is working on a railroad track at night where trains are being constantly operated, whether the railroad company in the exercise of reasonable care should give instructions that some one among them should keep a lookout to protect the rest from injury is for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1033; Dec. Dig. § 286.*]

8. MASTER AND SERVANT (§ 180*)—INJURIES TO SERVANT—EMPLOYER'S LIABILITY ACT.

Federal Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), regulating the liability of interstate carriers for injuries to servants, includes within its scope all persons who could be included within the constitutional power of Congress, and hence included a trackman engaged in the repair of a switch connected with a track used for both interstate and intrastate commerce.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 180.*]

At Law. Action by Michael Colasurdo against the Central Railroad of New Jersey. Verdict for plaintiff. Motion for new trial on exceptions. Denied.

This is an action of negligence against a railroad company. The plaintiff was a track walker whose leg was cut off by a train of four cars running without an engine in the Jersey City yard of the defendant on Christmas day, 1908, at about 10 minutes before 7, at which time he and two other men were at work repairing a switch in the yard. The man actually at work upon the switch was one Nighland, who was in command of the plaintiff and another track walker. Nighland was seated at the switch engaged in repairing, and both he and the other two men had lanterns to light him at his work. A train had come from Somerville, N. J., had discharged its passengers at the Jersey City station, had been pulled back west to Fiddlers, a station just outside the yard, and was being "kicked" back under the control only of the car brakes, so that it might arrive at the embarking platform to take a new load of passengers to Somerville. At the time of the accident, it was from 400 to 500 feet from the end of the platform and was running eastward toward the platform under its own momentum, which it had received from the "kick" of the locomotive, which had at the time been cut off from the cars.

Nighland was killed by the accident, the plaintiff had his leg cut off, and the other track walker escaped. Both plaintiff and the track walker testified that they heard no whistle or other sound, and the unhurt track walker that he saw no light. An employé of the defendant was upon the back of the last car, which was the front of the moving train as it was being backed down to the platform. He says that he put two white lights on the rear platform, and the red lights which mark the rear of a train behind the door; that he saw the three lights of the men working upon the track some 200 feet before the train reached them, and at once shouted and whistled and made such noise as he could, but supposed they heard him and would in time leave the track until the train was within six or eight feet, at which time he applied his brake, but too late. The plaintiff relied in part upon the failure

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 180 F.—53

of the defendant to give instructions to guard the three men by having some one detailed to watch out for cars and protect them.

The case was originally brought in the Supreme Court of the state and removed by the defendant for diverse citizenship. Upon the trial, after it appeared that the plaintiff was a citizen of the United States, resident in New Jersey, the defendant company being concededly a New Jersey corporation, the defendant moved to dismiss or remand the case for failure of jurisdiction. The complaint had, however, set up, among other grounds, that the plaintiff sued to recover under the federal employer's liability act, passed April 22, 1908, and being chapter 149 of the First Session of the Sixtieth Congress (35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]). This act provides that every common carrier by railroad, while engaged in commerce between the states, should be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, where the injury or death result from the negligence of any of the officers, agents, or employes of the carrier. Section 3 of that act provides that contributory negligence shall not bar a recovery, but that the damages shall be diminished pro tanto. The plaintiff thereupon insisted that the action was none the less maintainable in this court, though not originally brought there in view of the fact that the suit was alleged in the complaint to arise under a law of the United States. Plaintiff further contended that the dispute involved a construction of the statute itself and was not a contest about the facts only (*Austin v. Gagan* [C. C.] 39 Fed. 626, 5 L. R. A. 476), and in that connection he proved that the tracks connected by the switch in question were used by the defendant for the passage of trains from the state of New Jersey to the state of Pennsylvania, as well as for trains that had their western terminus within New Jersey. The question was therefore raised whether the plaintiff engaged in the repair of such a switch was within the statute "a person suffering injury while he was employed by such carrier in such commerce."

The defendant urged that the plaintiff assumed the risk of his position, and that the defendant had not been negligent in any way. At the close of the case, the defendant made a motion for the direction of a verdict and made several exceptions to the charge which will be considered hereafter.

Thomas J. O'Neil, for plaintiff.

De Forest Bros., for defendant.

HAND, District Judge (after stating the facts as above). The question is squarely raised in this case of the jurisdiction of this court. In so far as it depends upon diverse citizenship, the case must be remanded under Act March 3, 1875, c. 137, 18 Stat. 470 (U. S. Comp. St. 1901, p. 507). That act provides, in section 5, that, if at any time it appears that the suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the said Circuit Court, that court shall proceed no further, but dismiss the suit or remand it to the court from which it was removed, as justice requires. If, however, the dispute or controversy is one arising under a law of the United States, then this court has jurisdiction, and it makes no difference that the defendant could not have been originally sued in such a controversy outside of its domicile. Such domiciliary objections do not go to the subject-matter of the jurisdiction, and the only ground for a remand or dismissal under the act of 1875 is when "the dispute or controversy" is not "properly within the jurisdiction" of this court. Such a dispute or controversy is within its jurisdiction if the correct construction of the law, which is laid in the complaint as the basis of the right of action, is necessarily involved in the decision, and it is quite clear in this case that it is necessary to determine the mean-

ing of the phrase "person employed by such carrier in such commerce." Therefore this court has jurisdiction, even though the complaint should be dismissed because the plaintiff was not a person so employed. In short, a decision of the meaning of that act is necessary, and such a necessity gives me jurisdiction, regardless of the result of the case. *Huntington v. Laidley*, 176 U. S. 668, 20 Sup. Ct. 526, 44 L. Ed. 630.

Coming then to the merits, I will take up the points raised by the defendant seriatim. First, upon the motion to direct a verdict, I think the refusal was proper. From the evidence the jury could have found that the plaintiff, who was under the orders of Nighland, had been standing facing east so that the train came upon him from the rear, while Nighland himself was at work facing either south or west, and the other track walker stood apparently between the two. If this was the relative position of the three men, the jury could have found that the plaintiff was relying upon the other track walker or Nighland to look west and to observe the trains. If both failed to warn plaintiff of the train coming from that direction, the accident was due to their negligence in a duty reasonably imposed upon them, and, though they were fellow servants, yet under this statute their negligence was that of the master. The fellow-servant rule has been so much ingrained in both bench and bar that this point was not made on the trial; but it was directly in the evidence and justified a refusal to dismiss for lack of the defendant's negligence.

Besides, there was also evidence in the case that the rear of the train was not lighted, that no warning was given of the train's approach, and that the man at the rear, although he saw the lights, waited too long before trying to check the train. Since the accident happened at night, and the train was running swiftly and without any ready means of control, I think the case is clearly differentiated from *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758, and I certainly do not think that as matter of law there was no negligence in operating in a freight yard four cars under their own impetus, after dark, without warning and without light. None of the cases cited by the defendant have a set of facts similar to this. Upon these two grounds therefore, and without considering the question of the necessity of stationing a man to watch the three, I am satisfied that there was evidence of the defendant's negligence.

Contributory negligence being no defense, there remains only the assumption of the risk, which clearly enough is differentiated in the statute, though the usual distinctions between the two seem to me, I must say, very unscientific and vague. Perhaps the best difference is that of the degree of proximity of the supposed acceptance of the danger to its occurrence. *Schlemmer v. Buffalo, etc., R. R. Co.*, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681. The plaintiff here assumed the risk, if at all, either, first, by accepting employment; or, second, by obeying Nighland's order to hold the light. As to the first ground, the jury could have found that he had never been called on to mend a switch before, in which case they could not have found that he assumed the risk when he accepted the employment at the beginning of

the last week or the last day when he went to work. As to the second ground, to obey Nighland's order may have been contributorily negligent; but that is, I think, all it was. If there is any distinction between that and assuming the risk, as the statute requires, to put yourself in such a position is negligence rather than assumption. However, it is not necessary to decide this, because the jury, as I have said before, could well have supposed that the plaintiff relied on Nighland or the other track walker to watch for trains coming from his rear. Clearly he did not as matter of law assume the risk of being run down by an unlighted train which gave no warning to any one, which the jury could have found to be the case. The assumption can begin only after the plaintiff is aware of the master's delinquency.

The only important exception which remains is to that part of the charge which permitted the jury to find the defendant negligent in not stationing some one to watch the gang of men while at work. It was possible under the charge for the jury to find that, although there were lights upon the train, and that the trainman acted reasonably in not trying to stop the train before he did, yet the defendant was negligent in not giving standing instructions in such cases for some employé to watch for trains. The defendant offered evidence that other railroads never did anything of the sort except in cases of large gangs who obstructed each other's vision, in which cases a man is detailed for that purpose; but it is well settled that the necessity of such rule is for the jury. *Devoe v. New York Central*, 174 N. Y. 1, 66 N. E. 568; *McCoy v. New York Central*, 185 N. Y. 276, 77 N. E. 1174. It seems to me now, as it did at the time, that where a gang of men is working on the track in the dark, and where trains are being constantly operated as these were operated, it is a fair question for the jury whether the railroad company should give instructions that some one among them keep on the lookout to protect the rest from being injured. Such a person might have to engage in the work from time to time; but it is at least a fair question of fact whether some one should not all the time watch for the approach of trains. Had I myself sat upon such a jury, I should have thought that it was a reasonable necessity for the safety of the men, regardless of the practice of other roads, and that a railroad should have a rule instructing its employés always to maintain a watch, while at work in the dark. It seems quite clear that, unless this is done, the attention of all will of necessity at times become directed upon the work rather than upon the danger.

The remaining question is of the application of the act of 1908, and that turns on whether the plaintiff was employed in interstate commerce. The act in question was passed after the decision of the Supreme Court in the *Employer's Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, in which a similar act was declared unconstitutional by a divided court, because it applied generally to all carriers engaged in interstate commerce, regardless of whether or not the particular act was in interstate commerce. Some questions, however, were decided by the whole court in those cases, and one of these was that the act was not unconstitutional because it regulated the relation of master and servant; all the justices recognizing that Congress

might regulate those relations while the master and servant were employed in interstate commerce. The present act was clearly passed to meet the objection of that decision, and I think it should therefore be construed as intending to include within the term "person employed in such commerce" all those persons who could be so included within the constitutional power of Congress; that is to say, the act meant to include everybody whom Congress could include. Under this construction the inquiry becomes whether Congress could constitutionally have passed a statute regulating the relation between a carrier-master and a servant who was engaged in the repair of a track used both for interstate and intrastate commerce. Preliminarily the distinction should be noted that the act will not necessarily apply to the same person in all details of his employment. One man might have duties including both interstate and intrastate commerce, and he would be subject to the act while engaged in one and not the other. This being so, the question is whether his repairing of a switch is such employment, when the switch is used indifferently in both kinds of commerce. Suppose the track had crossed a corner of a state, and there was only one station within that state so that all trains crossing over that track must necessarily be engaged in interstate commerce. Would not a track worker engaged in the repair of such a track be engaged in interstate commerce? I do not think that he would be any the less so engaged than the engineer on the locomotive or the train despatcher who kept the trains at proper intervals for safety. Of course, it is not necessary that the man must personally cross a state line. If the repair of such a track be interstate commerce, does it cease to be such because there are two stations within the state and some of the trains start at one and stop at the other? I cannot think that this is true, although counsel have referred me to no case upon the subject and I have found none. The track is none the less used for interstate commerce, because it is also used for intrastate commerce, and the person who repairs it is, I think, employed in each kind of commerce at the same time.

Despite the earlier ruling in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, it has in recent times been stated several times by the Supreme Court that state statutes may indirectly regulate interstate commerce, even though Congress may at any time itself under its proper constitutional powers enact a provision of directly opposite tenor. *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed 819; *Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108. If, as was held in those cases, a state has the power to regulate such commerce until Congress intervenes, because it is as well within the state's proper powers, must not the corollary be true as well, that Congress may intervene, even when the effect of that intervention be incidentally the regulation of intrastate commerce as well? Could not Congress, for example, provide that all tracks used in interstate commerce must be of a standard width and weight? Would that not affect all tracks used in such commerce, although they likewise were used for intrastate commerce? Of course, any one could use any other tracks he choose for intrastate commerce; but it can surely not be a ground to limit Congress' proper powers that the track has a joint use. If so, the repair of such tracks

must be a part of interstate commerce, and under the Employer's Liability Cases, *supra*, the relations of master and servant arising between the railroad and its employes engaged in repairing the track are similarly within the power of Congress.

I am therefore of opinion that the plaintiff was at the time engaged in interstate commerce and entitled to the rights secured by this act. That being so, it is a matter of no consequence whether the train that struck him was engaged in that commerce or not. It is true that the act is applicable to carriers only "while engaged" in interstate commerce, but that includes their activity when they are engaging in such commerce by their own employes. In short, if the employe was engaged in such commerce, so was the road, for the road was the master, and the servant's act its act. The statute does not say that the injury must arise from an act itself done in interstate commerce, nor can I see any reason for such an implied construction.

I will therefore deny the new trial and direct judgment on the verdict. The defendant, if it wishes, may have a certificate on the jurisdictional point direct to the Supreme Court, though that opens only a limited review. *U. S. v. Jahn*, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87.

In re SOUTHERN CO. OF BALTIMORE CITY.

(District Court, D. Maryland. April 4, 1904.)

1. BANKRUPTCY (§ 350*)—CLAIMS—RENT—PRIORITY—WHAT LAW GOVERNS.

Whether a landlord's claim for rent accrued at the time of adjudication is entitled to priority in bankruptcy depends on whether it is entitled to priority under the laws of the state by virtue of the provision of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), giving priority to debts owing to any person who by the laws of the states or the United States is entitled to priority.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 537; Dec. Dig. § 350.*]

2. BANKRUPTCY (§ 350*)—CLAIM OF LANDLORD—RENT—PRIORITY.

Under Code Pub. Gen. Laws Md. 1888, art. 47, § 11, providing that the estate of an insolvent shall be distributed according to the principles of equity, and no creditor shall acquire a lien by *fieri facias* or attachment, unless the same be levied before the filing of his petition, a landlord not having priority for rent accrued prior to the adjudication of the tenant in bankruptcy was not entitled to a lien therefor under St. 8 Anne, c. 14, § 1, declaring that, before any chattels shall be removed from the premises by virtue of any execution thereon, rent accrued for a period not exceeding one year shall be paid, and hence the landlord was not entitled to payment of accrued rent out of the sale of assets distrainable by the bankrupt's trustees.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 537; Dec. Dig. § 350.*]

In re Southern Company of Baltimore City, bankrupt. Claim of landlord for priority for rent due at the time of adjudication. Denied.

Leon E. Greenbaum, for landlord.

Robert W. Mobray and Paul M. Burnett, for receiver.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

MORRIS, District Judge. The bankrupt corporation was lessee of a hotel building in Baltimore City and owed the landlord \$875 rent which had fallen due before the date of the adjudication and remained unpaid. There was sufficient chattel property on the premises subject to distraint to have satisfied the rent if the landlord had exercised his remedy by distraint. The chattels were taken into possession by the receivers appointed by this court and sold under orders of court, and the landlord now petitions to be paid out of the proceeds.

The landlord claims that growing out of his right to distraint he has a quasi lien recognized by the statute of 8 Anne, c. 14, § 1, which is in force in Maryland, requiring that before any chattels shall be removed from the premises by virtue of any execution there shall be paid the rent due, not exceeding one year's rent. It is quite true, as urged by counsel for the landlord in this petition, that in several federal cases under similar statutes it has been held that in bankruptcy proceedings the landlord was entitled to priority.

In *Longstreth v. Pennock*, 20 Wall. 575, 22 L. Ed. 451, under a statute of Pennsylvania similar to 8 Anne, it was held that the seizure of the chattels under proceedings in bankruptcy was in the nature of an execution and was within the equity of the statute, and that the landlord's claim was rightly given a preference. It was held to be a question of the local law of Pennsylvania.

In *Re Wynne*, 4 N. B. R. 23-29, Fed. Cas. No. 18,117, Chief Justice Chase sitting in the Circuit Court for Virginia held that the question was whether or not there was a lien under the state law and ruled that under a statute of Virginia quite similar to the statute of Anne the landlord had a lien of a high and peculiar character.

In *Re Trim*, 5 N. B. R. 23, Fed. Cas. No. 14,174, it was held by District Judge Bryan that in South Carolina, under the statute of Anne as interpreted in that state, the landlord had priority.

In *Re Mitchell*, 8 Am. Bankr. Rep. 328, 116 Fed. 87, it was held by District Judge Bradford, after very careful consideration, that under a similar statute in Delaware as against the assignee in bankruptcy the landlord was entitled to priority.

In *Malcomson v. Wappoo Mills* (C. C.) 85 Fed. 910, where receivers appointed in an equity suit had taken possession of chattel property, Circuit Judge Simonton held that under the statute of Anne, re-enacted in South Carolina, receivers in an equity suit must accord priority to the landlord's claim for rent due.

The present case, however, must be determined by the Maryland law, and the Maryland law is what the Court of Appeals of Maryland has declared it to be. The bankrupt act gives priority to "debts owing to any person who by the laws of the states or the United States is entitled to priority."

If the landlord is not entitled to priority under the state law, he is not entitled to priority under the bankrupt law.

The Maryland law has been so clearly announced by the Court of Appeals of Maryland that it presents no difficulty. In *Buckey v. Snouffer* (1856) 10 Md. 149-155, 69 Am. Dec. 129, it was held, in a case arising under the state insolvent laws, that a claim for rent due

at the time of the insolvent's application without a previous levy was not a lien on goods found on the premises and was not entitled to priority. The court said:

"Whatever may be the law elsewhere, in this state when a debtor applied for the benefit of the insolvent laws under Acts 1805, c. 110, and its supplements, his property came under the custody of the law for the benefit of his creditors. And it being well settled that goods in the custody of the law are not liable to be distrained, it follows that the distress relied upon by the appellee cannot be sustained; the property at the time having been beyond its reach. That a claim for rent is of a peculiar character and may be recovered in full, when other creditors of the tenant will be allowed only a dividend of his estate, cannot be denied. But we do not understand this to be in consequence of the rent being, per se, a lien on goods found on the premises. It is because the law allows the landlord to collect his rent by seizing the property as a pledge to be dealt with according to its requirements. The legislation upon the subject indicates that rent was never considered as possessing the attributes of a lien. If so, why was it declared by the statute of Anne that sheriffs levying executions should satisfy one year's rent? If rent was a lien before the statute, the property passed to the sheriff incumbered with the landlord's claim; and the plaintiff on the execution could have had satisfaction only after payment of the rent. But we think Acts 1805, c. 110, § 7, is decisive of the question. It gives priority to judgments, incumbrances, and liens; but it declares also that no process against the property shall have any effect thereon, except writs of *fi. fa.* actually and *bona fide* laid before the time of the application. Whether a distress for rent levied before that time is process within the intent of the act does not arise on the appeal. Nor would such a construction aid the appellee, because he made no such distress. We do not think that this view of the subject deprives the landlord of any peculiar right. The law has granted him a remedy enjoyed by no other class of creditors. If he fails when entitled to avail himself of it, he has no more reason to complain if loss results than has a judgment creditor who neglects to sue out his *fi. fa.* and have it laid before his debtor becomes an insolvent petitioner."

Gaither v. Stockbridge (1887) 67 Md. 222, 9 Atl. 632, 10 Atl. 309, was a Maryland case where receivers had been appointed for an insolvent corporation by an equity court on November 12th. A quarter's installment of rent fell due on December 1st, a few days after the goods had been sold by the receivers and removed. It was held that the receivers had not made themselves liable for the whole quarter's rent and that the landlord was only a general creditor; that before any quasi lien for rent could exist in Maryland under the statute of Anne the rent must be due and the goods remain subject to distress by the landlord.

In *Fox v. Merfeld* (1895) 81 Md. 80, 31 Atl. 583, the rule announced in *Buckey v. Snouffer* was reaffirmed. This was a case in insolvency. The landlord, after the insolvent's application, levied a distraint for rent due before the application. The Maryland Court of Appeals, commenting on the case, said:

"In no material respect does it differ from the case of *Buckey v. Snouffer*, 10 Md. 149 [69 Am. Dec. 129], which has only recently been approved by this court in *Gaither v. Stockbridge*, 67 Md. 228 [9 Atl. 632, 10 Atl. 309]. It is the declared doctrine of this state that when a debtor applies for the benefit of our insolvent laws his property passes for the benefit of his creditors, and, it being well settled that goods in *custodia legis* are not liable to be distrained upon, it follows necessarily that the distresses or either of them cannot be sustained as the property at the time the warrants were issued had passed beyond the reach of any legal right to distrain. It is also

clearly settled law of this state that rent is not per se a lien on goods found on the demised premises unless the same have been seized under a legal distress. In this case the rent had been due since the 15th of December, 1893, but Fox slept upon his rights and allowed Coblens to apply for the benefit of the insolvent law before he issued his first distress. He was without a remedy, as the property of the insolvent had passed into the custody of the law subject only to such liens or incumbrances as had been acquired before Coblens' application. It was contended at the hearing in this court that *Buckey v. Snouffer*, supra, was decided when Acts 1805, c. 110, § 7, was in force, and that the then terms of the act were wholly different to the provisions contained in Acts 1854, c. 193, which is now codified as section 11, art. 47, of the Code, and reads as follows: 'The estate of the insolvent shall be distributed according to the principles of equity, and no creditor shall acquire a lien by fieri facias or attachment, unless the same be levied before the filing of his petition.' We have not, however, been referred to any authority entertaining this view, nor are we aware that the distribution of estates in the insolvent courts has at any time, either in England or in this country, been made, save 'according to the principles of equity.'

The reasoning on which the Maryland Court of Appeals has declared that in Maryland under the state insolvent laws no priority can be accorded to the landlord's claim for rent, when no distress has been taken prior to the filing of the petition, applies with at least equal if not greater force to proceedings under the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) when administered in Maryland.

The petition must be dismissed.

IN re CHAUDRON & PEYTON.

IN re FAUST.

(District Court, D. Maryland. June 30, 1910.)

1. BANKRUPTCY (§ 350*)—RIGHTS OF LANDLORD—LIEN ON DISTRAINABLE ASSETS.

Where a landlord, not having distrained on the assets of his tenant for rent in arrear prior to bankruptcy adjudication, had no lien under the laws of Maryland, he could not obtain a lien against the proceeds of a sale of distrainable assets by the tenant's trustee in bankruptcy, under the bankrupt act, giving priority to debts owing to any person who by the laws of the state or of the United States is entitled to priority, by applying to the bankruptcy court for payment of the rent in arrear or in the alternative for permission to distrain on the goods on the premises.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 350.*]

2. COURTS (§ 366*)—FEDERAL COURTS—RULES OF DECISION—DECISION OF STATE COURTS.

Decision of a state court of last resort that a landlord, in the absence of distraint, is not entitled to priority for rent in arrear, on the insolvency of the tenant, is binding on the federal courts sitting in bankruptcy.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950, 956; Dec. Dig. § 366.*]

State laws as rules of decision in federal court, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

In the matter of Chaudron & Peyton, bankrupts. Petition of William K. Faust for payment of rent in arrears as a preferred claim. Denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Walter C. Mylander, for landlord.
Samuel J. Fisher, for trustee.

ROSE, District Judge. On the 31st of May, 1904, the bankrupts leased from the petitioner the premises 431 East Saratoga street in Baltimore city for the term of five years accounting from the 1st day of July, 1904, at and for the annual rent of \$1,500, payable in equal monthly installments of \$125 each on the 1st of each month. The tenants were to pay the bills for water rent. By the terms of the lease the landlord had the right to distrain whenever any installment of rent should be 10 days in arrear.

On the 18th of May, 1909, Chaudron & Peyton were adjudicated bankrupts. At that time two monthly installments of rent and of water rent aggregating \$259 were due and in arrears. There was then, and until after the filing of the landlord's petition now under consideration, on the premises a stock of goods of value much greater than the amount of rent in arrear. On the day of the adjudication in bankruptcy a receiver of the bankrupt's property was appointed by this court, and on the 7th of July a trustee was elected. While the receiver notified the petitioner that he would not assume the said lease, he actually kept the goods of the bankrupt, or some of them, on the property until a day or two before July 1, 1909, when he surrendered possession of the premises to the petitioner. Rent from the date of the adjudication to the 1st of July was paid by the receiver.

On the 8th of June, 1909, the petitioner filed his petition praying for the payment of the \$259 of rent in arrear at the time of the adjudication in bankruptcy, and \$77.70 the proportional amount of said rent from the 1st day of May, 1909, to the day of such adjudication, or in the alternative for permission to distrain on the goods on the premises.

At the hearing of the petition counsel for the petitioner admitted that he was not entitled to have treated as a preferred claim the \$77.70 proportion of rent which accrued between the 1st and 18th days of May, 1909. He did insist, however, with great ability and with a wealth of industry and learning, that he was entitled to an order of the court allowing the \$259 of rent due and in arrears at the time of the adjudication to be paid as a preferred claim out of the proceeds realized from the sale of the goods which were on the premises at the time of the adjudication in bankruptcy and at the time of the filing of his petition on the 8th of June, 1909. His contention is that wherever at the time of an adjudication in bankruptcy the bankrupt owes rent which is then due and in arrears, and there are at the time of such adjudication distrainable goods on the premises, the landlord may acquire a right to be paid in preference out of their proceeds, if their proceeds shall be sufficient to pay him, provided the said landlord filed a petition with the court asking for such payment, or, in the alternative, for permission to distrain on the said goods.

Such has not been the practice of this court under the present bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]). The whole question was very fully considered some six years ago by Judge Morris in the matter of the Southern Company of Baltimore city. In that case, as in this, the contention was made that the statute of 8 Anne, c. 14, § 1, is in force in Maryland. There is no question that it is. It was there insisted, as here, that in *Longstreth v. Pennock*, 20 Wall. 575, 22 L. Ed. 451; *In re Wynne*, 4 N. B. R. 23-29, Fed. Cas. No. 18,117; *In re Trim*, 5 Nat. B. R. 23, Fed. Cas. No. 14,174; *In re Mitchell* (D. C.) 8 Am. Bankr. Rep. 324, 116 Fed. 87; *Malcomson v. Wappoo Mills* (C. C.) 85 Fed. 910—it had been determined in the federal courts that under state statutes in Pennsylvania, Virginia, Delaware, and South Carolina, very similar to the statute of Anne, the landlord was entitled to the payment of his rent as a preferred claim. To these citations in the present case are added: *In re Gerson*, 2 Am. Bankr. Rep. 170; *In re Pittsburg Drug Co.* (D. C.) 20 Am. Bankr. Rep. 227, 164 Fed. 482; *In re West Side Paper Co.* (D. C.) 20 Am. Bankr. Rep. 289, 159 Fed. 241; *In re Goldstein*, 2 Am. Bankr. Rep. 603; *In re Bishop*, (D. C.) 18 Am. Bankr. Rep. 635, 153 Fed. 304; *In re Ells* (D. C.) 3 Am. Bankr. Rep. 564, 98 Fed. 967. On the other hand, counsel for the landlord with equal zeal, industry, and learning calls attention to: *Powell v. Daily*, 61 Ill. App. 552; *In re Jefferson* (D. C.) 2 Am. Bankr. Rep. 206, 93 Fed. 948; *In re Houston* (D. C.) 2 Am. Bankr. Rep. 107, 94 Fed. 119; *In re Joslyn*, 3 N. B. R. 473, Fed. Cas. No. 7,550.

It is admitted that the bankruptcy act does not expressly give any preference to the landlord. If he is entitled to priority of payment, it is under that clause of the bankrupt act which provides that priority shall be given to debts owing to any person who by the laws of the states or of the United States is entitled to priority. It is not a question as to whether in the opinion of the individual federal judge the claim for rent is one of peculiar obligation, or whether in his opinion it stands on the footing of all other honest debts justly due and owing. The sole question is whether under the state law of the state in which the property is situated the rent is under such circumstances a preferred claim. *Longstreth v. Pennock*, 20 Wall. 575, 22 L. Ed. 451.

Under the bankrupt act a creditor is allowed the same priority which he would have had had not that act superseded the state law governing the distribution of insolvent estates. *Collier on Bankruptcy* (7th Ed.), 742; *Loveland on Bankruptcy*, 780; *Remington on Bankruptcy*, § 2197; *In re Worcester County* (First Circuit) 4 Am. Bankr. Rep. 496, 102 Fed. 808, 42 C. C. A. 637; *In re Jones* (D. C.) 18 Am. Bankr. Rep. 209, 151 Fed. 108.

Judge Morris, after a review of the Maryland authorities, reached the conclusion that there could be no doubt that in Maryland rent in arrears at the time of the filing of a petition in insolvency was not a preferred claim. In that conclusion I fully concur.

In 1856 the Court of Appeals of Maryland, in the case of *Buckey*

v. Snouffer; 10 Md. 149-155, 69 Am. Dec. 129, in which a landlord after the institution of insolvency proceedings had levied distress on the property on the leased premises, said:

"Whatever may be the law elsewhere, in this state when a debtor applied for the benefit of the insolvent laws under Acts 1805, c. 110, and its supplements, his property came under the custody of the law for the benefit of his creditors. * * * And it being well settled that goods in the custody of the law are not liable to be distrained, it follows that the distress relied upon by the appellee cannot be sustained; the property at the time having been beyond its reach. That a claim for rent is of peculiar character, and may be recovered in full, when other creditors of the tenant will be allowed a dividend only of his estate, cannot be denied. But we do not understand this to be in consequence of the rent being, per se, a lien on goods found on the premises. It is because the law allows the landlord to collect his rent by seizing the property as a pledge, to be dealt with according to its requirements. * * * The legislation upon the subject indicates that rent was never considered as possessing the attributes of a lien. If so, why was it declared by the statute of Anne that sheriffs, levying executions, should satisfy one year's rent? If rent was a lien before the statute, the property passed to the sheriff, incumbered with the landlord's claim; and the plaintiff in the execution could have had satisfaction only after payment of the rent. * * * We do not think that this view of the subject deprives the landlord of any peculiar right. The law has granted him a remedy enjoyed by no other class of creditors. If he fails, when entitled, to avail himself of it, he has no more reason to complain, if loss results, than has a judgment creditor who neglects to sue out his *fi. fa.* and have it laid before his debtor becomes an insolvent petitioner."

Nearly 40 years afterwards, in the case of *Fox v. Merfeld*, 81 Md. 80, 31 Atl. 583, decided in 1895, only three years before the enactment of the present bankruptcy act, *Buckey v. Snouffer* was expressly affirmed. The landlord after the insolvent's application levied a distraint for rent due before the application. The Court of Appeals said:

"In no material respect does it differ from the case of *Buckey v. Snouffer*, 10 Md. 149 [69 Am. Dec. 129], which settled the law in this state, and has only recently been approved by this court in *Gaither v. Stockbridge*, 67 Md. 228 [9 Atl. 632, 10 Atl. 309]. It is the declared doctrine in this state that, when a debtor applies for the benefit of our insolvent laws, his property passes in custodia legis for the benefit of his creditors, and, it being well settled that goods in custodia legis are not liable to be distrained upon, it follows necessarily that the distresses, or either of them, cannot be sustained, as the property, at the time when the warrants were issued, had passed beyond the reach of any legal right to distrain. It is also clearly settled law in this state that rent is not per se a lien on goods found on the demised premises, unless the same have been seized under a legal distress. In this case the rent had been due since the 15th of December, 1893, but *Fox* slept upon his rights and allowed *Coblens* to apply for the benefit of the insolvent law before he issued his first distress. He was then without a remedy, as the property of the insolvent had passed into the custody of the law, subject only to such liens or incumbrances as had been acquired before *Coblens'* application. * * * It was contended at the hearing in this court that *Buckey v. Snouffer*, supra, was decided when Acts 1805, c. 110, § 7, was in force, and that the then terms of the act were wholly different to the provisions contained in Acts 1854, c. 193, which is now codified as section 11 of article 47 of Code, and reads as follows: 'The estates of the insolvent shall be distributed under the order of the court according to the principles of equity, and no creditor shall acquire a lien by *feri facias* or attachment, unless the same be levied before the filing of his petition.' It is insisted that this sec-

tion provides another and entirely different method for the distribution of the estates of insolvents. We have not, however, been referred to any authority sustaining this view, nor are we aware that distribution of estates in the insolvent courts has at any time, either in England or in this country, been made, save 'according to the principles of equity.'"

It is not contended on behalf of the landlord in this case that the Court of Appeals has ever reversed either of these decisions.

It is not claimed that, under the insolvent laws as administered in this state before the passage of the national bankrupt act, a landlord who did not distrain for rent before the filing of an insolvent petition was paid in preference to the other creditors. It is most earnestly urged, however, upon the court that the broad language of *Buckey v. Snouffer* and *Fox v. Merfeld* is obiter; that in each of these cases the landlord sought to distrain after the appointment of an insolvent trustee without first obtaining permission of the insolvent court; and that he could not do, the goods being in the custody of the law.

It is argued that if the landlord, instead of proceeding to distrain, had filed a petition in court asking leave either to distrain or to be allowed his rent, he would have been given one relief or the other.

I have personally examined the record in *Fox v. Merfeld*. It there appears that the landlord did file such a petition, and that its prayer was denied.

The petitioner calls attention to a number of decisions in Maryland, as, for example: *Washington v. Williamson*, 23 Md. 244; *Everett v. Neff*, 28 Md. 176; *Thomson v. Balto. & Susquehanna Steam Co.*, 33 Md. 312; *Wanamaker v. Bowes*, 36 Md. 42; *Gaither v. Stockbridge*, 67 Md. 224, 9 Atl. 632, 10 Atl. 309; *Thompson Ry. Co. v. Young*, 90 Md. 278, 44 Atl. 1024.

He argues that these cases apply principles which are in the opinion of the learned counsel for the landlord logically irreconcilable with the doctrine of *Buckey v. Snouffer* and *Fox v. Merfeld*. The difficulty in the way of this court accepting this contention is made manifest by the fact that the case principally relied on by counsel for the landlord is *Gaither v. Stockbridge*, 67 Md. 224, 9 Atl. 632, 10 Atl. 309, and that case the Court of Appeals of Maryland, in the subsequent case of *Fox v. Merfeld*, said is in entire harmony with the doctrine which it enunciates in *Fox v. Merfeld*.

In the case of *Gaither v. Stockbridge* a receiver was appointed for the Duffy Malt Whisky Company on the 12th of November, 1886. He took possession of the goods and chattels on the landlord's property and remained in possession of them on such premises until the 22d of November, 1886. The goods were then sold, and on the 29th of November the receiver tendered possession of the warehouse to the landlord. An installment of rent fell due on the 1st of December. It was held that the landlord was not entitled to the payment of this rent out of the proceeds of the goods. In that case the court said, in discussing the various questions which arose, that the ordinary receiver of a court of chancery does not stand in the

same relation to the property as does an assignee in bankruptcy or in insolvency. It adds:

"Where the goods of the lessee are remaining on the demised premises at or after the time when the rent becomes due, and the landlord seeks to exercise his right to distrain, and the only impediment to the exercise of that right is the possession of the court, by its receiver, it seems to be a settled rule of practice to order the receiver to pay the arrears of rent out of the proceeds of the property, or to permit the landlord to proceed with his distress, notwithstanding the possession of the receiver."

The text-writers and the decided cases all recognize that in Maryland a landlord who fails to exercise his right to distrain before insolvency proceedings are begun has no right to preferential payment. 2 Poe on Practice, § 810; Purnell on the Law of Insolvency in Maryland, § 127, p. 71; 2 Tiffany on Landlord & Tenant, § 1900, note 12; In re Gerson, 2 Am. Bankr. Rep. 175.

The industry of the learned counsel for the landlord has led him to examine the records of the chancery courts of first instance in Baltimore city and to show that it is their habitual practice, in cases where corporations are being wound up by receivers, to allow rent due and in arrear at the time of the appointment of a receiver to be paid as a preferred claim. For this practice, the distinction made by the Court of Appeals of the state between a receiver appointed by a court of chancery in the exercise of its ordinary jurisdiction and an assignee or trustee in insolvency is a sufficient explanation.

It may be that there is very little difference in effect between the winding up of an insolvent corporation by a chancery receiver and the winding up of an estate of an equally insolvent individual or corporation by a trustee in insolvency under the state law or a trustee in bankruptcy under the federal law. But the question is not what in the opinion of a federal judge the state law ought to be, but what it is. He may think that a distinction does not rest upon a real difference in principle, but if the distinction is well established in the state law so far as he is concerned that is the end of it. In so saying, I do not mean for one moment to intimate any opinion that the distinction taken by the courts of Maryland between the rights of a landlord to whom rent is due at the time of the appointment of a receiver and a landlord to whom rent is due at the time of the institution of proceedings in insolvency or bankruptcy is not well founded.

The counsel for the landlord calls attention to the fact that the Code of Maryland (sections 376 and 377 of article 23) provides that a bill may be filed by any creditor or stockholder against any corporation alleged to be insolvent, and if the allegations be sustained a receiver may be appointed and the corporation dissolved, and that:

"Whenever any such corporation shall have been adjudged to be dissolved, * * * all its property and assets of every description shall be distributed to the creditors of said corporation in the same manner that the property and assets of an insolvent debtor are distributed under the provisions of article 47 of the Code of Public General Laws, but no discharge shall be granted to said corporation."

Article 47 is the insolvent act.

He has found several cases in which, where corporations have been decreed to be dissolved, the equity courts of first instance in Baltimore city have allowed priority to rent claims.

It does not appear that the question as to whether the receiver in such case is the ordinary chancery receiver or is an official with the rights and duties of an insolvent trustee had been considered by the court. Certainly the Court of Appeals of Maryland has not as yet passed on or approved such practice.

He also calls attention to the case decided in this court under Bankruptcy Act March 2, 1867, c. 176, 14 Stat. 517; and reported as *In re Rose*, 20 Fed. Cas. 1176. In that case Judge Giles held the landlord's claim for rent to be entitled to preferential payment. The opinion is a very short one and seems to have been given without consideration of the Maryland cases.

The petition will therefore be dismissed.

PRIMEAU v. GRANFIELD.

(Circuit Court, S. D. New York. March 15, 1910.)

1. CORPORATIONS (§ 117*)—SALE OF STOCK—RESCISSION FOR FRAUD—NECESSITY FOR RESTORATION.

Where the buyer of stocks had sold most of them, he would not be entitled to a rescission of his contract of purchase for misrepresentation of the seller, being incapable of tendering restoration of what he got.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 506; Dec. Dig. § 117.*]

2. CONTRACTS (§ 133*)—ILLEGAL CONTRACT.

Even a wrongdoer is not the prey of any spoliator who may outwit him, and while the law will enforce no part of a contract, the performance of any stipulation of which is forbidden, the parties do not become outlaws when they make such a contract, and their rights in equity as well as at law are the same as those of others in so far as they do not require the enforcement of any part of the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681-700; Dec. Dig. § 133.*]

3. EQUITY (§ 65*)—RIGHT TO RELIEF—UNCONSCIONABLE TRANSACTIONS.

The iniquitous conduct which will bar a suitor in equity need not be directed against the defendant, but must be such that the prosecution of the suitor's rights will of itself involve the protection of wrongdoing.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 65.*]

He who comes into equity must come with clean hands, see note to *Knapp v. S. Jarvis Adams Co.*, 70 C. C. A. 543.]

4. PRINCIPAL AND AGENT (§§ 23, 69*)—EXISTENCE OF RELATION—EVIDENCE.

Evidence held to show that money sent by complainant to defendant, for purchase of mining stocks was sent to him as agent, and that he so acted, so that plaintiff was entitled to an accounting for secret profits obtained by defendant through buying the stocks himself and reselling them to complainant at an advanced price.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 41, 130-145; Dec. Dig. §§ 23, 69.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Bill by Paul A. Primeau against Horace Granfield. Decree for complainant.

Charles J. Hughes, Jr., and Mark Hyman, for Primeau.

Edmund F. Richardson, Wm. H. Davis, and Frederick Lienau, for Granfield.

HAND, District Judge. This is a final hearing on a bill in equity for an accounting. The bill is voluminous, and there have been ample amendments, but the frame of it remains simple. It alleges that the complainant, Primeau, remitted from the East from time to time moneys to the defendant, Granfield, to be invested in shares of stock in mining companies and in mining claims, all in the state of Colorado. Granfield acted in the matters, according to the bill, as agent and fiduciary of Primeau, and professed to be buying the properties from third persons and to be paying to them the sums which Primeau sent him. In fact Granfield was the owner himself of all of them and the sums which he got from Primeau were much more than what he had paid for the properties. Because of his secret profits made upon these representations and the fiduciary relations which existed between the parties, Granfield, became bound to account to Primeau. The bill adds in certain cases charges of misrepresentations as to the character and value of the properties purchased. The answer concedes that the parties had dealings in mining shares and mining claims; that Primeau bought of Granfield; that the property Granfield in fact owned; and that he made profits in his sales. It takes issue upon the existence of any fiduciary relation between the two; alleges that Primeau perfectly understood that he was buying of the owner; that he dealt at arm's length; and that all the profits were the result of a legitimate gain in bargain and sale. It likewise denies any of the misrepresentations alleged.

The transactions extended over a period of about seven years, from 1894 to 1901, and comprised 10 separate corporations or claims, in a number of which there were several transactions. In all, the transactions covered by the briefs amount to 21, not including a claim for a general balance struck between the parties in the fall of 1899. The testimony was immensely voluminous, both oral and documentary, and there was an absolute conflict of testimony between the parties. To the solution of this conflict there are accessible many contemporaneous documents, consisting in the main of correspondence between the parties, during large parts of the period in question. Primeau at the outset of their relations was quite unacquainted with mines and mining. He is a man of no education, extremely illiterate, but shrewd, at least as a salesman of stock to Eastern customers on a small scale, and apparently of unbounded energy and little or no scrupulousness in the means by which he attains his purposes. Granfield was originally a salesman of books who drifted somewhat fortuitously into the business of speculating in mines at the time when Cripple Creek began to show that extraordinary richness as a gold producing territory which has since become so well-known. He is a man of decided mental power, expresses himself with vigor and pre-

cision, and is in literacy and all intellectual attainments much Primeau's superior. Though he was unscrupulous in his business dealings, his testimony reads like that of a very capable and energetic man of affairs. I have no trouble in finding that he acquired an ascendancy over Primeau and that Primeau relied upon his judgment and information, when the purchases were made. Granfield's home is in Mt. Vernon in this state, but he early maintained regular connections in Denver and was repeatedly in Colorado for long periods of time. While Primeau also went to Colorado on several occasions the measure of his acquaintance with the district of Cripple Creek and with its speculations was not in the least comparable to Granfield's, and such personal acquaintance as he ever got was for the most part in the company of Granfield, and, I think I may fairly infer, under the supervision of Granfield. Those instances in which this was not the case, do not materially affect the fact that it was through Granfield that he got such information as he did ever get about the properties he was buying. I have been obliged to go into each of the transactions in detail to determine the relations of the parties, in view of the unsatisfactory character of the testimony of each, but there are some preliminary matters which must be determined before the details properly come up.

First, I have disregarded altogether the alleged misrepresentations of Granfield regarding the properties. This is not because I think he did not mean to defraud Primeau by false statements, because in several cases I think he did, even after all allowances are made for the natural exaggeration of expression and anticipation which the astounding discoveries thereabouts to a large extent excused. The reason for disregarding the statements is that Primeau has long since himself sold and so passed on to others most of the properties he bought. These he peddled about in the East and even in France to small investors generally, both personally and through the mediation of agents. While he retains some of the property he is, in no instance able to offer a restoration of what he got, and he cannot therefore make the tender necessary to a rescission of any of the contracts. His remedy for any fraud must be at law for damages, and I have therefore confined him to the theory of his bill; that is, that Granfield received the moneys in a fiduciary capacity and misappropriated a part of them. While the misrepresentations necessarily have an important weight incidentally in the relations of the parties, no relief can be granted by virtue of them.

Granfield's affirmative defenses are two: First, laches, which at most was no more than a delay of three years, until Primeau began to collect testimony, and which I dismiss; and, second, Primeau's disqualification to come into a court of equity because of his own inequitable conduct. The latter has some serious aspects, and, in view of the fact that it was nowhere pleaded, and—despite Granfield's efforts to show to the contrary—no where indicated in the trial, I should be obliged to allow the case to be reopened, if I thought that a *prima facie* case had been made out against the bill. The grounds for this defense are three: First, Primeau's fraudulent change of

several letters; second, his suppression of a great number of letters; and, third, his iniquitous dealings with his customers.

Upon the first issue, there are four letters urged upon me, each of which bears evidence of some change, and each of which was put in evidence before any allegations were put in the bill of the transactions to which they refer. This satisfies me that they were never intended to be used in the suit for the purpose of supporting a fraudulent claim, and that if they were forged it was for a different purpose. Had they been changed for this suit, Primeau would have insisted on some claims being made which they would support. By far the most plausible explanation of them is that, if Primeau changed them at all, which I think most likely, he changed them for the purpose of showing to his customers that he had paid more for the properties than in fact he had. It was, for instance, most improbable that he should have thought he could have got from Granfield \$10,000 by so simple a means as raising complainant's Exhibit 431. The same reasoning applies in regard to complainant's Exhibit 380. While this explanation is most discreditable to him, and fortifies the inferences regarding his dealings with his customers, it disposes of the contention that he was corruptly using in the cause forged documents. I do not believe this to be true, and so I need not consider whether or not I should follow *Harton v. McKee* (C. C.) 73 Fed. 558, if on the facts it was applicable.

In regard to the second defense, the suppression of documents, I should have thought nothing of it, but for Primeau's silly explanations. That he should not produce many of the very numerous letters which passed between them is not only not surprising, but is to be expected. Granfield also failed to produce a great many letters. In the case of Primeau especially, having no fixed place of business, being a man of extremely slovenly business habits, I am rather surprised that he can produce as many as he does. However, his attempts to explain their disappearance are childish, and I do not believe them. These attempts do not by any means indicate that he suppressed the letters, but only that he supposed he must show some excuse other than the truth. If his own letters to Granfield showed any diversity in the facts from those of Granfield's he produces, some suspicion might justly ensue, but they corroborate and serve to complete the extant letters of Granfield, and do not in any case that I can recall indicate that any of Granfield's lost letters were by their contents damaging to Primeau. The correspondence which is produced certainly bears every internal evidence of being selected indiscriminately. How that could be the case if there had been any intelligent suppression of damaging letters I cannot see. Granfield makes some effort to show that some of those which do not appear are especially significant, but he does not convince one. It is true that for a continuous period of some length all correspondence seems to have disappeared that had any consequence, but as to that period I have allowed nothing to Primeau. The utmost which Granfield can ask in any case, and even if Primeau had suppressed correspondence, is that he must suffer from the presumption of what they would have shown. I know of no

rule which directs me to turn him out of court. However, as I have said, I do not regard the charge of suppression as substantiated *prima facie*.

The remaining objections concern Primeau's treatment of his customers. His own counsel attempts to explain the letters which he wrote to Granfield requesting him to make representations to his customers, but his efforts are wholly unsatisfactory in my judgment. It is quite clear that Primeau repeatedly suggested to Granfield that he write decoy and delusive letters. I find no instance in which I am certain that Granfield acceded to his requests, except respondent's Exhibits 214 and 215, in which Granfield wrote one letter to be used as a decoy to a customer, misrepresenting the price at which Primeau was to buy, and another letter to Primeau stating the real price. From a number of Primeau's letters I am, however, quite satisfied that he was ready to make any representations which were necessary to procure the sale of his stocks and claims, and that he tried to induce Granfield to join him in deceiving the buyers. It seems to me idle to attempt by ingenious explanations to account innocently for the suggestions which he kept making to Granfield.

However, there is no direct evidence of any single sale of stock which was procured by misrepresentations unless it be some of the sales made to Brosseau and Roberge. These sales comprise but a small part of the money for which Primeau now asks an accounting, and there is no way that I know in which the money he procured from Brosseau and Roberge under false representations, if any, can be distinguished from the other money. Granfield's effort is rather so to discredit Primeau by proof of his dealings with his customers as to make it impossible for him to come into a court of equity. The upshot of his contention is that the money which Primeau got from his customers, however it was obtained, was fair spoil for anyone else. Of course, if Granfield and he were together engaged in a corrupt conspiracy to defraud Primeau's customers, and if, in pursuance of that conspiracy, Granfield obtained the money, Primeau could not then come into this court and ask for an accounting based alone upon the corrupt contract.

While I am not wholly satisfied that the parties entered into a contract involving the swindling of Primeau's customers as an incident to its performance, certainly that is the worst construction that the evidence admits and for the purpose of argument I will assume it to have been the fact. After Primeau got the money he turned it over to Granfield to be eventually paid to the sellers. We may assume that since the contract between them contemplated the acquisition of the money by fraud neither party could have enforced any of its stipulations. Nevertheless, when Primeau got the money, it was his, in equity as at law, and all of it remained his money after it went into Granfield's hands, because Granfield took it only as his agent. Allowing to the utmost the invalidity of all the stipulations of the contract, the fact remains that Primeau's rights to the money are quite independent of the enforcement of any part of the contract, even if he had acquired it through the past performance of the contract.

When Granfield took it as agent, there remained nothing to be done, under the contract, but his payment of it to the supposed sellers, and that was an obligation that Primeau does not seek to enforce. He relies wholly upon his ownership of it once acquired, Granfield's possession of it as agent, and his failure to pay it over in accordance with his principal's instructions. Even a wrongdoer is not the prey of any spoliator who may outwit him. It is true that the law will enforce no part of a contract the performance of any stipulation of which is forbidden, but the parties do not become outlaws when they make such a contract, and their rights in equity as well as at law are the same as those of others, in so far as they do not require the enforcement of any part of the contract. This is the result of the following cases, all of which were in equity: *Sharp v. Taylor*, 2 Phil. Ch. 801; *Harvey v. Varney*, 98 Mass. 118; *Heath v. Van Cott*, 9 Wis. 516; *Trice v. Comstock*, 121 Fed. 620, 57 C. C. A. 646, 61 L. R. A. 176; *Owens v. Owens*, 23 N. J. Eq. 60; *American Association, Ltd., v. Innis*, 109 Ky. 595, 60 S. W. 388; *Pitzele v. Cohn*, 217 Ill. 30, 75 N. E. 392.

I do not at all agree with Primeau that the iniquitous conduct which will bar a suitor in equity must be directed against the defendant. The rule in trade-mark cases is quite enough to disprove that limitation of the rule at the present time, however it may have been originally. On the other hand, I do agree with him that the conduct must be such that the prosecution of the suitor's rights will of itself involve the protection of wrongdoing. It is quite true that again in the trade-mark cases the false representations which disqualify the complainant need not be a part of the very trade-mark which the complainant wishes to protect (*Manhattan Medicine Company v. Wood*, 108 U. S. 218, 2 Sup. Ct. 436, 27 L. Ed. 706), but they must be used in immediate association with the trade-mark. While the cases do not explicitly so decide, I think the proper interpretation is that the association of the misrepresentation must be so close that they may be regarded as together one statement made to the public. There is at least no indication in any of the cases that if the owner of the trade-mark had used a similar misrepresentation in a way quite disconnected with the trade-mark, although it was to effect the sale of his goods, such misconduct would put his whole business at the mercy of fraudulent competitors. In short, the "transaction," which must be illegal in order to defeat him, is the entire representation of which the mark is fairly a part. Since, therefore, Primeau need not rely upon the illegal contract, but only upon rights which arose through its performance, I will not dismiss his bill.

A further general objection is that Primeau could not have supposed Granfield to be his agent, because he knew that Granfield was acting in the interest of unknown sellers who paid him an indefinite commission for his services. This objection goes to the very heart of the bill's equity, because unless the fiduciary relation existed between Primeau and Granfield, Primeau could not claim any interest in the funds which he paid to Granfield without rescinding the transaction. In other words, if Primeau when he paid over the money,

intended it at once to belong either to Granfield or to Granfield's principal, he cannot in equity reclaim it without completely unravelling the transaction. He cannot at once claim to be the buyer of the property and have any interest in the purchase price, even though Granfield had wrongfully represented to him that when it was paid, he (Granfield) would hold it in trust for another.

I think that Primeau did not suppose that he lost the right of control over the money, until Granfield paid it to the sellers, and that whatever he thought were Granfield's relations with them, he meant to retain the right to change its destination and indeed to recall it, while it was in Granfield's hands. My reasons for thinking this are that it was the custom of Primeau to change the destination of moneys after Granfield had received them, which he could not have done if the money belonged to the sellers as soon as it was sent. Again, instead of sending on the whole purchase price at once, Primeau usually sent it on in small installments, though he understood that the sellers were to be paid in one or more substantial payments. From all the correspondence I am satisfied that Primeau looked upon the money he sent on as his own, until Granfield should have paid it over to the sellers. While Granfield contests the conclusion that he was acting for outside persons at all, I do not understand that he contends that if it be once admitted that he was acting for outsiders, I should assume that the payments when made must be treated as made to him irrevocably as the agent of the sellers. When, therefore, Granfield told Primeau that he had paid out to third persons what he was in fact keeping for himself, it was of no consequence whatever that Primeau supposed Granfield was getting commissions from such persons or that he was their agent. The payments which Granfield said he made never took place, and the money always remained Primeau's just as they had before he said he had paid it over.

Before taking up the transactions in detail, it will be more convenient to consider some of the questions which recur in a number of instances. The most important of these is Granfield's contention that the letters which he wrote and which purport to show that he was offering properties of third persons, Primeau well understood to be mere decoys, designed to conceal from Primeau's customers that they were both disposing of their own holdings. He even explains Primeau's own letters to him as written in the same vein, and that Primeau used to show them to his customers before they were sent, as evidence of his own good faith. In the first place, I must premise any consideration of this explanation by saying that it must be well proved. When a man seeks to put so tortured an interpretation upon his own letters, and that too a most dishonest one, I shall, as judge of the facts, look very suspiciously on it, and expect of him that he make clear proof of it before I believe him.

It is, however, true that the parties at times clearly contemplated doing just this, and in at least one instance (respondent's Nos. 214 and 215), that they did so. Unhappily the improbability of Granfield's explanation is therefore not so great, as it should be for the sake of the good faith of each, and the letters must be considered as they arise.

One check, however, for their authenticity is absolute, and that exists whenever either Granfield or Primeau mentions the price at which Primeau is to buy. In all cases Primeau sold to his customers at greatly advanced prices. It would have been fatal to Primeau's supposed use of the letters to mention the price that he was in fact paying, and any letters which do mention the actual prices may be taken as certainly authentic. There are a great many such.

Again, when in any given transaction there is one such letter which speaks of property as belonging to a third person who will sell for a given price, the rest of the correspondence touching that transaction and describing it as a proposed purchase from third persons must be taken as authentic, even when the price is not mentioned, because once the esoteric interpretation be abandoned it must be abandoned altogether as to that particular bargain.

Still another indication of the truth of the letters is to be found in Granfield's very frank though discreditable admissions that he thought it no wrong in general to deceive his customers regarding the actual ownership of those properties which he sold them.

In some cases I have been somewhat puzzled to determine whether I should interpret phrases in the correspondence as indicating one of two possible situations. Granfield's letters at times can be read as meaning either that he had a good bargain which he could close with the seller for Primeau, or that he had already closed it for himself and needed the money to complete the purchase. There is a great difference between the two, because, in the first, Primeau was sending him money with which to buy for him, while in the second he was making a purchase of Granfield who simply needed the money to discharge his own commitments to outsiders. In solving this ambiguity I have had recourse to this reasoning: In all cases of the sort, Granfield was misstating the truth, because either he had in fact already bought and paid for the property, or he owed upon it only a small part of what he received from Primeau. Of course he must have had some motives for falsely saying that the money was to be paid to third persons, and the most reasonable motive was to conceal the fact that he was really selling to Primeau. This is corroborated by his own admissions that he thought it quite honest to deceive people about his own ownership of what he sold them, and that to Primeau especially he "did this" "in all our deals" (Respondent's Proofs, 1171). Where there is doubt about which of these two constructions a letter should bear, I have therefore felt obliged to select that which Granfield has spoken of as the usual course between them. In a few cases it is quite clear that the other should be taken.

Finally, the character in general of the correspondence is of consequence. When the parties did determine upon writing decoy letters they did not speak ambiguously as respondent's Exhibits Nos. 214 and 215 plainly show. The credulity of Primeau's customers did not require fine maneuvering or delicate finesse, and besides it was very easy to write the kind of letter which answered best. The passages showing a fiduciary relation occur in letters with all sorts of other material, and bear every internal evidence of frank communica-

tion between two men who have continuous and intimate business relations. It is in most cases very difficult to believe that they could have been intended for the deception of third persons, and, unless I have been entirely thrown off the truth, I have no trouble in dismissing Granfield's interpretation of them, as the mere fabrication of a man who is put to an explanation, and who seizes the only possible one, which can gain any color from the relations of the parties.

I shall therefore treat these letters as genuine except in such cases as I indicate a contrary opinion.

The master will take and state the account in accordance with the foregoing directions, following the procedure laid down in Smith's Chancery Practice, vol. 2, p. 127 et seq., except that in place of taking out warrants from the clerk's office, the account will be filed with the master who will prescribe suitable times for each step. After the account is once stated, the master must take up the question of tracing the trust funds into the Raaler lease, as claimed in the bill. Primeau insists that some of the moneys which Granfield wrongfully got from him he used for the development of a mining claim called the Raaler, which he held on lease from a mining corporation.

The parties wish to be further heard upon the question as to the tracing of these funds, and I shall therefore not pass upon it now. Let them fix upon any convenient date, and I will hear them at chambers.

UNITED STATES v. ALLEN et al.

(Circuit Court, W. D. Washington, W. D. January 26, 1910.)

No. 1,072.

1. MINES AND MINERALS (§ 45*)—ENTRY OF COAL LANDS—CANCELLATION OF PATENTS—FRAUD.

Evidence *held* to show that two patents of public coal lands running to two persons were acquired as part of a general plan for procuring title in behalf of a single association to an area of coal lands in excess of the limits prescribed by law.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 131; Dec. Dig. § 45.]

2. MINES AND MINERALS (§ 42*)—ENTRY OF COAL LANDS—PATENTS—VALIDITY—FRAUD.

Where two persons were engaged in an unlawful combination to procure title in behalf of a single association to an area of coal lands in excess of the limits prescribed by law, that only two claims aggregating 320 acres allowed by Rev. St. § 2347 (U. S. Comp. St. 1901, p. 1440), were actually patented to them, would not make the patents valid; the unlawful combination making the proceeding illegal from the beginning.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 123; Dec. Dig. § 42.*]

3. MINES AND MINERALS (§ 45*)—VOIDABLE PATENT—CANCELLATION—BONA FIDE PURCHASER.

A corporation was formed to take over two patented coal land claims, the patents being in fact voidable, having been illegally obtained, one of the incorporators being father of the patent holder, and he and another

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

incorporator having been parties to the transaction whereby the patents were obtained. The holder of the patent subscribed for all but four shares of the capital stock and sold to the corporation the two claims in payment of her subscription. Upon issuance to her of the shares she immediately transferred part of them to the treasurer of the company to be sold for the company's use. She was made secretary of the corporation and her father manager, and they continued to hold those offices until the present time, covering a period of five years. *Held*, that the corporation was not a bona fide purchaser for value without notice precluding the government from proceeding to cancel the patents, as one holding a voidable patent to public lands cannot protect himself against the process of the government by forming a corporation in which he is the dominant factor and conveying to it the premises which he has acquired in violation of law.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 131; Dec. Dig. § 45.*]

In Equity. Action by the United States of America against Watson Allen and others. Decree for complainants.

Elmer E. Todd, U. S. Dist. Atty., and Henry M. Hoyt, Sp. Asst. U. S. Atty.

Graves & Murphy, for defendants Helen Pack Wilson and Wilson Coal Company.

DONWORTH, District Judge. The object of this suit is to cancel a patent issued to the defendant Helen Pack Wilson, covering the northwest quarter of section 10 in township 14 north of range 1 west of the Willamette meridian, situated in Lewis county in the Vancouver land district, in this state. Defendants Watson Allen and wife are merely nominal parties and have filed a disclaimer. The defendants really interested in the controversy are Helen Pack Wilson and Wilson Coal Company. As the basis of the suit, complainants charge that the patent was obtained by fraudulent evasion of the provisions of the statutes (Rev. St. §§ 2347-2351 [U. S. Comp. St. 1901, pp. 1440, 1441]) governing the disposition of the vacant coal lands of the United States. The evidence leaves this issue free from doubt. The contention of the government is so clearly established that any detailed reference to the proof would be a work of supererogation. The important facts, however, may be recapitulated.

Some time prior to the year 1901, R. A. Wilson and his son George B. Wilson became aware of the existence of coal on certain public lands in Lewis county. They and several of their acquaintances filed declaratory statements in the Vancouver land office for the acquisition of a number of quarter sections of such lands; all the claims either adjoining or being in close proximity. When the time came for making entry and payment, the proceedings thus initiated were suffered to lapse, probably by reason of inability to make payment in accordance with the terms of the statute, \$3,200 for each claim. Among those who filed these declaratory statements and allowed them to lapse was L. G. Wilson, a nephew of R. A. Wilson. The several members of the Wilson family were evidently acting in concert and composed in fact an association of persons formed for the purpose

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of acquiring coal lands. Their conduct clearly proves this. R. A. Wilson was the head of the association and managed and directed the proceedings for all. After the abandonment of the first proceedings, he was still of the opinion that a successful financial venture could be made by the acquisition and development of these coal lands, and in February and March, 1901, he caused new declaratory statements to be filed, as follows:

"Coal declaratory statement No. 506, by Helen Pack Wilson for the northwest quarter of section ten (10), township fourteen (14) north, range one (1) west, W. M., filed February 20th, 1901.

"Coal declaratory statement No. 507 by Katie Roberts Wilson for the southwest quarter ($\frac{1}{4}$) of the northeast quarter, and west half ($\frac{1}{2}$) of the southeast quarter ($\frac{1}{4}$) of section ten (10), township fourteen (14) north, range one (1) west, W. M., filed February 27th, 1901.

"Coal declaratory statement No. 508 by Minn Marie Wilson for the east half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$) and the east half ($\frac{1}{2}$) of the southeast quarter ($\frac{1}{4}$) of section ten (10) township fourteen (14) north, range one (1) west, W. M., filed February 27th, 1901.

"Coal declaratory statement No. 509 by James R. Winston for the northwest quarter ($\frac{1}{4}$) of section fourteen (14) township fourteen (14) north, range one (1) west, W. M., filed February 27th, 1901.

"Coal declaratory statement No. 511 by Salomon Lauridsen and Henry Kamps, as an association, for the southeast quarter ($\frac{1}{4}$) of the northeast quarter ($\frac{1}{4}$), east half ($\frac{1}{2}$) of the southwest quarter, ($\frac{1}{4}$), and the southeast quarter of section four (4), township fourteen (14) north, range one (1) west, filed March 26th, 1901."

These several locators were all acting in concert, and R. A. Wilson was their joint representative. Helen Pack Wilson and Minn Marie Wilson are his unmarried daughters, who at that time, and for a considerable time thereafter, lived with him at his home in Seattle. Katie Roberts Wilson is the wife of L. G. Wilson. Later Virgil R. Wilson, another nephew of R. A. Wilson, made application to enter as coal lands the southwest quarter of the same section 10 above mentioned, on the understanding that he would receive about \$500 for his services in procuring the land and would turn it over to the interests controlling the other claims. Neither R. A. Wilson nor any of his associates had sufficient means to make payment for the lands at the land office and provide for development work, and they endeavored to find some person who would finance their enterprise. In May, 1901, R. A. Wilson made the acquaintance of P. C. Richardson and succeeded in making a financial arrangement with him. Richardson did not have much money, but he had some Seattle real estate and a steamboat on the Yukon river, both of which he expected to be able to convert into cash, and to realize therefrom about \$21,000 for the business venture. Pursuant to this understanding between R. A. Wilson and Richardson, the Sterling Coal Company was formed under the laws of the state of Oregon; its capital stock being fixed at \$500,000, and the incorporators being R. A. Wilson, George B. Wilson, and one resident of Oregon who had no real interest in the company. When that company was organized, R. A. Wilson and Richardson's attorney made a written proposition to the company reciting that they held title by warranty deed to 1,040 acres of coal and timber land in Lewis county, Wash. (describing it),

giving its estimated value as \$500,000 and offering to sell and convey it to the company in full payment of the capital stock. This proposition the company accepted. The lands so described included the quarter section involved in this suit and the other lands above described, though none of the claims had then reached the stage of payment and entry.

To assure the company that the proposition would be carried out, the several locators (including Helen Pack Wilson and Minn Marie Wilson) made deeds conveying the lands to R. A. Wilson, and he executed a declaration of trust stating that he held the conveyances in trust for the company. None of the deeds nor the declaration of trust was placed on public record. Richardson succeeded in selling his Seattle property and paid \$8,300 into the hands of George B. Wilson as treasurer of the Sterling Coal Company. Richardson also put the Yukon river steamboat at the disposition of the company; but nothing was ever realized from that asset, chiefly by reason of the subsequent falling out between the Wilsons and Richardson. In March, 1902, Helen Pack Wilson and Virgil Wilson duly entered their claims at the Vancouver land office. The \$6,400 paid to the government at that time for these two claims was taken from the treasury of the Sterling Coal Company by George B. Wilson and was a part of the money which Richardson had realized from the sale of his Seattle lots. The funds of the Sterling Coal Company also paid for the development work done on the claims and probably paid the expenses of the witnesses who went to Vancouver to testify before the land office authorities at the hearing at the time of entry. Before the time for entry arrived, however, the attorney representing the Wilsons before the land office stated to them that the lands could not be legally entered while the deeds executed to R. A. Wilson in trust for the company were outstanding, and the deeds were therefore returned to the grantors and destroyed. About the beginning of the year 1902, R. A. Wilson and Richardson each endeavored to secure for himself control of a majority of the stock of the Sterling Coal Company, with the result that at the annual meeting held in January of that year Richardson and persons friendly to him succeeded in voting a majority of the stock, whereupon R. A. Wilson and George B. Wilson withdrew from the stockholders' meeting. From that time forward the Wilsons and Richardson were antagonistic, and shortly thereafter a complete break took place between the Wilsons and the Sterling Coal Company. The Wilsons have never admitted that the money paid to the government for the two patented claims was the same money that Richardson had paid into the treasury of the Sterling Coal Company, but that such is the fact is too plain for argument. Richardson made a total loss, so far as the evidence shows, of his investment in that company. In due course in the months of June and September, 1902, the patents in the usual form issued to Helen Pack Wilson and Virgil R. Wilson for the two quarter sections embraced in their entries.

On September 15, 1903, the Sterling Coal Company brought a suit in equity in this court, the bill being verified by Richardson as secre-

tary, in which Robert A. Wilson, Helen Pack Wilson, Minn Marie Wilson, Kate Roberts Wilson, and L. G. Wilson, her husband, Salomon Lauridsen, Henry Kamps, and James R. Winston, were defendants. The prayer of the bill was that it be adjudged that Robert A. Wilson in the proceedings leading up to the acquisition of these claims acted as agent and trustee of the Sterling Coal Company, that the company be decreed to be the owner of the claims patented to Helen Pack Wilson and Virgil R. Wilson, and that the company have a conveyance thereof. To this bill R. A. Wilson, Helen Pack Wilson, and Minn Marie Wilson severally demurred. After argument the demurrer was sustained by Judge Hanford in a written opinion in which he called attention to the vagueness of many of the allegations and said:

"If it can be determined from the averments of the bill, after indulging in all fair inferences, that anything was agreed to with respect to the assignment of coal claims to be made to the corporation, it was an impracticable agreement, that is, something which could not be carried into effect, because the assignments to be made embraced a greater quantity of land than could be lawfully entered by an association, and it was not such an agreement as could be severed so as to be enforceable in part."

The suit was therefore dismissed in May, 1904, for want of equity on the grounds stated.

R. A. Wilson continued his endeavor to finance the property. Virgil R. Wilson conveyed his quarter section to Minn Marie Wilson, and thus the two daughters of R. A. Wilson held the apparent legal title to the two patented claims. During this period R. A. Wilson gave to defendant Watson Allen an option on six coal claims; two of them being those held by his daughters, and the others apparently being those for which declaratory statements had been filed. The two daughters made deeds conveying the patented 320 acres to Allen with the understanding that the deeds should remain in escrow until title should be secured to the other tracts. After a delay of more than a year, the other tracts not having been acquired, Allen conveyed both claims to Helen Pack Wilson. It is because of the deeds running to Allen (which about a year after their execution were placed on record, though Allen had not consummated and never did consummate the purchase of the property) that he is made a party defendant in this suit. The declaratory statement originally made by Minn Marie Wilson was suspended by the land office authorities on their becoming acquainted with some of the facts herein mentioned, and thus the attempt to acquire the quarter section embraced in that application was defeated. For reasons not entirely disclosed, the remaining declaratory statements do not appear to have led to any results in favor of the locators.

It will thus be seen that the two patents running to Helen Pack Wilson and Virgil R. Wilson were acquired as a part of a general plan for procuring title in behalf of a single association to an area of coal lands greatly in excess of the limits prescribed by law. This case is not distinguishable in principle from that of *United States v.*

Trinidad Coal Co., 137 U. S. 160, 11 Sup. Ct. 57, 34 L. Ed. 640. In that case the court says:

"The restrictions imposed upon the entry and purchase of the vacant coal lands of the United States have been so clearly expressed that no doubt can exist as to the intention of Congress in enacting the above sections. The statute authorizes an association of persons to enter not exceeding 320 acres, and provides that only one entry can be made by the same person or association, and that 'no association of persons, any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof.'

"It is contended that the case made by the bill is not within the prohibitions of the statute, although the demurrer admits that the Trinidad Coal & Coking Company acquired the lands in dispute pursuant to a scheme whereby the several tracts were to be entered for its benefit, in the name of certain persons, its officers, stockholders, and employes; the title, when thus obtained, to be conveyed to the company, which should, and did, bear all the expenses attending the entries and purchases from the government. This contention cannot be sustained unless the court lends its aid to make successful a mere device to evade the statute. The policy adopted for disposing of the vacant coal lands of the United States should not be frustrated in this way. It was for Congress to prescribe the conditions under which individuals and associations of individuals might acquire these lands, and its intention should not be defeated by a narrow construction of the statute. If the scheme described in the bill be upheld as consistent with the statute, it is easy to see that the prohibition upon an association entering more than 320 acres, or entering or holding additional coal lands, where one of its members has taken the benefit of its provisions, would be of no value whatever."

In *United States v. Keitel*, 211 U. S. 370, 29 Sup. Ct. 123, 53 L. Ed. 230, this statement of the principles governing the construction and application of the statute was reaffirmed and declared to be applicable as well to criminal as to civil proceedings. A pooling scheme made between individual entrymen and embracing more than 320 acres of coal lands whereby each member of the combination agreed to hold each and every tract for the benefit of all, though the legal title was to remain in the several individuals, was declared unlawful by Judge Hanford in *United States v. Portland Coal & Coke Co. (C. C.)* 173 Fed. 566. The fact that only two claims aggregating 320 acres were actually patented cannot avail the defendants. The unlawful combination made the proceedings illegal from the beginning, and, if the true facts had been disclosed in the papers filed in the land office, the entries could not have been received. Had it not been for the action of the land office authorities in suspending the claim of Minn Marie Wilson, a third quarter section would have been acquired by the association, and the failure to procure patents to the remaining claims was not due to any purpose to comply with the limitations of the statute. The entire scheme was an attempt to evade these limitations, and public policy forbids that it should succeed in whole or in part as to any one concerned in the illegal acts. Though a different rule may apply under other statutes, the proceedings here are governed exclusively by sections 2347 to 2351 of the Revised Statutes. It is definitely settled that the prohibitions contained in section 2350 apply to all entries for such lands, whether or not there has been a prior location and possession by the entryman under sections 2348 and 2349. These two sections merely give a "preference right of entry" to a

qualified person who has opened and improved a coal mine on the public lands and is in possession of it. The entry itself is provided for by section 2347.

"Turning to section 2347, the preceding section referred to, it will be seen that the entry therein provided for is the cash entry made by applying to purchase the land, and coterminously therewith making payment for the same, which entry, as we have decided in the Keitel Case, excludes the right of a qualified person to make the entry in his own name with the money and for the benefit of a disqualified person." *United States v. Forrester*, 211 U. S. 399, 29 Sup. Ct. 132, 53 L. Ed. 245.

The evidence satisfactorily establishes the fact that at the time of entering and paying for the two claims in question Helen Pack Wilson and Virgil R. Wilson were making the entries with the money of others and for the benefit of others as well as themselves in an attempt to secure for a single association acting as a unit a greater area of coal lands than is permitted by the law and particularly in contravention of the prohibitions of section 2350.

It remains to be considered whether the Wilson Coal Company is in any better position than the patentees of the lands. The facts material to this inquiry will now be stated.

In the summer of 1904, R. A. Wilson and George B. Wilson called at the office of L. E. Kirkpatrick, an attorney at law, who had recently come to Seattle, and told him of the coal lands. Negotiations followed with the result that Kirkpatrick agreed to form a corporation for acquiring and developing the two patented claims (then standing on the record in the name of Helen Pack Wilson) and agreed to invest therein certain money on his own account. The entire negotiations and arrangements were made between Kirkpatrick and R. A. Wilson and George B. Wilson; the daughter being called in when the terms were practically agreed upon and the execution of legal documents was required. A corporation called the Wilson Coal Company (one of the defendants here) was organized under the laws of the state of Washington, with Kirkpatrick, Helen Pack Wilson, Watson Allen, and George N. Gilson as incorporators. Allen and Gilson appear to have acted as incorporators merely as an accommodation to the parties; they subscribing to one share of stock each as a formality. The capital stock was fixed at \$65,000, divided into 6,500 shares of the value of \$10 each. Helen Pack Wilson subscribed for all but four shares of the stock and made a proposition at the first meeting of the company to sell to the company the two patented claims in payment of her subscription. This proposition was accepted, and accordingly she executed and delivered a deed dated October 11, 1904, conveying the two claims to the Wilson Coal Company.

As soon as the articles of incorporation of the Wilson Coal Company were filed, Richardson and his attorney, learning of that fact, called upon Kirkpatrick and told him that the Sterling Coal Company claimed to be the owner of these lands, that the Wilsons held the title for that company, that Richardson and his friends had contributed money towards buying the lands for that company, and that they desired to warn him and the Wilson Coal Company of the rights of the Sterling Coal Company. Kirkpatrick testifies that this conversation

did not suggest to his mind any idea that the land had been acquired unlawfully, as he was not familiar with the coal-land laws and did not know anything, practically speaking, about the methods of acquiring title from the government. A short time after this conversation, the Wilson Coal Company received the conveyance of the two claims from Helen Pack Wilson, and the 6,496 shares of its capital stock (fully paid) were issued to her. She immediately transferred 2,500 of these shares to the treasurer of the company to be sold for the company's use. She was also made secretary of the company and has ever since held that office. Just how much of the stock had passed to the hands of other parties before the beginning of this suit (February, 1905) does not appear. The company's stock books were not offered in evidence. It is shown, however, by Kirkpatrick, that in October and November, 1904, he had taken 600 shares (par value \$10 each) at 50 cents on the dollar, and two other persons took 100 shares and 50 shares respectively; one paying cash to the company, and the other agreeing to pay in labor. At the time the evidence was taken (July, 1908) the stock had been increased, and about 8,500 or 9,000 shares were outstanding. Of these Helen Pack Wilson then held 3,600 shares. Kirkpatrick had increased his holdings to 1,000 shares. In addition to the two Wilson coal claims, the company acquired an adjoining 40-acre tract. Its mining operations have been of an active character, but have been almost wholly confined to the 40-acre tract. R. A. Wilson has been its manager.

These facts, in my opinion, fall far short of putting the Wilson Coal Company in the position of a bona fide purchaser for value without notice. A person who holds a voidable patent to public lands cannot protect himself against the process of the government by forming a corporation in which he is the dominant factor and conveying to it the premises which he has acquired in violation of law. So far as the evidence discloses, at the time of the commencement of this suit the holdings of Helen Pack Wilson and the treasury stock composed all but 750 shares out of the 6,500 shares constituting the company's capital stock. I have stated somewhat fully the circumstances which the government claims to have charged Kirkpatrick with notice of the invalidity of the Wilson title before he made any investment in the company. It may be questioned whether those circumstances would have been sufficient to charge him with notice if he had purchased the land, considering the respect due to a United States patent and the scant attention usually paid to claims of a defeated litigant. But that question I am not called upon to decide. That Kirkpatrick is free from any suggestion of wrongdoing is clear beyond question, and the only claim is that the circumstances were sufficient to impose upon him the duty of investigating further. However, it was the corporation that became the grantee of the land. Kirkpatrick and others only acquired some of the stock that the corporation issued to Helen Pack Wilson in return therefor. R. A. Wilson, the real party who arranged with Kirkpatrick for the corporate transaction and became the corporation's business manager, and Helen Pack Wilson, who received practically all of the corporate stock and became its

secretary, were fully informed of the facts affecting the title, and their knowledge was the knowledge of the corporation. It is to be regretted that, before the government brought suit, some apparently innocent parties had acquired stock; but, if that fact should be considered sufficient to nullify the knowledge which the corporation had already acquired, it would be practically impossible to make any corporation restore property illegally obtained. Changes in the holdings of stock of corporations occur with more or less frequency. One of the risks that are taken by purchasers of corporate stock is that, by reason of facts known to the officers of the corporation and the persons in control of affairs, its title to its apparent assets may not be as secure as the public records seem to indicate. The fact that transfers of the stock of a corporation have taken place may, in a proper case, be material in considering the question of laches; but to declare the Wilson Coal Company a bona fide purchaser of this property because of the stock transfers shown here would be to announce a principle not sustained by any authority cited, and, in my opinion, not supported by any good reason.

I therefore conclude that complainants are entitled to a decree canceling the patent.

THE GEORGIC et al.

(District Court, S. D. New York. May 31, 1910.)

1. COLLISION (§ 82*)—STEAM VESSELS MEETING IN FOG—SPEED.

Where a steamship for some 15 minutes prior to collision with a meeting vessel in a fog had been going at slow and dead slow speed, and was barely moving at the time of collision, her prior speed is immaterial.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 170-174; Dec. Dig. § 82.*]

2. COLLISION (§ 84*)—STEAM VESSELS IN FOG—VIOLATION OF RULES.

Article 16 of the Inland Navigation Rules (30 Stat. 99 [U. S. Comp. St. 1901, p. 2880]), which provides that "a steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over," is mandatory, and its violation creates a very strong presumption of fault, and casts upon the offender the burden of showing by clear testimony that his error did not contribute to an ensuing collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 168, 176; Dec. Dig. § 84.*]

Collision rules—speed of steamer in fog, see note to *The Niagara*, 28 C. C. A. 532.]

3. COLLISION (§ 83*)—STEAM VESSELS MEETING IN FOG—MUTUAL FAULT—VIOLATION OF RULES.

A collision in the Main Ship Channel to New York Bay in a fog between the meeting steamships *Georgic* and *Finance*, in which the latter was sunk, *held* due to the fault of both vessels, each of which heard the fog signals of the other forward of her beam in a position not ascertained, but did not stop as required by article 16 of the Inland Navigation Rules (30 Stat. 99 [U. S. Comp. St. 1901, p. 2880]), but continued ahead until the signals had been repeated three or more times, each time closer, when both were going at moderate speed and a compliance with

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the rule would have avoided the collision. The *Finance* held also in fault for being on the wrong side of the channel.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 156, 167, 175; Dec. Dig. § 83.*]

In Admiralty. Proceeding by the Oceanic Steam Navigation Company as owner of the steamship *Georgic* for limitation of liability for damages occasioned by collision between that vessel and the steamship *Finance*. Decree for limitation of liability, and finding both vessels in fault.

Mr. Montgomery and Mr. Kirlin, for the *Georgic*.

Mr. Rogers and Mr. Burlingham, for the *Finance*.

Mr. Symmers and Mr. Kneeland, for divers cargo owners and underwriters.

HOUGH, District Judge. From the voluminous testimony in this case a few facts can safely be said to be either admitted or so plainly proven as to require only statement without discussion of the evidence. On the morning of November 26, 1908, there was a collision between the *Georgic* and the *Finance* in the Main Ship Channel to the eastward of a north and south line drawn from the Hook Beacon to Buoy N 4 and (having regard to the line of channel buoys) between Buoys N 4 and N 2½. The vessels came together with the bow of the *Georgic* against the port side of the *Finance* at a point not more than one-third of the *Finance*'s length forward of her extreme stern. The angle of collision between the port sides of the two steamers was between 3 and 4 points. A more definite statement is not necessary, nor attainable. The moment of contact according to the *Georgic*'s time was between 7:44 and 7:45 a. m.; more than this cannot be positively asserted, but it was probably nearer 7:45 than 7:44. It is not possible to compare the times when similar or related orders were given on the two vessels, because, although the time record on the *Georgic* is ample, and I think proven to be accurate, the *Finance* became a total loss, all her records and documents have disappeared and one of her engineers lost his life. All statements of time from the *Finance* can therefore be nothing more than efforts of memory, and the only thing plain is that her clocks were somewhat faster than those on the *Georgic*. In the view taken of this cause, however, I do not think that the exact moment of order given or maneuver executed on the *Finance* is of great importance in reaching decision.

The *Georgic* is a large and full-powered steamer with twin screws, 558 feet long, was at the time of disaster in proper trim, with an average draft of about 20 feet, and was bound in from Liverpool to this port. The *Finance* was a much smaller, single screw, boat, 295 feet long, of lighter draft, and bound out from New York to Colon. For some time prior to the early morning of November 26th the weather in the neighborhood of Sandy Hook had been foggy, and both steamers spent the night preceding collision at anchor; the *Georgic* outside of Gedney's Channel, the *Finance* southwesterly of the "Spit Buoy" near the southwest spit of Flynn's Knoll (her exact posi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion will be considered hereafter). Shortly before 7 a. m. of the 26th the fog lightened, and each vessel hove up anchor and proceeded on her way. Each was in charge of a Sandy Hook pilot, each was fully manned and competently officered, and no substantial complaint has been made by any party as to improper sounding of fog signals or lack of lookouts properly stationed. Each vessel had a leadsman attending to his duties, and the *Georgic*, besides maintaining men stationed on bridge and forecastle head, as is customary on entering port, had an officer and two men in the crow's nest, which is situated between 30 and 40 feet above deck, about 50 feet from the bow and approximately 100 feet forward of the bridge. After leaving their respective anchorages both vessels were disappointed in finding the fog grow thicker as they advanced. To me the testimony from the *Georgic's* crow's nest is of great importance. It shows that the fog lay low where it was thickest, and where this collision occurred—i. e., to the westward of the turn out of Gedney's, and into the Main Ship Channel; and indeed, if it be not matter of common knowledge that fog encountered in patches and upon the whole clearing with the morning sun does lie low, it is at least common knowledge that such is the usual testimony in collision causes. Therefore I find no difficulty in believing that Second Officer Hague, in the crow's nest of the *Georgic*, is the witness of education and intelligence who had the best opportunity of observing the manner in which the two vessels neared each other.

The disputed questions of fact relate to: (a) The respective speeds of the approaching vessels; (b) the courses steered by them while so approaching; and (c) the place of collision.

Preliminary to consideration of these points it may be noted as a matter not open to discussion that the *Finance* sank and for a long time remained at a point between 750 and 800 yards, very slightly west of north (true) of bell buoy No. 5. It is also admitted by all that the tide movement in this region on high water (and the tide was approximately high between 7 and 8 a. m. of November 26th) is north or a little to the west thereof. One method, therefore, of ascertaining the place of collision is to discover from the evidence how long the *Finance* remained off the bottom after collision, and how far she traveled with the tide before she stopped by contact with the mud.

Inasmuch as the *Finance* contends that the *Georgic's* bow pierced her side to a depth of about 8 feet and that although just before collision her engines were put full speed ahead, she had attained little if any headway through the water, it is an assumption obviously favorable to the *Finance* that after being struck her progress to the eastward was practically nil. As it is also admittedly true that the vessels were in contact but for a moment, it follows that the only movement of the *Finance* after collision was her tide drift. Irrespective, therefore, of the very important question whether this collision happened on the southerly or northerly side of the Main Ship Channel, it is obvious that a line from bell buoy No. 5 through the wreck of the *Finance* must run approximately through the point of contact between the two ships. It follows from this that knowing where and when the navigation of both vessels just before collision began, we know the distance that each

traveled in a time capable of accurate measurement on the part of the Georgic and of approximate estimation on that of the Finance.

The speed of the Georgic from the time she weighed anchor outside of Gedney's Channel until she had Buoy N B 2 abeam at 7:28 a. m. seems to me wholly unimportant. She had come up Gedney's seeing the buoys on each side. There was no difficulty in such navigation, and no reason appears why she should not have gone faster than even the highest speed imputed to her at that time by the claimants. The language of Brown, J., in the *Ludvig Holberg*, 157 U. S. at page 67, 15 Sup. Ct. at page 480 (39 L. Ed. 620), is with slight changes applicable to this litigation. It was there said that if a colliding steamer "ran 20 miles an hour down to the Narrows, and was running dead slow at the time she first heard the whistle (of the other vessel), fault could not be imputed to her for her previous speed." If, by the Georgic's time, the moment of collision be taken as early as 7:44, that vessel required 16 minutes to travel from Buoy N B 2 to the point of collision. This distance cannot be (no matter on which side of the channel the disaster occurred) more than 2,200 yards, and computation gives an average speed for the distance of less than four knots per hour. But her engines, which were at slow when passing out of Gedney's Channel, were put dead slow at 7:36, slow again at 7:38, dead slow at 7:39, and stop at 7:41. This shows an almost continually decreasing speed and tends strongly to confirm the repeated statements of her officers that she barely had steering way (or words to that effect) shortly after her engines were stopped. At 7:42 the engines were reversed, and I find nothing in the testimony to discredit the statements that at the time of collision the backwater from her propeller had nearly come abreast of her bridge and the leadsmen had obtained an up and down cast of his line.

I do not think that the rule of moderate speed in a fog could have been more strictly adhered to than it was by the Georgic, and I find nothing in the evidence to justify the assertion that her speed was excessive. This view is, I think, strongly confirmed by the fact, sworn to by almost every witness and contradicted by none, that although the Georgic came in contact with the Finance at an angle of certainly not over 4 points, the port sides of the two vessels never closed in on each other, which must mean that the force of collision was not sufficient to swing the Finance against the Georgic. If the blow had been such an one as a vessel of the Georgic's bulk would surely have delivered if more than barely moving, their swinging together could not have been prevented. The speed of the Finance cannot be gauged by any evidence so satisfactory or reliable. Undoubtedly at the moment of collision her engines were going full speed ahead. How long they had been in such operation is variously stated from half a minute to two minutes. What they had been doing before they were put full speed ahead is a question that can only be decided by considering testimony which varies from that of the pilot, who says that they had been at rest for from three to five minutes, to that of one of the engineers who says that they had been going full astern and were put full ahead without any stop order between. I can discover no ground

for a more definite finding than this, viz., there is a general consensus of evidence from the Finance that she was actually under way for about 35 minutes before collision. In that time she traversed a distance of approximately 5,200 yards. Her average speed was therefore less than four knots, and she had so far overcome her headway before collision as to make some very competent observers on the Georgic believe that if she had not gone full speed ahead collision might have been avoided by the Georgic's passing the Finance's bow. This unfriendly criticism, in connection with the opinions of the Finance's witnesses, convinces me that the speed of the latter vessel was not excessive—i. e., she was able to control her movements if she otherwise obeyed the law; but I do not think that when the vessels were within sight of each other she was so nearly stopped as was the Georgic.

Inquiries as to the courses of the two vessels and the exact place of their collision may be pursued together, for solution depends upon the same evidence. No reason appears to me to doubt the evidence from the Georgic as to the courses steered by that vessel after Buoy N B 2 was abeam at 7:28 a. m. She steered the channel course of west by south and passed within less than a ship's length of Buoy N 2½ on that course. How near she passed to Buoy N B 2 is a question upon which her own witnesses are not fully agreed, and her pilot gives a greater distance than do the other observers.

Estimates of time and distance are so notoriously difficult to form, so hard to remember, and so wholly unreliable as to have become proverbial for uncertainty. Yet one result of this is that uniformity in such estimates is often ground of just suspicion, and it is rather from an average of apparently honest impressions than from positive evidence that the result must be reached. I am therefore of opinion that the Georgic passed N B 2 probably somewhat closer than she did 2½, and adhered to her channel course of west by south until very shortly before collision when she ported a point. This course brings the Georgic well over to the northerly side of the channel, and that course I believe she held, not only because the weight of the evidence shows it, but because it was a natural—i. e., the easiest—thing to do. By creeping along the north side of the channel and maintaining the channel compass course she would keep in sight of the line of red buoys and thereby most readily escape the danger of going aground.

In ascertaining the course of the Finance the exact location of her anchorage is important. It has been given as an estimated distance from the "Spit Buoy," and also by bearings on the Spit Buoy and Black Buoy No. 1. The indicated positions are not identical by about 150 yards, but the difference does not seem to me very material, for it is abundantly testified to from the Finance that after she got under way at least one and probably two of the red buoys on the north side of the channel were seen not far distant on her port side.

The steamship Corona had been lying at anchor not far from the Finance; she went out ahead of the latter vessel, and her pilot has testified in this case. He proceeded to sea by picking his way from

red buoy to red buoy along the northerly side of the channel, a proceeding as illegal as it is usual; and I remain of the opinion that the same usual procedure was in the mind of the pilot of the *Finance* when he actually got under way at or a little before 7 a. m. of November 26th. It is to be remembered that although the master and pilot of the *Finance* declare that it was ultimately their intention to go out by the south channel (a proceeding permitted by the light draft of their vessel) such was not the purpose of the pilot until he had been under way for approximately half an hour, and the reason he gives for changing his mind and trying for the south channel is that he heard the *Georgic's* whistle.

The compass courses that he gives in explanation are as follows: An easterly course from anchorage until the bell on Sandy Hook bore about south southeast; then east by north (which is the channel course for *Gedney's*) until he heard "the steamer coming in," and then "I told the captain we would keep to the southward so as to keep out of the way of ships coming in through *Gedney's*; we intended to go out through the south channel." And he accordingly changed his course to east southeast, and maintained that until collision was inevitable. The pilot's statement that he laid an east by north course when the bell on Sandy Hook bore about south southeast is repudiated as a mistake by counsel for his own ship; but I find in the testimony no other or more definite statement as to when the easterly course was changed to east by north. If the *Finance* started from either of the positions assigned as her anchorage by her own witnesses, the sooner she laid an east by north course the nearer she was to the line of the red buoys and the northerly side of the channel. Starting from the same anchorage the longer an easterly course was maintained the further to the southward would her east southeast course get her at the moment of collision.

An effort has been made in argument to show that the *Finance's* pilot did not mean the bell on Sandy Hook, but "the bell buoy off the point of the Hook"—i. e., bell buoy No. 5; but this argument is coupled with the assertion that the *Finance* had been upon her east southeast course for at least five minutes before she sighted the *Georgic*. This statement of the course of the *Finance* is open to criticism in at least two particulars: (a) It is so inaccurate and indefinite a statement that when coming from the pilot in charge of navigation it invites doubt as to his accuracy or reliability or both; and (b) if taken, as counsel for the *Finance* urged it upon the court, it places the point of collision within 200 yards or less of bell buoy No. 5. I cannot accept the story of the *Finance* as to courses as interpreted by her own counsel, because (1) as above stated it was more natural for her to follow the *Corona*; (2) it is wholly inconsistent with the credible and coherent statements regarding the courses of the *Georgic*; and (3) if the collision happened anywhere near (i. e., within 200 yards of) bell buoy No. 5, it is impossible that the tide movement could have carried the *Finance* to the place where she now lies sunk within the time she remained afloat. The question as to how long the *Finance* remained afloat is therefore important, and almost every witness from that vessel has been asked to give his opinion. Opinions

on such a point are peculiarly open to the criticism made in *The St. Louis*, 98 Fed., at page 751, 39 C. C. A., at page 262; i. e., the witnesses are "speaking from impressions rather than from any tangible evidential facts. The time for observation consisted of [a] few seconds, fraught with apprehension and excitement."

The recorded opinions in this case run as high as twelve minutes, but first officer Peterson said:

"When the boats pulled apart, I don't know whether the *Finance* went any way at all. I think she dropped right down. She sank just about where she struck. There wasn't very much change."

And Captain Mowbray declares that:

"After the vessel struck it was about five minutes before the *Finance's* stern touched the bottom, and it may be took five minutes more for her to sink";

while the bow lookout says:

"The tide swung the *Finance* a little till she struck the bottom. * * * The *Finance* lay just like a log; she didn't move nowheres, but just where the tide took her."

The comparisons and similes of the witnesses are of more importance than their guesses at time. Considering how many of the people on the *Finance* had to jump for their lives, and that when her stern was once on the bottom she could scarcely have moved at all, I am unable to believe (as above stated) that the place of collision contended for by counsel for the *Finance* is either proven or possible. It may also be noted that the soundings made by the leadsmen on both steamers are more readily suggested by the chart on the northerly side of the channel than anywhere else, and the sounding said to have been taken by the leadsmen on the *Finance* just at collision or immediately thereafter cannot possibly be identified elsewhere than well to the northerly edge of the channel. Without regard, therefore, to just where or when the *Finance's* turn to east southeast occurred, nor how far she traveled upon that course, it must be found that she was, when in collision with the *Georgic*, on the wrong side of the channel, having gone there with deliberation and without necessity, and was therefore at fault. *The Sea King*, 114 Fed. 535, 52 C. C. A. 349; *The No. 4*, 161 Fed. 847, 88 C. C. A. 665.

There came a time when the vessels saw each other; how far apart they then were has been the subject of much testimony and more discussion. A fair average of the estimates is in my judgment between a length and a length and a half of the *Georgic*. It is plain that the first person on the *Georgic* to see the *Finance* was Officer Hague in the crow's nest. He saw her after he had heard her whistle once, and that whistle was on the starboard bow. He first saw her masts, and thinks it was two or three minutes from the time he saw them until he perceived her hull. He saw two masts and they were "a little open across our bow," and when the hull appeared in sight about 600 feet away the *Finance* was plainly crossing the bow of the *Georgic* from starboard to port, i. e. going in a general southerly direction. That this was a situation of very great danger is too plain for comment. Hague

made prompt report of what he had heard and seen, and the responsibility for acting upon his report rested solely on Nichols, the pilot in charge of the *Georgic*. Whether he heard, or hearing paid any attention to the report from the crow's nest, is not plain from the evidence, but it is clear from his own evidence that he heard the *Finance's* whistle two or three minutes before he sighted her, and the whistle sounded about a point on the starboard bow. The third whistle he heard nearly ahead, and he then stopped his engines and ported his wheel. This he admits was "with reference to the third whistle."

Dougherty, the pilot of the *Finance*, is even more definite in his statements: He had himself piloted the *Georgic* several times, and could and did distinguish her whistle as that of a *White Star* ship. He thought he heard this familiar sound about three points on his port bow, and it grew louder as the steamer got closer. He first heard the whistle he believes about 10 minutes before collision, but he repeatedly states that he heard it four or five times, on his port bow and getting closer, before he stopped his engines. It is thus positively asserted by both pilots that each distinctly heard forward of his beam the fog signal of a vessel the position of which was not ascertained. Yet Nichols heard that whistle repeated three times, and Dougherty four or five times, before they respectively stopped the engines of the valuable vessels they had in charge. I think this is a plain violation, by the pilot of each vessel, of article 16 of the Inland Rules. That article is mandatory in that it declares that a steam vessel in the position above described "shall, so far as the circumstances of the case admit, stop her engines." I see nothing in the circumstances revealed by the evidence which prevented stopping the engines of each vessel. Quite naturally counsel for both steamers have said very little about this point, which is pressed upon the court by the cargo owners. It is asserted as an authoritative declaration that the Supreme Court said in *The Ludvig Holberg*, supra, page 68 of 157 U. S., at page 480 of 15 Sup. Ct. (39 L. Ed. 620):

"No case has ever held that a steamer was obliged to stop at the first signal heard by her unless its proximity be such as to indicate immediate danger."

Undoubtedly that was the rule under the international regulations of March 3, 1885, article 13; but article 16 of the International Rules of 1890 (identical with the same article of the Inland Rules of 1897) has been differently construed in decisions binding upon me. In *The St. Louis*, supra, the Circuit Court of Appeals for this circuit held a much less flagrant violation of this article ground for the application of the rule:

"That whenever it appears that one of the vessels (in collision) has neglected the usual and proper measures of precaution the burden is upon her to show that the collision was not owing to her neglect." 98 Fed. 752, 39 C. O. A. 263.

In *Re Clyde S. S. Co.* (D. C.) 134 Fed., at page 97, it was held that a failure to observe the precaution imposed by this article "creates a presumption of fault"; and the same rule was applied in *El Monte*, 114 Fed. 796. In the case last cited at page 800 is a reference to the pro-

ceedings of the Maritime Conference which adopted this rule, and I entirely agree with Judge Adams that it was put on the statute book on the recommendation of that conference in order that stopping at the first whistle should be imperative and because the conference and the Legislature did not wish "to leave too much to the navigator's judgment." Any violation thereof should in my opinion create a very strong presumption of fault, and cast upon the offender the burden of showing by clear testimony that his error did not contribute to collision and subsequent damage. The rule is very forcibly stated in *The H. F. Dimock*, 77 Fed. 230, 23 C. C. A. 123, and I perceive nothing opposed to it in *Dunton v. Allan S. S. Co.*, 119 Fed. 590, 55 C. C. A. 541, for in that case it plainly appears that the engines of the steamship were stopped "immediately upon hearing" the first sound signal of the vessel with which she afterwards came in collision. Thus a presumption of fault attaches to both vessels for violation of the statutory rule. Neither has borne the burden laid on her thereby. On the contrary, the moderate speed at which each was going when the other's whistles were heard, and the narrow margin by which the bounds of safety were overstepped, are proof conclusive that, even with the Finance on the wrong side of the channel, injury would have been avoided if the law had been obeyed.

In this as in so many other collision cases arising in New York Harbor, the result is reached with mortification, in that I am convinced that the pilots thrust by local law upon vessels of great cost, well manned and equipped, and carrying valuable lives, are guilty, not of errors of judgment only, but of total ignorance of the fundamental statutes affecting their calling. The depositions of all the pilots testifying in this cause have been scanned in vain to find any indication of knowledge by them of such matters as the narrow channel rule, or of even a statutory recommendation to stop the engines promptly on hearing a fog whistle forward of the beam.

For the reasons indicated, a decree will be entered, permitting limitation and declaring both steamers at fault.

TROXELL v. DELAWARE, L. & W. R. CO.

(Circuit Court, E. D. Pennsylvania. August 6, 1910.)

No. 694.

1. COURTS (§§ 353, 354*)—FEDERAL COURTS—PRACTICE IN STATE COURTS—NEW TRIAL—MOTION FOR JUDGMENT NON OBSTANTE.

Pennsylvania Practice Act April 22, 1895 (P. L. 286), authorizing a motion for a new trial and for a judgment non obstante veredicto, is applicable to actions at law tried in the federal courts sitting in that state.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 933, 934; Dec. Dig. §§ 353, 354.*

Conformity of practice in common-law actions to that of state court, see notes to *O'Connell v. Reed*, 5 C. C. A. 594; *Nederland Life Ins. Co. v. Hall*, 27 C. C. A. 392.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes.

2. COURTS (§ 299*)—JURISDICTION—INTERSTATE COMMERCE—PLEADING.

Where, in an action against an interstate carrier for death of a servant, the complaint alleged that defendant was engaged in transporting both freight and passengers, and of interstate and foreign commerce, such averment did not allege that defendant was engaged in the transportation of freight and passengers "in" interstate and foreign commerce, and must therefore be taken as an averment of the transportation of freight and passengers in both interstate and intrastate commerce.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 841; Dec. Dig. § 299.*]

3. MASTER AND SERVANT (§ 86*)—DEATH OF SERVANT—INTERSTATE EMPLOYEES—EMPLOYER'S LIABILITY—EXCLUSIVENESS.

Where a fireman on a train carrying both interstate and intrastate commerce was killed, his widow was not limited to suit under the federal employer's liability act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]), but was also entitled to sue under a state law not in conflict therewith.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 137; Dec. Dig. § 86.*]

4. MASTER AND SERVANT (§ 286*)—DEATH OF SERVANT—RAILROADS—NEGLIGENCE—QUESTION FOR JURY.

In an action for death of a railroad fireman in a collision between his train and certain cars which escaped from a grade siding, whether the railroad company was negligent in permitting the cars to escape, or in failing to provide a derailing switch, *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1020; Dec. Dig. § 286.*]

5. MASTER AND SERVANT (§ 217*)—DEATH OF SERVANT—ASSUMED RISK.

Where a railroad fireman had placed certain cars on a grade siding the day before he was killed by the escape of the cars in a collision between them and the train on which he was employed, and had knowledge that the switch was not provided with a derailing device, but he had not actual knowledge of the danger which existed by reason of defendant's failure to provide such derailing device, he did not assume the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 588; Dec. Dig. § 217.*]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

6. WITNESSES (§ 37*)—COMPETENCY—KNOWLEDGE.

Where, in an action for death of plaintiff's husband, she testified that she had seen his check for his monthly pay, she was properly permitted to testify as to his earning capacity.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 80-87; Dec. Dig. § 37.*]

7. APPEAL AND ERROR (§ 1048*)—EVIDENCE—PREJUDICE.

Defendant was not prejudiced by the interrogation of a witness on a subject concerning which the witness testified he had no knowledge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140, 4158, 4159; Dec. Dig. § 1048.*]

8. EVIDENCE (§ 513*)—EXPERTS—SUBJECT OF EXPERT TESTIMONY.

Where a railroad fireman was killed in a collision between certain cars which escaped from a grade siding and the train he was operating, an experienced railroad engineer was properly permitted to testify that the siding should have been equipped with a derailing switch.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2317, 2318; Dec. Dig. § 513.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

At Law. Action by Lizzie M. Troxell against the Delaware, Lackawanna & Western Railroad Company. Verdict for plaintiff, and defendant moves for judgment non obstante, and for new trial. Denied.

George Demming, for plaintiff.

J. H. Oliver and James F. Campbell, for defendant.

HOLLAND, District Judge. This action is brought by Lizzie M. Troxell, a resident of the state of New Jersey, against the defendant, a corporation organized under the laws of the state of Pennsylvania; the plaintiff suing as the widow of Joseph D. Troxell, on behalf of herself and minor children, to recover damages for the alleged wrongful death of her husband, who was an employé of the defendant company. The case was tried in this court on April 4 and 5, 1910, and a verdict rendered by the jury in favor of the plaintiff for \$7,698.28; whereupon a motion and 30 reasons for a new trial were filed, together with a motion for judgment non obstante veredicto. This latter motion will be first considered.

The defendant's right to move the court for the entry of such an order in its favor arises out of the Pennsylvania practice act of April 22, 1905 (P. L. 286), which is followed in the federal courts in this state. *Fries-Breslin Co. v. Bergen et al.* (C. C.) 168 Fed. 360, and 176 Fed. 76, 99 C. C. A. 384. The important part of this act provides:

"That whenever, upon the trial of any issue, a point requesting binding instruction has been reserved, the party presenting the point may, within the time prescribed for moving for a new trial, or within such other or further time as the court shall allow, move the court to have all the evidence taken upon the trial duly certified and filed so as to become a part of the record, and for judgment non obstante veredicto upon the whole record; whereupon it shall be the duty of the court, if it does not grant a new trial, to have certified the evidence, and to enter such judgment as should have been entered upon that evidence," etc.

At the trial the defendant submitted the following point for binding instructions:

"Under all the evidence your verdict should be for the defendant."

The court declined to so instruct the jury, and it is upon this action of the court that the motion for judgment non obstante veredicto is based.

The defendant's contention now is, upon this motion, that upon all the evidence in the cause it was the duty of the court, as a matter of law, to have instructed the jury to render a verdict in its favor, for the reasons:

1. That this action should have been brought by the personal representative of the decedent under the federal employer's liability act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]), the remedy thereunder being exclusive.

The allegations in the statement of claim are that "the defendant, the Delaware, Lackawanna & Western Railroad Company, is a common carrier corporation, engaged in a business of transportation both of freight and passengers, and of interstate and foreign commerce, and is incorporated for this purpose under special acts of the Legislature

of the state of Pennsylvania." This is not an averment of an engagement in business of transportation of "freight and passengers" "in" interstate and foreign commerce; that is to say, the business of transportation only in "interstate and foreign commerce." The "business of transportation of freight and passengers" is not restricted to "interstate commerce" alone, but must be taken to be an averment of the transportation of "freight and passengers" in "intrastate commerce" as well.

It was proven at the trial that at the time of Joseph D. Troxell's death he was employed as a fireman on one of the defendant's locomotives, which was actually engaged in hauling over defendant's railroad some cars containing property in interstate commerce and others engaged in intrastate commerce. The suit is instituted by Lizzie M. Troxell, the wife of the decedent, "on behalf of herself and minor children," in accordance with the provision of the Pennsylvania act of April 15, 1851 (P. L. 674), authorizing the widow of a person whose death shall have been occasioned by an unlawful violence or negligence to "maintain an action for the recovery of damages for the death thus occasioned." The federal employer's liability act of April 22, 1908, on this point provides:

"That every common carrier, etc., shall be liable in damages to any person suffering injury, * * * or in case of death of such employé, to his or her personal representative, for the benefit of the surviving widow of decedent and children of such employé."

If the federal act, as urged by the defendant, be exclusive of all state legislation upon this subject, and the remedy provided thereunder also exclusive, then it would have been necessary to institute suit in the name of the "personal representative" of decedent for the benefit of the surviving widow and children of "such employé," which was not done in this case. The question is not at all free from doubt. The act has been before the federal and state courts a number of times, and it has been held by the federal courts that the act of April 22, 1908, supersedes all state statutes regarding the relations of railroad employers and employes "engaged in interstate commerce."

There are five cases, to which the court's attention has been called, in which the effect of the federal act on state and territorial legislation has been considered. The first is the case of *Fulgham v. Midland Valley R. Co.* (C. C.) 167 Fed. 660. In that case there was no diverse citizenship, and it could not be brought in the federal courts except under the employer's liability act; in fact, it was admitted that the suit was brought under this act. The defendant was engaged in interstate commerce, and the suit was instituted by the "personal representative" of the decedent. In the statement of claim the plaintiff endeavored to recover for two elements of damage based upon the state act. In other words, the suit was instituted under the provisions of the federal act, and an attempt was made to recover under the state act. Under the state act there was an element of damage to which the plaintiff was entitled which could not be recovered under the federal act. They were in conflict, and it was held in that case that the recovery could not be had, and it was put upon the

ground that the federal act superseded "all state statutes relating to the relation of railroad employers and employes engaged in interstate commerce." This case, however, is not an authority on the question as to whether or not a suit instituted under the state law, which is not in conflict with the federal law, can be maintained for a recovery under a state law for the death of an employe, against the defendant, who at the time of the employe's death was also engaged in intrastate commerce.

In the case of *Whittaker v. Illinois Central Railroad Co.* (C. C.) 176 Fed. 130, it was a question as to the district in which the suit could properly be instituted, the consideration of which involved the question as to whether or not the federal act superseded state laws on the same subject. Suit had been instituted under the federal act, and the statement alleged that the defendant was engaged in interstate commerce.

In *Dewberry v. Southern Railway Company* (C. C.) 175 Fed. 307, the suit was instituted under the state act, and, on demurrer, the court held that the federal employer's liability act, making railroads engaged in interstate commerce liable for injury or killing employes while similarly engaged, is plenary, and superseded all laws of the state relating thereto. This case is almost identical on the facts with the one at bar, with the exception that it does not disclose whether or not the defendant was engaged in intrastate commerce at the time, nor whether the state act was in any particular in conflict with the federal act.

The other two cases, to wit, *Cound v. Atchison, etc., Railway Company* (C. C.) 173 Fed. 527, and *Southern Pacific Co. v. McGinnis*, 174 Fed. 649, 98 C. C. A. 403, raise the question as to whether or not the act of April 22, 1908, superseded all laws in the territory, which is entirely a different question from the one involved in the suit at bar. *El Paso, etc., Ry. v. Gutierrez*, 215 U. S. 87, 30 Sup. Ct. 21, 54 L. Ed. —.

As to the territories, "Congress may not only abrogate laws of Territorial Legislature, but it may itself legislate directly for the local government. It may make a void act of the Territorial Legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the territory and all departments of the territorial government. It may do for the territories what the people, under the Constitution of the United States, may do for the states." *National Bank v. County of Yankton*, 101 U. S. 133, 25 L. Ed. 1046; *Mormon Church v. U. S.*, 136 U. S. 42, 10 Sup. Ct. 792, 34 L. Ed. 478.

In neither of these cases was the question considered as to whether or not a recovery could be had under the provisions of a state law to recover damages for negligence of a common carrier engaged in both intrastate and interstate commerce at the time the alleged damage was inflicted. There is no doubt but that if this federal act is to be maintained, it must be upon the ground that it relates solely to employes engaged in interstate commerce, and the states must be permitted to deal with the questions between the employer and em-

ployé in matters wholly within the state. A more complicated situation will arise, as it did in this case, where the carrier is engaged in both intrastate and interstate commerce, and that the work upon which the employé is engaged when injured is both the work of intra and inter state commerce. We are inclined to the view that, in a situation like the one at bar, where the carrier is engaged in both intra and inter state commerce, and negligently causes the death of an employé in similar employment, that the personal representative of the decedent may institute a suit under the federal act, or action may be brought under a state act which is not in conflict with the federal act. The decision of the United States Supreme Court in the Employer's Liability Case, in declaring the act of June 11, 1906, unconstitutional, would indicate this view of the question. It is there said:

"One engaged in interstate commerce does not thereby submit all its business to the regulating power of Congress." 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297.

The following decisions of state courts will be interesting in connection with this question: Frank J. Luken v. Lake Shore & Michigan Southern Railway Company, decided March 1, 1910, by the Appellate Court of the state of Illinois, First district (not yet reported); Detroit, Toledo & Ironton Railway Company v. State of Ohio, decided March 15, 1910, by the Supreme Court of the state of Ohio (not yet officially reported) 91 N. E. 869; State of New York, Appellant, v. Erie Railroad Company, Respondent, decided April 26, 1910, by the Court of Appeals of the state of New York (not yet officially reported) 91 N. E. 849; William H. Hoxie v. New York, etc., Railroad Company, decided by the Supreme Court of Errors of Connecticut (not yet officially reported) 73 Atl. 754.

2. The approximate cause of the accident was the tampering with the brakes and blocks. It appeared from the evidence that the decedent was a fireman employed by the defendant company, and engaged on the 21st day of July, 1909, in that capacity in hauling a train on the main line towards Penn Argyl, when his engine was struck by six loaded ash cars, which, for some unexplained reason, had run away from the siding upon which they had been placed at Penn Argyl Branch, known as "Albion No. 2." This siding runs off the Penn Argyl Branch about 500 feet from the main line of the Bangor, Portland Division of the defendant railroad. The first 100 feet of the siding is on a level, and from there back for 700 or 800 feet there is a gradual grade averaging 1 per cent. There is a downgrade for upward of four miles from this siding to and down the main line. These cars had been placed upon this siding beyond the level portion thereof, on the grade, which, as has been said, was an average of about 1 per cent. There was evidence, which was uncontradicted on the part of the defendant, that these cars when placed upon the siding were braked, and that the brake on the first car was double—that is, two men turned it as hard and as strong as possible; and, further, there was evidence on the part of the defendant that blocks were placed under the wheels of the first two cars. Notwithstanding the testi-

mony of defendant's witnesses on this point, it is a fact in the case that these cars ran away from this siding out upon the main track and collided with the decedent's engine four miles below. The track was all downgrade from the point from which the cars started to the point of collision. There was no derailing device used by the defendant company at the switch upon which the cars had been placed.

The defendant contended that from the evidence submitted by it of the manner of braking and blocking the cars, the inference must be drawn that it was impossible for them to run away except by the interference of outside parties, and then to further infer that outside parties actually did interfere and loose the brakes and blocks, which started the cars from the switch; that this tampering with the brakes was the approximate cause, and the defendant is not liable.

The defendant's evidence as to the braking and blocking of cars may be said to be conclusive that they could not have run away except as a result of some person loosening the brakes and removing the blocks, but there is nothing to show whether or not that was done by the railway employes, in the usual course of handling these cars, subsequent to their having been braked and blocked, or that it was outside parties, with the criminal purpose of permitting them to run out from the switch. There is no evidence on this point at all. Had the defendant been able to show that the cars started by reason of a criminal interference with the brakes and blocks by outside parties, it would have been in a more favorable position.

The contention of the plaintiff is that by establishing the fact that these cars did run away and collide with the decedent's engine four miles below the point from which they started, and the fact that the tracks of the siding, branch line, and main line were all downgrade from the point where the cars started to the point where the collision occurred, together with the evidence of an experienced railroad engineer, who testified that under these circumstances there should have been a derailing device at the Albion siding, she has affirmatively established the negligence of the defendant, and that the jury would be warranted in drawing such a conclusion.

The defense endeavors to avoid the charge of negligence by proving the manner of braking and blocking the cars upon the siding, and urges that a conclusion must be drawn from this evidence that the cars could not have escaped except as a result of outside interference, and insists that such a conclusion is warranted and must be drawn by the court as a matter of law. The evidence relied upon does not justify a finding that "outside parties tampered with the brakes and blocks." The evidence of the defendant on this point, however, is a matter of defense to be submitted to the jury on the question of negligence. This evidence on the one side and on the other raise the question of the defendant's negligence, a question of fact which was submitted to the jury under proper instructions.

3. The decedent assumed the risk of defendant's negligence. It is contended that the decedent had placed these cars on that switch the day before, and that he knew there was no derailing device on this switch, and he, therefore, assumed all the risk of the dangerous surroundings, and assumed the risk of the defendant's negligence. We

do not think this contention can be maintained, but we think the better rule is that laid down by the Supreme Court of the United States in the case of *Texas & Pacific Railway Co. v. Swearingen*, 196 U. S. 51, 25 Sup. Ct. 164, 49 L. Ed. 382. In this case the court said:

"Knowledge of the increased hazard resulting from the dangerous proximity of the scale box to the north rail of track No. 2 could not be imputed to the plaintiff simply because he was aware of the existence and general location of the scale box. * * * It was for the jury to determine from all the evidence whether he had actual knowledge of the danger."

There is nothing in this case to show that the decedent had actual knowledge of the danger which existed by reason of the failure of the defendant to have a derailing device at this switch. He may have known that there was no derailing device placed upon the switch, but there is nothing to show that he knew of such a combination of dangerous conditions as existed at this point. The motion for judgment non obstante veredicto is therefore refused.

There are 30 reasons assigned for a new trial, 4 of which are based upon the admission of evidence on the part of the plaintiff against the objection of the defendant; 15 allege erroneous answers to points submitted by the defendant; and 6 are to alleged errors in the charge of the court. The twenty-seventh reason assigned is that the verdict is excessive; the twenty-eighth, the verdict was against the law; the twenty-ninth, the verdict was against the evidence; and the thirtieth, the verdict was against the charge of the court.

The first reason assigned for a new trial is that the court erred in permitting the plaintiff to testify to the earning capacity of her husband. She said she had seen his checks for his monthly pay, and upon that she was properly permitted to testify.

The second error is as to the plaintiff's offer to prove that blasts causing shaking and reverberations of the earth would account for the escape of the cars from the siding. The plaintiff was permitted to ask as to this condition at that point, against the objection of the defendant, but the witness knew nothing about it, so that the defendant was not injured.

In the third and fourth, the question as to whether the plaintiff's evidence of an experienced railroad engineer, to the effect that this switch was defectively equipped in not having a derailing device, was properly admissible, is raised. The witness testified that under the circumstances there should have been a derailing device placed at this switch, and we think it was proper matter to submit to the jury, and the witness was entirely competent to speak upon that question.

We do not think it necessary to take up seriatim the errors assigned to the answers of the court to the points submitted by the defendant, nor to those errors assigned to the charge of the court. A review of both the charge to the jury and the answers to the 32 different points submitted by the defendant does not, in our judgment, when read in connection with the facts in the case, show that the court committed any error.

The question of the defendant's negligence under all the circumstances was a question of fact, and it was properly submitted to the jury for their consideration, together with the question of the amount of

damages which the plaintiff sustained. The jury found the defendant liable, and rendered a verdict which we think is justified by the evidence as to the earning capacity of the decedent and the amount of damages suffered by the plaintiff.

The motion for a new trial is therefore overruled.

ROYCE v. DELAWARE, L. & W. R. R.

(Circuit Court, S. D. New York. May 27, 1910.)

1. MASTER AND SERVANT (§ 189*)—INJURIES TO SERVANT—RAILROADS—SUPERINTENDENT.

Where, by a long-existing custom on defendant's road, when a conductor or engineer wished to call the superintendent, he telephoned to the chief dispatcher's office, where it was in the discretion of the person answering whether he would communicate with the superintendent or advise what should be done, the railroad company thereby substituted for the superintendent's direction that of the person in the dispatcher's office who received a message and directed what should be done, not only with reference to the movement of the train, but as to such matters as were within the duties of the superintendent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 433; Dec. Dig. § 189.*]

2. MASTER AND SERVANT (§ 185*)—TOOLS AND APPLIANCES—DELEGATION OF DUTY.

Where a master delegates to fellow servants his own duty of providing servants with safe tools and appliances, he cannot excuse himself for a default because it arose from the negligence of those to whom the duty had been delegated.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 392-410; Dec. Dig. § 185.*]

3. MASTER AND SERVANT (§ 124*)—INJURIES TO SERVANT—DEFECTIVE LOCOMOTIVE—INSPECTION.

Where a railroad locomotive became defective on its trip, and it appeared that the engine, before going out, had been inspected and certain defects corrected, the duty to inspect did not again arise until the locomotive had been returned to the place where it could be examined and the defect remedied.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. § 124.*]

4. MASTER AND SERVANT (§ 185*)—INJURIES TO SERVANT—NEGLIGENCE—FELLOW SERVANTS.

A locomotive became disabled on one side en route, whereupon the conductor asked the train dispatcher for a pusher, which was promptly sent. No information was given by the train operatives that it was dangerous to run the engine further. *Held*, that there was no actionable negligence on the part of the railroad company; it not being liable for the negligence of the engineer and conductor in operating the train, they being fellow servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 401; Dec. Dig. § 185.*]

At Law. Action by Joseph M. Royce against the Delaware, Lackawanna & Western Railroad. Verdict was rendered for defendant, and plaintiff applies for a new trial. Denied.

See, also (C. C. A.) 176 Fed. 331.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Plaintiff was a brakeman on defendant's coal train from Scranton, Pa., to Hoboken, N. J. On running into a siding it was discovered that the upper guide on the left side of the engine had dropped off. The conductor, after consulting with the engineer, called the office of the chief train dispatcher at Hoboken and asked for a pusher. The engine was of the "Mother Hubbard" type; the cab being built over the boiler and fastened to it, leaving a place for the engineer to stand on the right side and for a brakeman on the left. The pusher was promptly sent, and the train proceeded, with the intention of leaving the engine for repairs at the Port Morris yard. On entering the yard the driving rod became disconnected and struck the floor of the cab, loosening one of the bolts that held it to the boiler, from which steam escaped and seriously injured plaintiff, who was on the left side of the cab.

Hatch & Clute, for plaintiff.

W. S. Jenney and J. L. Seager, for defendant.

HAND, District Judge. The evidence upon the alter ego in this trial is similar to that on the first, with the exception that now the plaintiff has proved that by the long-existing custom of the road, when a conductor or engineer wished to call the superintendent, he always telephoned to the chief dispatcher's office, and it was a question resting in the discretion of the person answering in that office whether he should himself communicate with the superintendent, or should advise what was to be done. By so doing I think that the road substituted for the superintendent's discretion that of those persons who got the messages in the chief train dispatcher's office, and that the chief train dispatcher upon this proof was the alter ego not only for the movements of trains, but for the duties laid on the superintendent. If the road established such a custom, it necessarily substituted the person who got the message in place of the superintendent himself. It could not prevent access to the superintendent by a custom of that sort and still be permitted to say that only the superintendent was the alter ego.

This, however, does not in my judgment meet all the difficulties which the Circuit Court of Appeals found in the plaintiff's case as originally presented. 176 Fed. 331. It is of course, well settled that, if the master delegate to any one else his own duty of providing his men with safe tools and appliances, he cannot excuse himself for a default because it arose from the negligence of those to whom he delegated it. This is settled by so many authorities that I need not cite any. If in this case, therefore, there was a default in furnishing safe appliances, the master was liable. But I do not think there was any default in that duty. The engine, when it started, had been repaired, and so far as appears was in reasonably safe condition. It is true that on its last inspection certain defects were found; but these had been corrected in the repairshop, and there was no evidence from which the jury could find that it was not reasonably safe when it started. The master of course is not responsible from minute to minute for any defects which arise. His duty is limited, first, to furnishing suitable appliances, and, then, to making proper inspection from time to time at reasonable intervals. The duty to inspect did not arise until the locomotive was again returned to the place where it could be looked over and the break remedied, not while the locomotive was en route.

The question, therefore, becomes whether the defendant was negli-

gent in the management of the engine before it got back to a round-house where it could be inspected and repaired. I must assume from the proofs that it was negligently run, for certainly that was a question for the jury; and, therefore, the question is: Who was the negligent person in permitting it to be used as it was until it got to the Port Morris yard? If there was negligence, clearly the engineer and the conductor shared in it; but they were fellow servants, and to hold the defendant some alter ego must have contributed his own negligence to the accident. As the proofs now stand, there must be some evidence of the negligence of the chief train dispatcher. Upon that I think the last paragraph of the opinion of the Circuit Court of Appeals still controls. The words I refer to are these:

"Even if the train dispatcher knew or thought the defect was one likely to make it dangerous to proceed with the engine in that condition, he had a right to suppose that the engineer had disconnected the disabled side, as the proofs show he could perfectly well have done. The purpose of the message was to get from the train dispatcher the remedy which the conductor thought applied to the situation, namely, the pusher, and this was promptly supplied."

In this trial the plaintiff thinks that he has met this difficulty by the testimony of Smith, who swore that, although the disabled side of the locomotive could have been disconnected, still there would have been a strain caused by the revolution of the rod. Smith's testimony in that respect is in substance as follows:

"If he had killed that side, it would have done no work; but the revolution of the rod would have still caused a strain on the lower guide after that, unless he was able to take down the main rod, which he could not have done."

This testimony, brought out on cross-examination, was directed to a strain on the lower guide which had not broken and which was not the cause of the accident, because it was the upper guide which had been lost. The witness' testimony was somewhat confused as to whether there was any strain upon the top guide except in backing; but of course that confusion was for the jury to resolve. However, this testimony is far from showing that the accident might still have happened if the right side had been disconnected. Laying aside the fact that he only says there would have been a strain on the lower guide, and even assuming that from it the jury might have inferred that there would also have been an upward strain, it nowhere appears that had the side been disconnected the strain was serious enough to cause a break. As the whole theory is that it was negligence for the chief train dispatcher not to insist upon the removal of the engine and for him to assume that the conductor could not have safely dealt with the situation, some such proof as this was essential to the plaintiff's case. Again, even if the engine with the tools actually at hand could not in fact have been so disconnected as to remove all danger, yet the chief train dispatcher, acting in the stead of the superintendent, still had a right to suppose, as the Circuit Court of Appeals holds in effect, that the men on the ground would neutralize that danger, or else keep the employ  s away from the injured side of the engine. It is not as though the chief train dispatcher had been consulted as to how the situation should be managed; nor was he to assume that the discon-

nection of the injured side was the limit of the possibilities of the men on the spot. The conductor assumed responsibility for the situation by asking for a pusher, and the chief train dispatcher could rely upon his doing what was necessary. When he said that the top guide was lost, it was to explain why he asked for the pusher, not to state the facts and ask for advice; he was then speaking, not to the superintendent at all, but to the chief train dispatcher, and asking that a piece of rolling stock be moved from one place to another. Therefore the information to the chief train dispatcher did not disclose to him a situation necessarily so dangerous that nothing short of entirely disconnecting the locomotive would have made it safe. Perhaps in that case the failure of the chief train dispatcher to intervene by affirmative action would have been a ground for negligence.

I cannot see that a substantially different case has been shown from that passed on above, and I shall therefore have to deny the motion for a new trial.

COLGATE v. JAMES T. WHITE & CO.

(Circuit Court, S. D. New York. August 3, 1910.)

1. INJUNCTION (§ 128*)—PUBLICATION OF BIOGRAPHY—EVIDENCE—WEIGHT.

Evidence on a bill to enjoin publication of complainant's biography *held* to show that he gave facts concerning his life on an understanding that they would be used in a set of books officially recognized by the federal government.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 278; Dec. Dig. § 128.*]

2. INJUNCTION (§ 59*)—PUBLICATION OF BIOGRAPHY.

Injunction lies to prevent publication of complainant's biography in a set of books other than a set issued under auspices of the federal government, where he gave the facts for use in such set only.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 114-116; Dec. Dig. § 59.*]

3. CONTRACTS (§ 168*)—TERMS IMPLIED—PUBLICATION OF BIOGRAPHY.

Complainant having indicated that he would give facts concerning his life for use only in a biography issued under auspices of the federal government, there was an implied promise that they would not be otherwise used.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 751; Dec. Dig. § 168.*]

4. EQUITY (§ 141*)—BILL IN EQUITY—REQUISITES.

While a bill in equity must advise defendant of the facts on which complainant relies, it need not state a cause of action at law, a bill which asks relief not itself inconsistent, and justified by the narrative part of the bill, being ordinarily sufficient; and complainant is not limited to any given theory of law if he does not depart from the bill itself.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 323-333; Dec. Dig. § 141.*]

5. COURTS (§ 329*)—FEDERAL COURTS—JURISDICTION—VALUE OF SUBJECT-MATTER.

On a bill to enjoin publication of complainant's biography in a set of books, an allegation that the right infringed is worth \$2,000 is *prima facie* sufficient to confer jurisdiction of the subject-matter on the federal

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

circuit court, in the absence of proof that the facts which he gave for publication in another set of books were merely formal, or such as any one might learn.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 897; Dec. Dig. § 329.*]

Jurisdiction of circuit courts as determined by the amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459.]

6. COURTS (§ 328*)—FEDERAL COURTS—AMOUNT IN CONTROVERSY—JOINDER OF CLAIMS NOT RELATED.

On enjoining publication of complainant's biography in a set of books other than that for which he gave facts of his life, relief cannot be had in the United States Circuit Court against a contract to subscribe for a set at \$10 a volume; the subject-matter concerning the biography and the subscription being distinct.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 891; Dec. Dig. § 328.*]

In Equity. Bill by R. R. Colgate against James T. White & Co. Decree for complainant.

See, also, 169 Fed. 887.

This is a bill in equity to prevent the defendant from publishing in the National Cyclopaedia of American Biography facts of complainant's life obtained from him, and to deliver up and cancel a certain written instrument of subscription to the said Cyclopaedia obtained from the complainant by fraudulent misrepresentations. The bill depends upon diversity of citizenship, and charges that the defendant represented to the complainant that the biography in which he proposes to insert the facts stated was one to which the Congress of the United States had made an appropriation of money, and that the defendant was engaged in collecting the information and in publishing such books for the government; that, upon these representations, the complainant told the defendant a number of facts, including the principal events of his life, and subscribed for a set of the said books at \$10 a volume; that the representations were false and known by the defendant to be false, and were made with intent to deceive and mislead the complainant; that the complainant is a private person, and not engaged in business nor a holder of public office, and that he acted upon the representations of the defendant that the publication was a government work; that the defendant threatens to use the facts so obtained and to collect for the subscription. The answer denies the substantial allegations of the bill, and alleges affirmatively that the complainant ratified the contract after knowledge of the facts.

Upon the final hearing certain affidavits were submitted as final proofs, which had been used upon a hearing for preliminary injunction. The complainant's affidavit alleges that he is a retired business man having an office in New York and living in Sharon, Conn.; that on December 2, 1908, he had a conversation with one Gower, a sales-agent of the defendant, who told him he had been assigned to write his biography for the "National Cyclopaedia of American Biography." The defendant protested, whereupon Gower said that it was a national affair. Complainant then said: "If it is a government matter, I will see you in reference to it." Gower came the next day, and had a conversation with the complainant at his office, to which conversation he instructed his stenographer to listen. Gower said that he was sorry complainant was opposed to having his biography written, but that this was something entirely different from the ordinary work of the kind, as it was a national affair, to which the complainant replied that, if it was a government matter, he would give him some facts. Complainant then says that he asked him how the government came to take the matter up, and Gower gave some explanation, using the names of some senators or of a representative, and saying that the bill had been introduced to make an appropriation for the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

work which was to be sent to each ambassador and consul. At that interview the complainant signed a subscription blank binding himself to take a copy of the work at \$10 a copy. The complainant will not swear that Gower used the word "government," but does say that he constantly used the word "national." Complainant used the word "government," however, without correction from Gower. On the 6th complainant says he learned of the character of the work, which was not in any sense under the patronage of the government. Next morning, on the 7th, he went to the office of the defendant and asked for White, one of the defendant's officers. He saw Gower at the time, who conceded that it was not a government work, but that the government had subscribed for a number of volumes. Complainant then told Gower that he wished to cancel his subscription, and was recommended to White, who subsequently came in and refused to cancel the subscription and to refrain from publishing the facts. On the 15th of January the complainant wrote, making a formal tender to rescind the subscription, and demanding that they refrain from publishing the facts. The complainant's stenographer, who was in the office at the time of the interview, swears that she listened to the conversation, as she was instructed, on December 3d, and that the complainant told Gower he disliked publicity of this kind, whereupon Gower said that this was entirely different from anything gotten out before, it was a national affair; that he also spoke of an appropriation by the government; that he constantly used the word "national." The impression she received from the conversation was that the Cyclopaedia was compiled and published under the direction of the United States.

These two affidavits constituted the complainant's direct proof. The defendant's proof consisted of Gower's affidavit, in which he denies that he ever said anything from which it might be inferred that the publication was a "government affair." At the interview on December 3d he says that he started by saying that this work was entirely different from the usual publications, for it was a national affair. He does not remember the complainant's saying it was a government matter. He denies that he said that a bill was being introduced for an appropriation to send the work to all ambassadors and consuls. He concedes that he spoke of the subsidization of such biographies by foreign governments, and that there was no government publication of the sort in this country. He says that he told the complainant that this was a private publication for which the government had done nothing but subscribe for a number of copies. He concedes that he used the word "national" repeatedly, but asserts that none of his conversation was sufficient to convey to a reasonable mind the idea that the publication was a government enterprise. He denies that it was apparent to him that the complainant was being misled. He remembers the interview of December 7th, in which the complainant requested White not to publish the biography. At that interview the complainant told White that Gower had told him it was a government publication. White replied, asking whether he claimed there had been misrepresentation, to which he said, "No; not that, but a misapprehension." In White's affidavit he says that he talked with the complainant on December 7th, who told him he did not wish to have his biography published, and said that he could not say that there had been misrepresentations, but rather misapprehension. White then suggested that he let the publication of his own biography go over until the volume after next, and the complainant accepted this as a compromise of the whole matter, and that at the end of the interview he said, "Send along the books. I will pay for them"; that they sent the first six books on December 10th, and on January 12th, two more; that on January 11th the first six books were refused. The affidavit of Linen for the defendant says that on December 3d the complainant came to the office and said that he had been influenced to give his biography upon the belief that it was a government publication; that at that time he said nothing about cancellation; and that in the interview he disclaimed the position that there had been any misrepresentation, but said that there had been misapprehension. The complainant replied in an affidavit, repeating that Gower had stated that the government had made an appropriation for the publication, and gave the name of a senator who introduced the bill; that on December 7th at the interview in the defendant's office he stated that

Gower had told him that the work was a government one and used the words "false representations," which made Gower and White very angry, so that he said he would substitute the word "misapprehension," which seemed to satisfy them. He denies that he said: "Send along the books. I will pay for them."

This is all the testimony in the case, although there was a subsequent interview on the telephone between White and the complainant.

Hawkins & Delafield, for complainant.
Philip J. McCook, for defendant.

HAND, District Judge (after stating the facts as above). I think there can be no doubt that Gower gave Colgate to understand that the facts were not to be published in the ordinary biography which is used as a bait to practice upon the vanity of the simple and so procure their money, but was to be used in a publication issued under the auspices of the United States government. It is significant that Gower does not deny that Colgate used the word "government" in reply to his own questions. Both sides concede that Colgate was extremely unwilling in the first instance to allow his biography to be used, and was reluctantly forced into the enterprise; nor do I think that there can be any doubt that whether his inference was reasonable or not he certainly supposed that the book had the sanction in some form of the government. Colgate's immediate claim of being misled is strong corroboration of that fact, as is also the affidavit of McLaren, the stenographer. The question is whether Gower gave him reasonable grounds for believing so. The name of the publication somewhat lent itself to that misconstruction. Colgate swears distinctly that he used the word "government" a number of times, and McLaren corroborates him. The well-known urgency of book agents to procure subscriptions under these circumstances adds to my belief that Gower let the interview proceed after it would have been apparent to any reasonable man that Colgate was acting under a misapprehension, and supposed that the facts would not be published in the usual kind of biography. I therefore find that as a fact the reasonable implication of the conversation was that, if Colgate would tell the facts, Gower would use them in a biography having some official recognition from the United States government, instead of publishing the account which he was to get up from other sources as he had threatened.

Upon the law I think that the complainant is entitled to an injunction, though not upon precisely the same lines as was suggested upon the argument. The contract between the complainant and the defendant, as I have found it, was to publish the facts of his life in a book issued under the auspices of the United States government. Assuming that there was fairly to be implied a negative covenant not to publish the facts except in a biography issued under government auspices, we have the general rule now well established that where, as here, the defendant has received the consideration and the complainant cannot at law have adequate relief, an injunction will go to enforce the negative promise, even in a case where the court would not grant affirmative specific performance. While the law first grew up under cases of personal service, beginning with Lord St. Leonard's decision in

Lumley v. Gye, 1 D. G., M. & G. 604, it is by no means confined to such cases. *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60, 51 N. E. 408, 43 L. R. A. 854, 68 Am. St. Rep. 749; *Chic. & Al. Ry. Co. v. N. Y. L. E. & W. R. R. Co.* (C. C.) 24 Fed. 516; *Singer Sewing Machine Co. v. Union Buttonhole & E. Co.*, Holmes, 253, Fed. Cas. No. 12,904; *Dwight v. Hamilton*, 113 Mass. 175; *De Mattos v. Gibson*, 4 De G. & J. 276; *Met. El. Supply Co. v. Ginder* (1901) 2 Ch. D. 799; *Wolverhampton & W. Ry. Co. v. London & N. W. Ry. Co.*, L. R. 16 Eq. 433, per Lord Selbourne.

The question is, therefore, whether here the promise to publish the facts in a government biography carried with it by implication the promise not to publish them in another kind of work. It is true that there was not that kind of inconsistency between the two which made it impossible to perform both promises. It was not like employing a chartered ship upon another voyage. *De Mattos v. Gibson*, supra. However, Colgate showed clearly enough that he would not have given the facts for any other purpose, and both parties understood that they were to be used only in a government biography. Colgate's position was that, since some account of his life was inevitable, he would disclose the facts if Gower would publish them, but that he would have nothing at all to do with the usual compilations which discredit the names of all those who lend themselves to their production. The commonest good faith requires the implication that he would not abuse the opportunity so given him by publishing them in a work which he from the outset found it necessary to assure Colgate that this was not.

No objection arises from the fact that the contract of subscription was in writing, because that clearly does not purport to cover the subject-matter of publishing the life, but was a mere subscription for the books themselves, regardless of their contents.

It is true that the bill of complainant does not specifically rest on contract. The bill is of a vague sort, sets up all the facts as a bill in equity should, and then prays for relief. It makes allegations of fraud and misrepresentation, and shows that the contract was made, what it was, and how the complainant's right ensued. It also shows the threatened breach. While, of course, a bill in equity must advise the defendant of the facts upon which the complainant relies, it does not have to state one of the limited causes of action known at law. A bill in equity which asks for relief not itself inconsistent, but justified by the stating, or narrative, part of the bill, is ordinarily sufficient, nor is the complainant limited to any given theory in law, provided he does not depart from the bill itself. Here the bill has no charge, no interrogatories, but confines itself to the narrative. It is quite as good as the bill in *Briges v. Sperry*, 95 U. S. 401, 24 L. Ed. 390. A court of equity interprets the bill so as to save its equity when possible (*Street*, Eq. Proc. § 288), and tolerates objections to its form only when taken at the outset, not at final hearing.

The defendant raises objection to the jurisdiction of this court on the score of the amount of the "matter in dispute." The matter in dispute is Colgate's right under the contract to prevent the use of the

facts derived from him in any biography other than one issued under government auspices. That right is not susceptible of certain valuation and must be fixed by either a jury, or a judge, from an estimate of the pecuniary recompense for the annoyance and chagrin involved. In this case it is, moreover, not limited by the injury suffered from a given infraction, because in analogy with the trade-mark cases it is the right itself which is at stake, not a specific violation. Colgate alleges that it is worth \$2,000, and that is *prima facie* enough in the absence of bad faith or obvious exaggeration. *Hilton v. Dickinson*, 108 U. S. 165, 174, 2 Sup. Ct. 424, 27 L. Ed. 688; *Barry v. Edmunds*, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729. I certainly cannot say that the value here laid is colorable under the act of 1875 in such sense that I must dismiss the bill. It may well be that to prevent the spreading broadcast of any kind of publication which will perpetuate the circumstantial details of his life would be worth to Colgate \$2,000 or more. I remember that the right is not to prevent any facts from coming out, but only those which he himself told. However, it is one thing to have irresponsible persons tell what they can learn generally, and another to have them tell the details that you have told them yourself. In the absence of any proof that the facts which he did give out were merely formal or such as any one might learn, I must accept his own valuation under the usual rule. However, there is no jurisdiction over the contract of subscription. There were substantially two contracts here. By one Colgate agreed to take a set of books at \$10 a volume, and in the other Gower agreed to publish the facts of Colgate's life in a government biography. The subject-matter of each is separate, and, as I have no jurisdiction over the subscription contract, the decree must be limited to an injunction against the defendant from using the facts so obtained.

Let a decree pass to that effect, with costs.

BAGENAS v. SOUTHERN PAC. CO. et al.

(Circuit Court, N. D. California. August 1, 1910.)

No. 15,067.

1. REMOVAL OF CAUSES (§ 36*)—ADVERSE CITIZENSHIP—JOINT ACTION AGAINST RESIDENT AND NONRESIDENT.

While a joint defendant sued purely by a fictitious name without other facts identifying him as a proper or necessary party to the action stated will be regarded as a formal party merely, whose presence on the record will not affect the right of removal by one otherwise entitled thereto, yet one may sue any or all of those jointly liable for a tort, and, where a joint cause of action is stated against them, a defendant so sued cannot question the good faith with which his codefendants have been joined with him, though such joinder may appear to be for the very purpose of preventing a removal to the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 36.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. REMOVAL OF CAUSES (§ 43*)—PROCEEDINGS—TIME FOR TAKING—AMENDMENT DISCONTINUING AS TO JOINT DEFENDANT.

Where an original complaint stated a joint cause of action against a resident and nonresident defendant, and an amended complaint for the first time made the resident defendant a mere nominal party to the record, asserting no cause of action against him, the nonresident defendant was not precluded from removing the cause to the federal court because the case was not removable at the time when, by the literal terms of the statute, removal might be had, and he had answered the original complaint and went to trial thereon, the time within which application for removal must be made being not jurisdictional, but modal and formal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 87; Dec. Dig. § 43.*]

3. REMOVAL OF CAUSES (§ 41*)—CITIZENSHIP—CONTROVERSY BETWEEN NON-RESIDENTS IN STATE COURT.

The Circuit Court has jurisdiction under the judiciary act (Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]) to entertain by removal an action by a nonresident alien in a state court against a citizen of another state.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 82½-84; Dec. Dig. § 41.*]

At Law. Action by Gus Bagenas, administrator of George S. Eliopoulos, against the Southern Pacific Company and another. On motion to remand to the state court. Motion denied.

Brennan & Lane and Costello & Costello, for plaintiff.

A. A. Moore and Stanley Moore, for defendants.

VAN FLEET, District Judge. This is a motion by plaintiff to remand the cause to the state court; the material facts being these:

The action was originally commenced in the superior court of the city and county of San Francisco by the widow and minor children as the heirs at law of one George S. Eliopoulos, as plaintiffs, against the Southern Pacific Company, a corporation organized and existing under the laws of Kentucky, and one John Doe Marshall, a citizen of California and resident of this district as defendants, to recover damages resulting to the plaintiffs from the death of the husband and father claimed to have been caused through the joint negligence of the defendants; it being alleged that, while deceased was lawfully a passenger on one of defendant corporation's trains, another train owned and operated by it and in charge of defendant Marshall as conductor was carelessly and negligently caused by the defendants to collide with the one on which deceased was riding, thereby derailling it and injuring him so that he died. To this complaint the defendant corporation answered, and the action subsequently went to trial. At the trial in response to a motion for nonsuit based, among others, upon the ground that plaintiffs had not capacity to sue, the plaintiffs asked leave to amend the complaint which was granted and the nonsuit denied. Thereafter what purported to be an amended complaint was filed in the action, but in the name of the present plaintiff, as administrator of the estate of said George E. Eliopoulos, deceased, against the same defendants; the names of the original plaintiffs not appear-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing. In the amended complaint, while he was named in the caption, no cause of action was stated against the defendant Marshall, but it was alleged that deceased while employed by the defendant corporation as a track repairer came to his death in the manner indicated in the original complaint through the "negligence and carelessness of the defendant Southern Pacific Company in operating said trains." Thereupon before any further proceedings in the Superior Court, and before the defendant was required to answer such amended complaint, it procured the action to be removed to this court on the ground of diversity of citizenship.

The contention of the plaintiff in support of the motion is that the proceeding for removal came too late; that, if the right existed at all, it was open to the defendant corporation at the filing of the original complaint as fully as at the date the removal was had; and that by answering in the state court and going to trial the right was waived. This contention is based upon the theory now advanced by the present plaintiff that the defendant Marshall never was a necessary party to the action, and that this appeared upon the face of the original complaint; that, being sued by a fictitious name, he was to be regarded as merely a nominal or formal party whose presence did not at any time constitute an obstacle to a removal of the cause by his codefendant. But this attitude is not only a manifest stultification of the theory upon which the original complaint was framed, but involves an obvious misapprehension of the facts there alleged. It is true that it is held that a defendant sued purely by a fictitious name, without other facts identifying him as a proper or necessary party to the cause of action stated, will be regarded as a formal party merely, whose presence on the record will not affect the right of removal by one otherwise entitled thereto. But that is not this case. In the first place Marshall was not, strictly speaking, sued by a fictitious name. The use of the name "John Doe Marshall" as alleged in the complaint did not imply that the name was wholly fictitious, but was to be taken as an averment that his surname was Marshall and merely his Christian name unknown to the plaintiffs. But in the next place he was distinctly identified by express averment as the conductor of the offending train, and as such a perfect cause of action was stated against him as a joint tort-feasor with his codefendant. A joint cause of action being thus stated against them, his codefendant was not at liberty to assume that Marshall was not sued in good faith, and, upon that assumption, seek to remove the cause. One may sue any or all of those jointly liable for a tort, and it does not lie with a defendant so sued to question the good faith with which his codefendants have been joined with him, even though such joinder may appear to be for the very purpose of preventing a removal of the cause. This principle is aptly stated by Judge Taft in *Hukill v. Maysville, etc., R. Co.* (C. C.) 72 Fed. 745, where it is said:

"If a plaintiff has a good cause of action for a joint tort against several defendants, it is not fraudulent in him to join them all in his suit, even if it does appear that he would not have joined the resident defendants with the nonresident defendants except for the purpose of avoiding the jurisdiction of the federal court. Where he has reasonable ground for a bona fide

belief in the facts upon which the liability of all the defendants depends, his motive in joining them cannot be questioned. It is only where he has not, in fact, a cause of action against the defendants, and has no reasonable ground for supposing that he has, and yet joins them, in order to evade the jurisdiction of the federal court, that the joinder can be said to be fraudulent, entitling the real defendant to a removal."

See, also, *Thomas v. Great Northern R. Co.*, 147 Fed. 83, 77 C. C. A. 255; *Knuth v. Butte Electric Ry. Co.* (C. C.) 148 Fed. 73.

And even though upon the facts alleged a question might arise as to the existence of a joint liability in the defendants, so long as the complaint alleged the cause of action in that form, the plaintiffs had a right to have the case remain in the state court and proceed upon that theory. This was recently held in this court in *Galeotti v. Diamond Match Co. et al.*, 178 Fed. 127, a case of cognate character, where, as the result of a painstaking examination of the decisions of the Supreme Court upon the question, the rule is thus stated:

"The doctrine of that court, as clearly indicated in the cases that have come before it, is, in substance, that the question whether one sued jointly with others in an action of this impression is properly joined is dependent upon the case as made in the complaint, and if, under the allegations of that pleading, it appears that the defendants are sought to be held jointly liable, the plaintiff has a right to have the action proceed upon that theory, and that the question of removability cannot be made to depend upon the question whether this court might eventually determine that the theory upon which the action was brought is erroneous, and that no joint liability in fact exists."

And, it appearing from the complaint in that case that it was intended by the plaintiff to state a joint cause of action against the defendants, it was directed that the cause be remanded to the state court.

It is quite apparent from these principles that the defendant corporation was not entitled to remove this cause upon the facts as they appeared in the original complaint. Had it attempted to do so, the law would have imperatively required this court to remand the cause. This being so, was the defendant too late in procuring the removal of the cause at the time it did?

It is not necessary for present purposes to determine whether, as advanced by the defendant, the action of the state court in allowing a discontinuance as to the original plaintiffs and the filing of the present complaint by a new party, based upon a different theory as to liability, was virtually permitting a new action, and for a new cause, to be commenced under the guise of an amendment. That question involves considerations which are beside the present motion; whereas, the same practical result must follow to defendant by treating the action of the state tribunal as authorizing an entirely proper amendment. It is certain that treating it as such the status of the defendant railroad company as to the right of removal is entirely changed under the case made in the amended complaint. That pleading, as we have noted, was virtually a discontinuance as to its codefendant Marshall. It entirely fails to state any cause of action against him, but charges the railroad company as being the sole author of the negligence upon which the right of recovery is based. Thus, for the first time, Marshall became a mere nominal party to the record, against whom no

cause of action is asserted; and all the authorities agree that such a party may be ignored in determining the right of removal. The only question then is, the case not being removable at the time when by the literal terms of the statute removal may be had, but becoming so later, is the defendant denied the assertion of that right? This question is very fully and completely answered in the negative by the Supreme Court in *Powers v. Chesapeake & Ohio Ry. Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673, where, after a discussion of the terms of the removal act in the respect here involved, it is held that the time within which application for removal must be made is not jurisdictional but modal and formal, and that to so construe the statute that the application can be made only within the time therein prescribed would in many instances defeat the right which the act was clearly intended to confer, and it is said:

"This provision clearly manifests the intention of Congress that the petition for removal should be filed at the earliest possible opportunity. But, so long as there does not appear of record to be any removable controversy, no party can be entitled to remove it, and the provision of the act of Congress that 'any party entitled to remove any suit' 'may make and file a petition for removal' at or before the time when he is required to make answer to the suit, cannot be literally applied. To construe that provision as restricting to the time prescribed for answering the declaration the removal of a case which is not a removable one at that time would not only be inconsistent with the words of the statute; but it would utterly defeat all right of removal in many cases. * * * The reasonable construction of the act of Congress, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold that the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right; and to consider the statute as in intention and effect permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which it was brought."

And it was held that, the plaintiff having, as here, discontinued as to the resident defendants, the action as to the nonresident defendant became removable, and its petition filed immediately upon such event was filed in due time.

Applying the principles of that case which are strictly pertinent to the facts here, it must be held that the defendant corporation in answering the original complaint and going to trial thereon did not waive its right subsequently accruing to have the action removed to this court.

I do not gather distinctly from plaintiff's brief whether he is to be understood as urging the objection raised in *Mahopoulus v. Chicago, etc., Ry. Co.* (C. C.) 167 Fed. 165, and *Barlow v. Chicago, etc., Ry. Co.* (C. C.) 164 Fed. 765; s. c. on rehearing (C. C.) 172 Fed. 513, that this court is without jurisdiction under the judiciary act (Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]) to entertain by removal an action brought by a nonresident alien in a state court against a citizen of another state. Plaintiff has contented himself by referring the court to those cases without definite comment, and it appears upon consideration that they are diametrically opposed in their conclusions upon the subject; the first holding that the jurisdic-

tion does not exist, and the latter that it does. If, however, it is intended to insist upon the objection here, I think it must, for present purposes, be regarded as concluded by the Matter of Tobin, 214 U. S. 506, 29 Sup. Ct. 702, 53 L. Ed. 1061, wherein the precise question was presented to the Supreme Court in an application for mandate to the Circuit Court of the United States for Minnesota to require that court to remand a case for want of jurisdiction; and the application was denied without comment. As this was the only question involved in the application; and as mandate is held in *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, to be the proper remedy in such a case, I think the denial of the application must be regarded as an implicit ruling by that court in favor of the existence of jurisdiction.

It results from these considerations that the motion to remand must be denied; and it is so ordered.

THE VARZIN.

(District Court, S. D. New York. May 21, 1910.)

SALVAGE (§ 34*)—COMPENSATION—RESCUE OF OCEAN STEAMSHIP WITH BROKEN PROPELLER SHAFT.

The German steamship Varzin, 4,470 gross tonnage, on a voyage from Australia to Boston and New York with a cargo of wool valued at \$1,300,000, ship, cargo, and freight being worth about \$1,500,000, broke her propeller shaft on January 29th, when some 350 miles from Boston. She was water-tight and otherwise seaworthy, and proceeded under sail, making some progress with fair weather, but in the meantime making distress signals. Her sails were not intended for independent navigation, and she could not shape her course in bad weather. On February 1st she was spoken by the steamer Erika, bound from New York to the Azores and Lisbon, which finally agreed to take her in tow, and on the 9th reached Boston with her in safety. During the time there was stormy weather, in which the hawser parted, and while waiting for the storm to abate the vessels drifted from their course. There was no great danger at any time to the Erika's crew, but during the heavy weather there was some to the vessel owing to the heavy tow, and she was somewhat strained. *Held*, that under the circumstances and in view of the valuable cargo of the Varzin and her peril, which, although not immediate, was considerable at that season, the Erika was entitled to a salvage award of \$45,000 in addition to an allowance for her time, coal consumed, and repairs and disbursements.

[Ed. Note.—For other cases, see *Salvage*, Cent. Dig. §§ 80-83; Dec. Dig. § 34.*]

In Admiralty. Suit by the owner of the steamer Erika against the steamship Varzin. Decree for libellant.

This is a libel for salvage of the German steamship Varzin, a steel screw freight steamer of 4,470 tons gross tonnage, while on a voyage from Australia to Boston and New York with a cargo of wool. At 9:28 p. m., January 29, 1910, the Varzin broke her tail shaft about a foot from the stern post and aft of her water-tight bulkhead. At that time her position as figured from an astronomical observation at noon on that day was latitude 37° 18' N. and longitude 63° 42' W. She had therefore come near the end

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of her voyage, as her first port was Boston. Repairs were made which made her substantially water-tight and were themselves of a durable and excellent character, so that she was to all intents and purposes seaworthy, except for the fact that she could no longer steam under her own headway. At the same time the master bent sails with which she was supplied, and besides rigged all other canvass, including awnings and tarpaulins, which he had on board, and which could in any way take the wind. Most of these were of an obviously provisional character. Two in particular were bent upon yards rigged upon the stay running from the mainmast to the foremast, and one was bent upon a derrick-boom which was itself rigged upon the foremast. With these sails and the help of southwesterly and southeasterly winds, she made considerable headway on her course on January 30th, and again on January 31st, the wind being during that time substantially favorable.

There is some dispute as to the distance she had covered before February 1st in the evening. The evidence of the claimant shows that even with southerly winds she could not in any sense shape a course, but she was nevertheless considerably nearer her port on the 1st than when the shaft broke. On the 29th the vessel had sent up rockets in signal of distress, and on the 31st sighted an east-bound steamer, which she signaled with rockets, but which paid no attention to her. On the morning of the 1st of February she sighted another east-bound steamer, which she again signaled by rockets, but which also passed her. On the evening of the 1st, at 9 p. m., she sighted the steamer Erika, bound from New York to the Azores and Lisbon, which she managed to speak. The Erika had left New York on January 30th and had passed southward of the usual track to the Azores to get advantage of the Gulf Stream. She was a German ship of 2,665 gross tonnage engaged on freightage charter by the Gans Steamship Line, and plying regularly upon her charter between those ports. After speaking the Erika, the Varzin unsuccessfully attempted to agree upon a price for towage with the master of the Erika. Thereupon the following entry was made in the log of the Varzin at 1 a. m., February 2d: "As our ship was not manageable the meeting of the officers decided in order to save ship and cargo to accept the said condition." The condition referred to was the settlement of the salvage by arbitration. The Varzin wished to start at once, the weather at that time being calm, but the night was dark and cloudy, and the Erika was unwilling to take the risk of putting a line from one ship to the other until the moon rose, which, being in the last quarter, was some time about 3 or 4 o'clock; moreover, the Erika needed some time to make ready by removing the steam pipes which ran along her hatches about which the hawsers were to be made fast. When the moon rose, the Erika was still unwilling to put out a boat, owing to a heavy swell, and by daybreak the wind had begun to blow from the north, increasing to a squall. The log of the Varzin conclusively shows that during that day, and while the Erika stood by, nothing could have been done with safety. Just how far the Varzin drifted at this time is somewhat uncertain, but on the morning of the 3d the sea had gone down enough so that at 8:45 a. m. the Varzin put out a boat which got a small line from the Erika, and eventually 120 fathoms of steel hawser, made fast to 90 fathoms of anchor chain, were stretched between the two vessels. During this time the ships were kept very near together, as was necessary to heave the hawser on board. The Erika began to tow at about 9 o'clock in the morning, the Varzin keeping a part of her canvas set, heaving the lead and signaling the distance made. The weather continued good with light winds on the 3d, but began to increase in force on the morning of the 4th, blowing northwest by west. On the afternoon of the 4th, the wind continued substantially from the northwest, but greatly increased in velocity until in the night of that day it was blowing at what is variously described as either a hurricane or "full storm," with a high sea, certainly 11 on Beaufort scale. At 8:30 the hawser parted, and the Varzin again went adrift. Further sails were set to keep the vessel as much as possible into the wind, and 15 gallons of oil were used to quiet the sea. The Erika had been prepared to cut the hawser before it broke, as she was laboring heavily and could not keep steerageway, particularly as the Varzin was veering in the wind widely from side to side. After the hawser parted, and during the night of the 4th and 5th, the salvor

stood by, and on the morning of the 5th, the weather having moderated, the Varzin a second time put out a small boat which got a line to the Erika, which again heaved the hawser on board and began towing on the morning of the 5th. Just how far the ships drifted during the night is a matter of doubt, as the last astronomical observation had been at noon on February 4th, and by the next they were well in advance of that, but there can be no doubt that they had drifted some distance in a general southeasterly direction. The wind during the 5th and 6th blew no stronger than 6 on the Beaufort scale, but freshened again on the 7th, accompanied by snow squalls and bad weather. Late on the 7th Highland Light was sighted, and from then the voyage was easier, the ships reaching Boston on the morning of the 9th. When the hawser broke, both ships were to the south of George's Bank, but subsequently, and on the 5th and 6th, while both vessels were pitching heavily and the hawser was again in danger of parting, the ships were fairly upon George's Bank.

The hawser, because of its weight, had a downward pull of about 45 degrees astern from the fair lead of the Erika, and when she pitched, and the bow of the Varzin at the same time rose to a sea, this created a strain upon the stern of the Erika which bent the ship somewhat. The engineer testifies that the shaft through this bending of the ship actually bore upon the upper shaft bearings so that they became heated by the friction, smoked, and constantly had to be cooled with oil and water. This testimony is contradicted by the testimony of the Lloyd's surveyor, Stewart, who denies the possibility of working an engine under the conditions testified to by the engineer of the Erika.

The value of the Varzin was at the least \$110,000, that of her cargo approximately \$1,300,000, and that of her freight nearly \$80,000, the whole of which she earned upon her arrival at Boston. The total values therefore came to something short of \$1,500,000. The total time consumed by the Erika in the towage was 10 days and 13 hours, of which 36 hours was spent in standing by on the 1st and 2d of February. The loss to the Erika in coal is estimated at substantially \$1,070, her disbursements, in Boston \$544, her time, about \$1,075, repairs about \$550. In addition to this, there was some proof of a loss due to the disarrangement of her schedule in Spain, which will be alluded to hereafter. The agreed distance of the towage was 358 miles.

Wheeler, Cortis & Haight, for libellant.

Wing, Putnam & Burlingham, for claimant.

HAND, District Judge (after stating the facts as above). The chief reason for making a liberal allowance in this case arises from the value of the property saved and its danger. As to the Erika's own peril, undoubtedly, if the story of the engineer is to be taken literally, the ship was in considerable danger of breaking her own shaft, particularly on the night of the 4th and during the 5th, when both were pitching heavily, and when the wind was very high, even by the Varzin's own log, which gives it up to 11 on the Beaufort scale. In view of its contradiction by the Lloyd's surveyor, I shall accept the engineer's statements with some reservation, but I cannot disregard the fact that, as the ship was going so slowly under full power that it could not make its own steerageway, the strain upon the shaft must have put it in considerable additional danger of breaking. Especially, while the ships were on the Bank, it would have been a matter of serious moment to be both adrift with broken shafts, and no one can fairly ignore that the salvor during that time was running a measurable risk. Upon her crew, except during those times when all hands were called to make ready for heaving the hawser aboard, or to clear

away when it parted, there was imposed no great hardship or personal danger beyond what is in general attendant upon seafaring.

Coming now to the peril in which the saved property stood, it seems to me that the Varzin greatly underestimates it, and the testimony of her master that she was tight and seaworthy for an indefinite period is to say the least only a small measure of the truth. I am quite satisfied that he could make no headway except as he could continue to meet favoring winds, and could not have made port unless by a series of happy fortuities. Before he spoke the Erika, his course showed that he depended substantially upon the wind, and that he could lay a course very little into the wind. His sails, except those made for the ship which were not really designed for independent navigation, were of the most flimsy character, and several times carried away. The light cargo made the ship ride high, and must have added much to the difficulty of maintaining any course into the wind. Especially the entry in the log of the Varzin shows pretty clearly that at the time the officers recognized that the ship was in no condition to continue any longer at sea than was absolutely necessary; nor do I credit the story of the Varzin's master that all he wished was a tow to New York, if he could get in communication with a boat carrying wireless. That would have no doubt been much cheaper and would have admirably answered his purposes if he had been able to get it at once, but he was certainly very willing to take the first assistance which offered, and which would bring into port his immensely valuable cargo. Though, as I believe, he had ample stores for the safety of his crew for an indefinite time, and though his position was somewhat north of some of the trans-Atlantic courses, it is quite obvious that with the winds which blew on subsequent days he was in great danger of blowing out of any course, and of drifting about helplessly till he was picked up by some steamer like the Erika, which in that event would have with reason claimed a larger award than can be awarded now. Certainly his wisest course was to do what he did, and avoid any further risk of danger or damage. It is very well now when all are safe and happy in port to consider the many means of safety which might have come to hand, but the fact must always remain that a ship practically helpless, 350 miles from land, is always in real peril in the north Atlantic in winter, and that, although there are ways in which she may come out of it, hull, cargo, and freight, there are likewise many others which lead quite elsewhere.

In so far as involves the loss of 36 hours in standing by on the 1st, I do not think that the master of the Erika can be blamed. He was not ready to heave on board the hawser until early in the morning, and it was natural that with some sea running he should be unwilling to risk his men until there was light with which to see what he was about. The Varzin herself did not suggest in the night that a small boat should go out, though she sent it out each time afterwards, and it seems to me unfair to charge with overcaution a master who will not put out his crew in a small boat in the dark and between two ships working so near together. Besides, that very proximity of the ships would have been doubly dangerous in the night, even by a

half moon. When the light came, I do not understand that either party contends that it would have been prudent to attempt to carry a line from one ship to the other until the following morning.

Though I am fixing a larger award than has heretofore been granted, so far as I find in the books, I have not thought that the sum should be fixed upon anything like the same percentage of the value of the property saved as would obtain in smaller cases. The salvor must no doubt have adequate inducement, but that inducement cannot be strictly proportionate to the value, and this is a principle which has been recognized in the cases. Considering the peril of the Varzin and her value, and the real, though not great, danger, which the salvor herself undertook in towing a much larger ship through such weather, the necessary length of time involved, and the extraordinary success of the help given, I think a salvage of \$45,000 is fair, and I will award that sum. To this may be added the expense of the Erika, amounting to some \$3,000, and consisting of the items mentioned in the statement of facts. I consider the loss involved in the supposed disarrangement of the schedule too remote to be the basis of damages. If the parties cannot agree upon the expenses, they may take a reference. Costs will follow the award.

IRVING et al. v. JOINT DIST. COUNCIL OF NEW YORK AND VICINITY OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AND AMALGAMATED SOCIETY OF CARPENTERS AND JOINERS OF AMERICA et al.

THE CARPENTER CASE.

(Circuit Court, S. D. New York. July, 1910.)

1. WORDS AND PHRASES—"CLOSED SHOP."

A "closed shop" is one that employs union labor only.

2. COURTS (§ 276*)—FEDERAL JURISDICTION—WAIVER OF OBJECTIONS.

By appearing in a suit in the federal Circuit Court, defendants waived any objection that the suit was not brought in the district where plaintiffs or they reside.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. § 276.*]

3. COURTS (§ 315*)—FEDERAL JURISDICTION—CITIZENSHIP.

A voluntary unincorporated association is not a citizen of any state, and hence the federal Circuit Court has no jurisdiction of a labor union constituting such association, nor of its members generally, on a bill against them to enjoin interference with an employer's business.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 861; Dec. Dig. § 315.*]

4. COURTS (§ 318*)—FEDERAL JURISDICTION—DISMISSAL OF PARTY—EFFECT.

A bill in the federal Circuit Court to enjoin interference with an employer's business may be dismissed as to a voluntary unincorporated labor union and its members generally, for want of jurisdiction of them, and stand as to the remaining individual defendants.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 863; Dec. Dig. § 318.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. INJUNCTION (§ 136*)—PRELIMINARY INJUNCTION—PROOF REQUIRED.

On motion for a preliminary injunction, it is only necessary to show that a cause of action exists, and that irreparable injury will be done complainants, unless they are protected.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 305, 306; Dec. Dig. § 136.*]

6. TRADE UNIONS (§ 6*)—RIGHTS OF PARTIES.

Workingmen have the right to unite to protect themselves, and to strike peaceably for grievances, but not to threaten owners, builders, and architects that their contracts will be held up if they, or any of their subcontractors, use another employer's products.

[Ed. Note.—For other cases, see Trade Unions, Cent. Dig. § 5; Dec. Dig. § 6.*]

7. INJUNCTION (§ 163*)—PRELIMINARY INJUNCTION—INTERFERENCE WITH EMPLOYERS.

On a bill to enjoin interference with an employer, an injunction is properly continued pending the action, restraining individual defendants from calling out employes in other trades who have no grievances against their employers, and from notifying owners, builders, and architects and others that they are likely to have their operations suspended if they use complainant's products.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 357-371; Dec. Dig. § 163.*]

Restraining boycotts, strikes, and other combinations by employes interfering with commerce or business, see note to *Shine v. Fox Bros. Mfg. Co.*, 86 C. C. A. 313.]

In Equity. Bill by Charles R. Irving and another, partners as Irving & Casson, against the Joint District Council of New York and Vicinity of the United Brotherhood of Carpenters and Joiners of America and the Amalgamated Society of Carpenters and Joiners of America and others. On motion to continue a restraining order as a temporary injunction. Motion granted.

Walter Gordon Merritt, for complainants.

Charles Maitland Beattie and William P. Maloney, for defendants.

WARD, Circuit Judge. This is a motion to continue in the form of a preliminary injunction a restraining order heretofore granted. It involves the question how far labor organizations, and their officers and members, can go to compel an employer of labor to maintain a closed shop; that is, to employ union labor only. Upon this argument the jurisdiction of the court is rested upon the difference of citizenship of the parties only.

The complainants are copartners, citizens of Massachusetts. The defendants are: (1) The Joint District Council of New York and Vicinity of the United Brotherhood of Carpenters and Joiners of America and the Amalgamated Society of Carpenters and Joiners of America, and the members of said Joint District Council; (2) Edward H. Neal, as secretary of the Joint District Council and individually; (3) David French, Joseph Crimmins, L. E. Storey, Henry W. Blumenberg, Henry Erickson, William O'Grady, Frederick Dhuy, Harry Lea, Thomas Dalton, Frank Hellereith, George Lynch, August Nagel, James B. Smith, James Martin, Julian Wazeter, indi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 180 F.—57

vidually and as business agents of said Joint District Council; (4) Charles H. Bausher, individually and as business agent of the said Joint District Council, and as a member of the General Executive Board of the United Brotherhood of Carpenters and Joiners of America; (5) Frank Duffy, individually and as secretary of the United Brotherhood; (6) William D. Huber, individually and as president of the United Brotherhood. All of the individuals named are citizens of other states than Massachusetts, and have been served with the subpoena by the United States marshal, except L. E. Storey, James Martin, and Julian Wazeter, citizens of New York, and Frank Duffy and William D. Huber, citizens of Indiana.

A demurrer, a plea, and an answer have been filed to the whole bill on behalf of all the defendants "other than the members of said Joint District Council," so that they are all before the court; Duffy and Huber, by appearing, having waived the objection that the action is brought neither in the district where the plaintiffs nor they themselves reside. Counsel for both parties wish a decision on the merits, and disclaim any disposition of the case on technicalities. Therefore, though the answer to the whole bill overrules the demurrer and the plea, I have considered all objections set up in the demurrer and plea, but shall mention only one I think good.

The defendants object that the Joint District Council, being a voluntary unincorporated association, is not a citizen of any state, and therefore the court has no jurisdiction of it or of its members generally. I think this objection good. *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800; *Taylor v. Weir*, 171 Fed. 636, 96 C. C. A. 438. The bill may be dismissed as to the Joint District Council and its members generally, and stand as to the other defendants, in accordance with the practice indicated in *Oxley Stave Co. v. Coopers' Union* (C. C.) 72 Fed. 695, affirmed 83 Fed. 912, 28 C. C. A. 99. There are intimations that service upon some of the members of such associations may be good as against the association and the other members in *United States v. Coal Dealers Ass'n* (C. C.) 85 Fed. 252, *American Steel & Wire Co. v. Wire Drawers' Unions 1 and 3* (C. C.) 90 Fed. 598, and *Evenson v. Spaulding*, 150 Fed. 517, 82 C. C. A. 263, 9 L. R. A. (N. S.) 904. If these cases mean more than that members of the associations not served may be held guilty of contempt if they knowingly assist in the violation of an injunction which has been granted, I am not disposed to follow them.

The particular grievance alleged in the bill may now be considered. The complainants are engaged in the manufacture of fine interior woodwork at East Cambridge, Mass., which they erect in place anywhere throughout the United States. They keep an open shop, employing union and nonunion labor without discrimination. For this reason they are regarded as enemies by the United Brotherhood. It has, and has long had, in the language of the defendants, a trade dispute with the complainants. The United Brotherhood is a voluntary unincorporated association having a membership of carpenters and joiners throughout the United States aggregating 185,000. These members are divided into local unions, which are also voluntary unincorporated associations and are represented by district councils,

composed of delegates from the local unions constituting the district. The members of the local unions are by virtue of that membership also members of the United Brotherhood and entitled to vote for delegates to its general conventions and for its general officers. The Joint District Council of New York and Vicinity consists of some 70 local unions of the United Brotherhood and of the Amalgamated Society of Carpenters and Joiners of America. There can be no question that these bodies constitute and are designed to constitute a combination of great power. The bill alleges that this power is being unlawfully used against the complainants, in that on April 21, 1910, they having begun work under a contract for the woodwork of the Cathedral of St. John the Divine in this city, the defendant French, business agent of the Joint District Council of New York, ordered their men to quit work because this product was "unfair"—that is, the product of an open shop—and the men did quit work. April 22d the complainants' foreman, having called upon the defendant Crimmins, shop delegate of the Joint Council, was informed by him that the men could not go back until the complainants kept a union shop in Massachusetts. April 23d, in another interview with the defendant French, the complainants' foreman was told that if he put nonunion work on the work at the cathedral, he (French) would pull out all the other trades working there. I have no doubt that this would have been done, nor is it denied in the affidavit submitted by the defendants. Thereupon the complainants obtained an order to show cause why a preliminary injunction should not be issued, and a restraining order in the meantime, which was granted.

For the purpose of showing the existence of the combination alleged in the bill, the complainants have referred to various incidents not connected with the particular charge relied on. September 26, 1906, Local Union No. 1,824, of Boston, presented a resolution to the meeting of the General Executive Board of the United Brotherhood, requesting that the complainants be placed upon the unfair list of the United Brotherhood. January 24, 1907, this request was denied; but the board requested all district councils, local unions, and members of the United Brotherhood to assist No. 1,824 by refusing to handle any material manufactured by the complainants. February 7, 1907, upon receiving additional information, the general president was instructed to notify members in districts where the complainants' trim is used "of the condition under which the trim is manufactured and the law of the United Brotherhood regarding the same." July 20, 1907, Local Union 1,824 presented to the convention of the United Brotherhood a resolution reciting that, the strike of Local Union 1,824 against the complainants having run 14 months, it was recommended to the entire membership to refuse to handle any trim coming from them, which was adopted. January 23, 1908, Frank Duffy, general secretary of the United Brotherhood, wrote the following letter:

"I am in receipt of information from our district council in Boston to the effect that the firm of Irving & Casson of that city is figuring on the contract for the U. S. Armory School at West Point, for which you are the architects. I desire to call your attention to the fact that the above-mentioned firm is

and has been for several years past unfair to organized labor, and our organization has been fighting said firm for some time. I would therefore ask that you do all in your power to have the contract for this job let to some fair concern. You will thereby aid us materially in our fight against Irving & Casson, and I am sure that anything you may do along the lines suggested will be appreciated."

July 14, 1908, he also wrote the following letter:

"I am in receipt of information to the effect that you have the contract for a large residence in Brookline, the owner of which is Ex-Governor Powers, of Maine, and that the firm of Irving & Casson is figuring on the interior trim for said job. I am therefore writing to inform you that this firm is now and has been for some time past one of our greatest enemies, having absolutely refused on more than one occasion to pay our members union wages and work them union hours. It is only natural, therefore, that we should wish to have the work given to some firm which is fair to the members of our organization, and I would therefore request that you use your influence in having the contract for the interior woodwork on this job let to such a firm. I can assure you that anything you may do for us along this line will be thoroughly appreciated. Thanking you in advance for your kind attention in this matter, I am respectfully yours."

Instances are set out in the complainants' affidavits in which they have lost business because of notifications coming from the combination. Although their bid was satisfactory in the case of the Fifth Avenue Building, on the corner of Twenty-Third street and Fifth avenue, the architect refused to accept it because he feared labor complications likely to result from their keeping an open shop. A similar thing occurred in connection with estimates on wood finishing for the Church of St. Bartholomew. Other cases in which the complainants were interfered with arose in connection with a contract made in Bristol, Conn., in March, 1909, and in connection with the building of the Second National Bank, at Twenty-Eighth street and Fifth avenue, in the fall of 1908, and in connection with the house of H. H. Beard, Sixty-Eighth street and Madison avenue, in 1907, and with the Gainsborough Studio in the fall of 1908, and with the house of A. L. Stirn at Stapleton, Staten Island, in the summer of 1908.

Without meeting these instances of interferences categorically, the defendants object that they are stated upon hearsay and lack precision. No doubt more and better evidence would be required on final hearing, but all that is needed upon a motion for a preliminary injunction is to satisfy that a cause of action exists and that irreparable injury will be done the complainants unless they are protected. In such a case a preliminary injunction ought to issue.

The right of workmen to unite for their own protection is undoubted, and so is their right to strike peaceably because of grievances; but their right to combine for the purpose of calling out the workmen of other employers who have no grievances, or to threaten owners, builders, and architects that their contracts will be held up if they or any of their subcontractors use the complainants' trim, is quite another affair. To take the converse of the proposition: Will the defendants admit that employers may combine to prevent any employer from using union labor? May the employers agree not to sell to or contract with any one who deals with an employer who uses union labor?

Either of these propositions is destructive of the right of free men to labor for or to employ the labor of any one the laborer or the employer wishes. See the language of Justice Harlan in *Adair v. United States*, 208 U. S. 161, 174, 28 Sup. Ct. 277, 52 L. Ed. 436. If the struggle is persisted in between labor and capital to establish a contrary view, ultimately either the workmen or the employers will be reduced to a condition of involuntary servitude.

Whether the complainants do a large business, or, as the defendants allege, a small business, there is no doubt that the defendants by combination between themselves and with others have determined to force them against their will to maintain a closed shop in Massachusetts or go out of business, and to compel all persons in their employment, whether they will or not, to become members of the union or lose their employment. Of certain suggestions in the defendants' papers that the complainants are seeking to prevent the workmen from organizing and striking and from communicating with each other, it may be said in the words of Brown, J., in the Supreme Court of Pennsylvania, in *Purvis v. Local No. 500, United Brotherhood of Carpenters and Joiners*, 214 Pa. 348, 353, 63 Atl. 585, 586, 12 L. R. A. (N. S.) 642, 112 Am. St. Rep. 757:

"The zeal of counsel may account for, but can hardly excuse, the statement in appellants' paper book of the questions involved on this appeal. They are there stated to be: 'Is the dissemination by means of printed notices by a lawfully constituted lodge of union laborers to its members and employers of labor, of its adopted rules by virtue of its constitution forbidding its members to work nonunion material, an unlawful conspiracy? Is it lawful by peaceful means to make effective such rules?' From an examination of the averments of plaintiffs' bill, the ample proofs submitted in support of them, and of the facts found by the court below, it is most manifest that the only question before us is whether the appellants were properly enjoined from injuring and destroying the business of the appellees, in pursuance of a conspiracy to do so, as a penalty for their refusal to unionize their mill. This would mean to the appellees, as they aver, that they would be compelled to employ only union workmen, and to yield their free and unrestricted right to select their own employes in the conduct of their business; that they would be compelled to submit themselves to the control of the union, and to put themselves within its power to dictate to them the number of hours to constitute a day's work in their mill, the compensation to be paid therefor, the time of payment thereof, and the selection of their employes. It would be a recognition of the power of the agents of the union to practically control their business."

The particular acts sought to be enjoined in this case are the calling out of the employes in other trades, who have no grievance against their employers, and the notification of owners, builders, architects, and third persons that they are likely to have their operations held up if they use the complainants' trim. Whether the complainants may be found to have other rights on final hearing, and whether persons not parties may be guilty of contempt if they knowingly assist in the violation of the preliminary injunction to be issued, need not now be considered.

Motion granted, with leave to the parties to submit within one week forms of order which they respectively think appropriate under this opinion.

UNITED TRANSP. & LIGHTERAGE CO. v. NEW YORK & BALTIMORE
TRANSP. LINE.

NEW YORK & BALTIMORE TRANSP. LINE v. UNITED TRANSP. &
LIGHTERAGE CO.

(District Court, S. D. New York. June 23, 1910.)

1. ADMIRALTY (§ 1*)—JURISDICTION—MATTERS OF EQUITABLE COGNIZANCE.

While a court of admiralty is often spoken of as one of equity, the phrase means no more than that equitable principles are applied to the solution of matters of maritime jurisprudence, and not that an admiralty court may draw within its jurisdiction matters primarily of nonmaritime cognizance.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 1-17; Dec. Dig. § 1.*]

2. ADMIRALTY (§ 36*)—ANSWER—SET-OFF.

There is no warrant in the admiralty practice for a counterclaim, and a set-off is cognizable only so far as it relates to the particular transaction which is the subject of the libel, and goes to reduce or overcome the original demand.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 36.*]

3. ADMIRALTY (§ 36*)—PLEADING—CROSS-LIBEL.

A cross-libel cannot be maintained in admiralty unless it arises out of the same cause of action as that propounded in the original libel.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 36.*]

4. ADMIRALTY (§ 36*)—SUIT FOR BREACH OF CONTRACT—SET-OFF—CROSS-LIBEL.

Libellant for a number of years performed lighterage services for respondent under an agreement fixing the prices therefor. New officers having succeeded to the management of the business of respondent corporation, a new agreement as to prices was made between them and libellant. *Held*, that a new contract was thereby created, and that in a suit by libellant to recover for services rendered thereunder respondent could not plead as a set-off or by way of cross-libel a claim for damages, on the ground that the prices previously paid were exorbitant and the agreement therefor collusive and fraudulent, something did not arise out of the same transaction or cause of action for which libel was filed, but out of a separate contract.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 36.*]

5. CONTRACTS (§ 1*)—DEFINITION.

A contract is a transaction between two or more persons in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1513-1534; vol. 8, pp. 7615, 7616.]

In Admiralty. Suit by the United Transportation & Lighterage Company against the New York & Baltimore Transportation Line, and cross-libel by respondent against libellant. Decree for libellant. Cross-libel dismissed.

The original libel was filed by the lighterage company to recover for lighterage services rendered respondent during a period definitely stated, and pursuant to a verbal contract whereby libellant for an agreed rate of pay undertook "to lighter goods and merchandise at the port of New York from the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

vessels owned and controlled by the respondent to various points * * * and also to lighter goods and merchandise from (said) various points * * * to the vessels of said" respondent. The respondent transportation line denied that any "verbal contract" was made as alleged, and averred that "through its officers and agents * * * it declared that it could and would pay no more and only such sums as are (stated in the libel) not as a reduction of any existing or extant contract or contracts but absolutely as a limit of price for such services, and the same were thereupon and thereafter charged to (respondent) by (libelant) at the rates set forth" in the libel. The answer then set up a "counterclaim," the substance of which is that for a long time prior to the dates in the libel mentioned libelant had been performing lighterage services for respondent at exorbitant and unlawful, if not fraudulent, rates of pay. Such rates are said to have been exorbitant because they were much higher than those charged for similar services by other persons in the same line of business and same neighborhood. They were unlawful because said exorbitant rates were agreed upon between one of the principal officers of the libelant and a like officer of the respondent, who were son and father, the father being at the same time a stockholder and officer in both libelant and respondent, and the son being an officer and (apparently) a stockholder in libelant, and also an employé of respondent. The answer does not in terms charge active fraud on the part of father and son aforesaid, but it does allege that the arrangements made and the prices paid were "improper," and in argument charges of extreme fraud have been pressed.

The cross-libel sets up the same matter as is asserted by way of "counterclaim" in the answer, and demands as affirmative relief the repayment by the lighterage company to the transportation line of the difference between the charges made and paid prior to the period sued for and what is alleged to have been the usual and customary rate of charge for similar services at the times they were rendered. The singular method above set forth of pleading to the contract alleged in the libel is explained by the following facts: For a long time prior to May 1, 1908, the lighterage company had furnished certain boats for lighterage purposes to the transportation line, doing this in pursuance of an oral agreement between the father and son aforesaid, which agreement fixed the rates of pay, and is the agreement or contract concerning which the transportation line now complains. It is quite evident that Mr. Groves (the father) was prior to May, 1908, and for many years had been, a very influential, if not the most influential, personage connected with the transportation line. He was an old stockholder and its general manager. He had built up its business from a condition of continued loss to one of great apparent prosperity, and it is evident from his testimony that he expected to do as he pleased in matters relating to the transportation line's affairs, without much, if any, consultation with fellow officers, directors, or stockholders. Shortly prior to May, 1908, he (with apparently certain other shareholders) sold out a controlling interest in the transportation line's stock to one Monk. Mr. Groves seems then to have been no longer a shareholder, and certainly he ceased to be an officer. As general manager he was succeeded by one Roome, and Roome thereupon sent for the son (Groves, Jr.), and told him that a lower rate would thereafter be paid for lighterage services in New York Harbor than had been current under the régime of Groves, Sr. To this rate Groves, Jr., agreed for the libelant lighterage company, and for services so rendered pursuant to this conversation between Roome and Groves, Jr., the libel is brought on the theory that these two men did in May, 1908, make a contract for breach of which this action lies. The answer does not admit that a contract was then made, because it is of the essence of respondent and cross-libelant's position that there never was but one contract or agreement between these two corporations, and that was the exorbitant, unlawful, and improper, if not fraudulent, contract, made between father and son as aforesaid, but modified as to rate of pay by Roome as last above set forth.

Mr. Laws and Mr. Betts, for libelant.

Mr. Kneeland, for respondent and cross-libelant.

HOUGH, District Judge (after stating the facts as above). The first question suggested is this: During all the times covered by the pleadings herein were two contracts or only one contract made between the parties to this litigation? A complete and final definition of the word "contract" will perhaps never be reached, but I know of no better description of a business or commercial compact than that approved by Washington, J., in *Dartmouth College v. Woodward*, 4 Wheat., at page 656 (4 L. Ed. 629):

"A transaction between two or more persons in which each party comes under an obligation to the other and each reciprocally acquires a right to whatever is promised by the other."

Applying this to the uncontradicted evidence, when and how did libellant and respondent obtain the reciprocal rights against each other averred in the libel and admitted by the answer? Clearly on or about May 1, 1908, when Mr. Groves, Jr., and Mr. Roome had their conversation. Until the minds of those two men met whatever other contract or contracts may have existed between the lighterage company and the transportation line, the contract in suit did not exist; and the certain test of this is that no action could have been brought upon it. It does not advance matters to speak of this conversation as a modification of an existing contract. A contract once made cannot be modified except by a new meeting of minds, and, when such mind meeting occurs, a new contract springs into existence.

Holding, therefore, that the contract sued on in the libel had no existence before May, 1908, by what right can the respondent sustain either by way of set-off or cross-libel the matters shown in its pleadings?¹

Undoubtedly the rule of the common law was hard, and a statute was required to correct an inequity that became more apparent as commercial transactions expanded, "but courts of equity from a very early day were accustomed to grant relief in that regard independently as well as in aid of statutes upon the subject." Per Fuller, C. J., *Scott v. Armstrong*, 146 U. S. 507, 13 Sup. Ct. 150, 36 L. Ed. 1059. The remedy of set-off "has been very much extended in equity * * * (where) the mutual obligations have grown out of the same transaction; and * * * purely equitable considerations have been held to authorize the setting off of many classes of obligations held by the defendant against a judgment duly recovered against him, in a court of law." Blount v. Windley, *supra*.

It is true that a court of admiralty is often spoken of as one of

¹The word "set-off" is not used in respondent's pleadings, but the "counter-claim" (for which no warrant is found in admiralty practice) has been regarded by all parties as an attempted set-off. "Set-off" (properly so called) did not exist at common law, but is founded on St. 2 George II, c. 24, § 4, which in substance and effect enacted that, where there were mutual debts between the plaintiff and the defendant, one debt may be set against the other, and such matter may be given in evidence under the general issue or be pleaded in bar, so that notice shall be given of the sum or debt intended to be offered in evidence." *United States v. Eckford*, 6 Wall. 488, 18 L. Ed. 920. And see, also, as to the origin of "set-off," *Hall v. United States*, 91 U. S. 562, 23 L. Ed. 446; *Blount v. Windley*, 95 U. S. 176, 24 L. Ed. 424; *Carr v. Hamilton*, 129 U. S. 255, 9 Sup. Ct. 295, 32 L. Ed. 669.

equity, but that phrase means no more than that equitable principles are applied to the solution of matters of maritime jurisprudence. It is a perversion of the phrase to argue from it that, because admiralty seeks for aid in the analogies of equity, a maritime court is therefore entitled to draw within its jurisdiction matters primarily of nonmaritime cognizance. The temptation is often strong to pursue a controversy between two litigants into all its ramifications, and endeavor to adjudicate them all in one decree. But in a court of limited jurisdiction (however important) the temptation should be carefully withstood, and in this matter of set-off the inquiries must always be made: (1) Does the alleged set-off grow out of the same transaction as that which must be proven to support the libel; and, if it does, (2) could the claim be made the subject of an independent action in the admiralty?

The first inquiry has often been pursued, and quite recently in this court in *Hastorf v. Degnon-McLean Contracting Co.* (D. C.) 128 Fed. 982, and the result reached that ordinary "set-off is not cognizable in admiralty except so far as it relates to the particular transaction which is the subject of the libel and goes to reduce or overcome the original demand." The particular transaction alleged in this libel is the breach of a contract made in May, 1908, and therefore, without passing upon many interesting questions raised by libellant, I hold that the matters set out in the answer to the original libel are not proper subjects of set-off herein, and cannot therefore be regarded in the original suit.

The second question above suggested, viz., whether a good set-off in admiralty must always be a good independent maritime cause of action, I do not find it necessary to consider in this case, and no opinion is expressed thereon. The cross-libel is, as the record herein shows, filed specifically in pursuance of rule 53 of the Supreme Court in admiralty. That rule declares the practice whenever a cross-libel is filed "arising out of the same cause of action for which the original libel was filed," and has been construed to mean that no cross-libel can be filed unless it does arise out of "the same cause of action as that propounded in the original pleading." *The Theresa Wolf* (D. C.) 4 Fed. 152. And the same result has been reached in this court in *George D. Emery Co. v. Tweedie Trading Co.* (D. C.) 143 Fed. 144.

Under the cases cited, therefore, this cross-libel cannot be maintained because it does not arise out of the same cause of action as that on which the original libel is based. The further question whether the cross-libel sets forth a cause of action in admiralty at all need not therefore be considered, although I assume that even if it be possible to use equitable, but nonmaritime, demands by way of set-off, admiralty can grant no affirmative relief on any libel, original or cross, which does not reveal a cause of action on a maritime contract or for a maritime tort. Whether a recovery based upon alleged fraud in the procurement and enforcement of a completed contract can ever be the subject of a libel in admiralty, even though the completed contract be maritime, is an interesting question, but for the reasons above given not necessary for the determination of this case, and therefore as to it, no opinion is expressed.

Decree for libellant in original libel; cross-libel dismissed. Costs in both cases.

THE LEHIGH.

THE DENVER.

(District Court, S. D. New York. June 6, 1910.)

COLLISION (§ 102*)—OVERTAKING STEAM VESSELS—SUCTION.

As the steamship Denver, 390 feet long and drawing 23 feet aft and 17½ forward, was passing through the Main Ship Channel from New York Bay to the sea at a speed of 12½ knots or more she slowly overtook the tug Lehigh, which was on an almost parallel course and 150 feet or her port side. The tug, which was 150 feet long and drew about 15 feet, slowed down intending to pass to the westward under the stern of the Denver, when she took a sudden sheer to starboard and struck the steamship about 40 feet from the stern. The wheelsman of the tug testified that the wheel was not ported. *Held*, on the evidence, that the collision was caused by the suction of the Denver, and that she was in fault for not appreciating the danger and taking precautions to obviate it by reducing speed or keeping at a greater distance; and that the tug was also in fault for reducing speed which rendered her more subject to the force.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 102.*

Overtaking vessels, see note to *The Rebecca*, 60 C. C. A. 254.]

In Admiralty. Suit by the New York & Texas Steamship Company, as owner of the steamship Denver, against the steam tug Lehigh, and cross-libel by the Lehigh Valley Transportation Company, as owner of the Lehigh, against the Denver. Decree in favor of each for half damages.

Mr. Brown, for the Denver.

Mr. Kirlin, for the Lehigh.

HOUGH, District Judge. At 4:20 p. m. of March 31, 1906, the Denver left Pier 16 East river bound out to sea, and at 4:30 p. m. the Lehigh left the stakeboat at Red Hook Flats bound to Perth Amboy. The Denver is a large coastwise steamer 390 feet long, and on the afternoon in question was drawing over 23 feet aft and 17½ forward. The Lehigh is an ocean-going tug, 150 feet long; and, with a very full supply of coal and water on board, was drawing an average of 15 feet. The times of departure above stated are not only testified to without contradiction, but admitted in the pleadings. Nearly, if not exactly, at 5:15 p. m. the vessels collided in the Main Ship Channel, somewhere between the West Bank Light and the Perch buoy at the entrance to the Swash Channel. The testimony in the case was taken so long after the collision that no serious effort is discovered in the record to ascertain what if any difference existed between the clocks on tug and steamer. It is in evidence that the Lehigh's clock was kept accurately with local time as indicated by the Western Union time ball; and, in the absence of any testimony to the contrary, it is assumed that the clocks of the respective vessels were practically synchronous. The witnesses have not agreed as to exactly where the collision took place by about a mile; the master of the Lehigh fixing the collision just below the West Bank Light, and Capt. Barstow of the Denver just off Perch buoy. I do

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

not think this difference very important, for wherever they were when collision occurred they were necessarily at the same place; and the Denver had started to get there 10 minutes before the Lehigh. If the exact spot of collision were important, I should attach greater weight to the testimony of Capt. Barstow of the Denver than to that of any observer on the Lehigh, because the Denver was steering by the buoys and was of such draft as to require strict attention to the channel; whereas the Lehigh was not confined to the Main Ship Channel and could have turned off and pursued her voyage to Perth Amboy by porting her wheel as soon as she passed the West Bank light.

Concerning the method of collision and the causes therefor the parties were not agreed further than this, viz.: Just before the Lehigh began to swing toward the Denver the vessels were side by side in the Main Ship Channel about 150 feet apart, with the stem of the Lehigh abreast or slightly forward of the port side of the Denver's bridge; and they were then on apparently parallel courses. The Denver avers that contact occurred with the bow of the Lehigh against the Denver's port quarter some 40 feet from the stern, with the tug at about right angles to the steamship. On the facts thus asserted the Denver declares the Lehigh in fault for deliberately porting her helm, trying to go under the Denver's stern, and failing to succeed in that obvious maneuver. The Lehigh agrees with the foregoing thus far only, viz., she did intend to go under the Denver's stern, having gotten far enough below the West Bank Light to turn with safety toward Perth Amboy. With this purpose she slowed her engines (to let the Denver get well ahead) and was instantly caught in the suction of that vessel and drawn against the larger vessel's side, the bluff of her starboard bow striking the Denver's quarter, twisting the tug's forward parts from starboard to port, and starting everything forward of her bulkhead.

It thus appears that the question of overwhelming importance in this case is: Which was the overtaking vessel? But before that inquiry is reached, it is almost equally important to ascertain the manner of their contact; i. e., whether head on, or a species of "slapping" blow. On this last point I am convinced that the statements for the Lehigh are more nearly correct, because there can be no doubt as to the nature of the injuries received by the tug, and such injuries would in my judgment have been impossible, had the blow been delivered at right angles; the damage done to the Denver also is neither in kind nor severity the natural result of a right-angle collision; and, finally, the observers on the Lehigh, being much nearer the point of contact, were in a better position to see just how the vessels did come together, and their intention of telling the truth, as they saw it, is unimpeached. As to which of the colliding vessels was the overtaker, within the legal meaning of the word, it seems to me beyond question that when they came near enough to each other to require each to take the other into account in pursuing safe and proper navigation the Lehigh was in the lead and the Denver considerably more than two points abaft her beam. The speed of the Denver is estimated by her own officers

at from 12 to $12\frac{1}{2}$ knots. She encountered no difficulties which made her stop, for any considerable time at all events, in going down the bay; while possibly from the time she was clear of her pier, and certainly from the time she had Castle William abeam, she traveled at full harbor speed. She must have done this (according to her own evidence) for it required but 55 minutes (assuming the collision to have occurred off the Perch buoy) to travel as nearly as can be estimated $12\frac{1}{4}$ knots. This gives a speed of over $12\frac{1}{2}$ knots per hour, and if (according to her master's experienced estimate) it required 10 minutes to get up full speed and arrive off Castle William, the balance of the distance must have been covered at even more than that rate of progress. The Lehigh, on the other hand, had but 45 minutes wherein to traverse not over $9\frac{1}{4}$ knots, and she, too, maintained her usual harbor speed without serious stoppage or delay, so far as this testimony shows. It is I think impossible that at any time the Lehigh could have been behind the Denver; and I conclude that from about Craven Shoal down the steamers were on slightly converging courses, with the Denver slowly overhauling the Lehigh. The collision therefore happened while the larger and faster vessel was in the very act of finally passing the smaller and slower one in a distinctly narrow channel and in shallow water, and when they were confessedly in such a situation as to require each to observe the other carefully.

The ultimate question is, therefore, this: Was the proximate cause of this collision a porting of the Lehigh's helm in order to pass under the Denver's stern, or the suction of the Denver? It is plainly true that Capt. Barstow of the Denver did not think at the time that suction had anything to do with it; he thought (and thinks) that the tug was "too far away when she started to port her helm for any suction. She was certainly a length away * * * 150 feet." And consequently he "never gave the least thought to suction, not a particle; it never came into my mind until this suit came up. I thought it was simply misjudgment; that is my idea of it." But nobody on the Denver can or does definitely swear to a porting of the helm. The testimony when considered amounts to this: The movement of the Lehigh was so violent and so quick that it could only be accounted for by a sudden helm movement. Such testimony is rather the expression of a theory than the statement of a fact, and is in my judgment overborne by the categorical denial of the intelligent and experienced man at the Lehigh's wheel, and by the very enormity of the error that would have been committed if he had done what the Denver thought he did do. It follows therefore that some explanation of the Lehigh's sheer to starboard other than a sudden porting of her helm must be found, and in my judgment it can only be found in the suction of the Denver. This matter has been gone into thoroughly by Brown, D. J., in *The Mesaba* (D. C.) 111 Fed. 215, and it was there held that when large vessels are navigating side by side at high speed for a distance of over a third of a mile prudence requires a separation of at least from 200 to 300 feet. This case has been followed in *The Fontana*, 119 Fed. 853, 56 C. C. A. 365, and *The North Star* (D. C.) 132 Fed. 145, where

the earlier cases are collated. See, also, *The Aureole*, 113 Fed. 224, 51 C. C. A. 181, and *The Monterey* (D. C.) 171 Fed. 442.

If the influence of suction did not occur to a navigator of the high character of Capt. Barstow, it is quite as plainly true that the possibility of danger from that cause did not at the time occur to any one on the *Lehigh*. One rarely finds a more perfect picture of security than the evidence reveals on the tug within two minutes of serious collision. The pilot was at the wheel. The captain was in his room just aft of the wheelhouse talking to the chief engineer about indifferent matters, and his son (who, though a passenger at the time, is a licensed shipmaster) was dozing in an easy chair near the door leading from pilot house to the captain's quarters. Yet they all knew that a large steamer was overhauling them on their starboard quarter, and the pilot at the wheel perceived that "the steamer was not going away from us very fast, so I slowed her down, as we had to turn in * * * to the westward, and * * * a few seconds after I slowed her down * * * I noticed she took a sheer." It is necessarily true that the moment the *Lehigh* slowed her engines she surrendered a certain amount of power, became less easily manageable and more subject not only to the suction influence of a large passing vessel, but to any other force tending to divert her from the course she was on. But no one on the *Lehigh* thought of this, and it is plain to me that not until they had gotten to Perth Amboy and talked the matter over with Capt. Cherry (the marine superintendent of the *Lehigh Valley*) did they on his suggestion conclude that their damages had been caused by the influence now asserted. No signals had been exchanged between steamer and tug, and it was still daylight when the collision occurred. The cases already cited have distinctly put upon the overtaking vessel liability for damages caused by her suction. The effect of them is to lay upon the navigator of a large vessel, intending to pass a smaller one from behind, knowledge of the danger, threatened by the intended passage. No such knowledge existed in this case, and no measures of precaution were taken. But the overtaken vessel has relative duties and responsibilities laid upon her by law. She should maintain her course and speed until the contemplated maneuver is accomplished. And surely the now proven and judicially ascertained dangers arising from suction do not render those duties and responsibilities less obligatory.

The *Lehigh* unnecessarily slowed and thereby obviously rendered herself more liable to be injured in just the way she was. This at least casts the burden upon her of showing that her act did not contribute to the joint damage. There is no evidence given to sustain that burden, and it is in my judgment at least probable that had the *Lehigh* not slowed she would have escaped damage, for a very slight diminution of her sheer to starboard would have enabled the *Denver* to pass by. She only failed by about 40 feet. It follows, therefore, that each libellant should have a decree for half damages and half costs.

UNITED STATES v. STOLLER.

(District Court, E. D. Washington, E. D. July 8, 1910.)

1. ALIENS (§ 67*)—NATURALIZATION—COURTS—JURISDICTION.

Act Cong. June 29, 1906, c. 3592, § 3, 34 Stat. 596 (U. S. Comp. St. Supp. 1909, p. 477), confers naturalization jurisdiction on the courts of the various states extending to aliens resident within the respective judicial districts of such courts. Const. Wash. art. 4, § 8, confers general jurisdiction on the superior courts of that state within their judicial districts, not limited to the counties composing the same, and by Rem. & Ball. Code, § 9050, Klickitat and Clarke counties are in the same judicial districts, the courts of those counties being presided over by the same judge. *Held* that, where an alien resident of such district was naturalized by such superior court while sitting in Clarke county, it was not a fatal objection to the naturalization that the alien was a resident of Klickitat county.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 131-137; Dec. Dig. § 67.*]

2. ALIENS (§ 68*)—NATURALIZATION—PETITION—FAILURE TO FILE IN DUPLICATE.

The provisions of Naturalization Act Cong. June 29, 1906, c. 3592, § 4, subd. 2, 34 Stat. 596 (U. S. Comp. St. Supp. 1909, p. 478), requiring a naturalization petition to be filed in duplicate, are directory only, so that a failure to comply therewith will not render the proceedings void.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138-146; Dec. Dig. § 68.*]

3. JUDGMENT (§ 24*)—DEFINITION.

The judgment of a court is its pronouncement from the bench, the written order being merely the evidence of what the court decided, and the requirement that the judge sign it is directory.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 12; Dec. Dig. § 24.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3827-3842; vol. 8, pp. 7695, 7696.]

4. JUDGMENT (§ 270*)—ENTRY—RECORD.

A judgment duly pronounced, but not entered, is entitled to record.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 501-509; Dec. Dig. § 270.*]

5. ALIENS (§ 72*)—NATURALIZATION PROCEEDINGS—STATUTES—CONSTRUCTION—OFFENSES—"FELONY."

Naturalization Act Cong. June 29, 1906, c. 3592, § 9, 34 Stat. 599 (U. S. Comp. St. Supp. 1909, p. 482), provides that every final order which shall be made on a petition shall be under the hand of the court, and shall be entered in full on the record kept for that purpose, and section 18 makes it a felony for any clerk or other person to issue or be a party to the issuance of a certificate of citizenship contrary to the provisions of this act, except on a final order under the hand of a court having jurisdiction to make such order, etc. *Held*, that section 18 does not make it a felony to issue a naturalization certificate without final order under the hand of the court, but that the felony consists in issuing it contrary to the provisions of the act, unless it be on a final order under the hand of the court.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 72.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2736-2744; vol. 8, p. 7662.]

6. ALIENS (§ 68*)—NATURALIZATION—JUDGMENT—COLLATERAL ATTACK.

A decree of naturalization is entitled to the same sanctity as other adjudications, and is not subject to collateral attack for mere failure of the court to comply with directory provisions of the statute.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 145; Dec. Dig. § 68.*]

7. ALIENS (§ 69*)—NATURALIZATION PROCEEDINGS—JUDGMENT—CERTIFICATE.

Where the court in a naturalization proceeding has rendered judgment admitting the alien to citizenship, the fact that the clerk issued a naturalization certificate before the final judgment had been signed and entered did not render such proceeding void under Naturalization Act Cong. June 29, 1906, c. 3592, § 18, 34 Stat. 602 (U. S. Comp. St. Supp. 1909, p. 486); such requirement being directory only and subject to correction *nunc pro tunc*.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 69.*]

Petition by the United States of America against Frederick Stoller to cancel a certificate of naturalization issued by the clerk of the superior court of Washington for Clarke county. Application denied.

Joseph B. Lindsley, U. S. Atty.

John Speed Smith, of counsel, for Naturalization Bureau.

WHITSON, District Judge. This is a proceeding by petition to cancel a certificate of naturalization issued to the respondent by the clerk of the superior court of the state of Washington for the county of Clarke. The facts set up and relied upon are:

(a) That the respondent was a resident of Klickitat county at the time his petition was filed.

(b) That the petition was not made and filed in duplicate.

(c) That prior to the issuance of the certificate no order of court admitting respondent had been signed, but subsequently a *nunc pro tunc* order was signed and entered.

These assignments embrace the errors deemed fatal to the action of the state court.

First. Section 3 of the act of June 29, 1906 (Act June 29, 1906, c. 3592, 34 Stat. 596 [U. S. Comp. St. Supp. 1909, p. 478]), designates the courts that are authorized to naturalize aliens, and the superior courts of this state, being courts of record, are embraced within its provisions. This section also provides:

"That the naturalization jurisdiction of all courts herein specified, state, territorial, and federal, shall extend only to aliens resident within the respective judicial districts of such courts."

Klickitat and Clarke counties are in the same judicial district, and the courts of those counties are presided over by the same judge. Rem. and Ball. Codes, § 9050. While in *United States v. Schurr et al.* (D. C.) 163 Fed. 648, it was held that a petitioner for naturalization must under the language above quoted file his petition in the county of his residence, the holding was based upon constitutional restrictions on jurisdiction of the circuit courts of the state of Michigan. In this state the superior courts are not thus limited. See article 4, § 6, State Const.; 1 Rem. & Ball. Code, p. 73, and cases there noted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The respondent, then, was within the letter of the law when he filed his petition in the judicial district in which he resided, and he was entitled to select the county of that district which best suited his convenience.

Second. We have seen that the superior court was acting in virtue of the authority conferred by the act of Congress. It is not alleged that the respondent failed to file a petition, but that he failed to make and sign it in duplicate. It will be observed that the language of the statute is very specific:

"That exclusive jurisdiction to naturalize aliens as citizens of the United States is hereby conferred upon the following specified courts," etc.

By this was meant the power to entertain and decide. The statute repeatedly refers to "the petition." See section 4. The second subdivision of this section does require that it be made and filed in duplicate; but, since the power was conferred upon the court and a petition duly verified was filed, the omission to file it in duplicate was nothing more than an irregularity. It did not affect the jurisdiction. The court could and should, of course, have required a literal compliance with the statute, but the view that its action upon the petition was void for the reason that its power was not thus invoked does not comport with the analogies of the law in the construction of statutes. For instance, a statute required the consent of the father to a marriage. It was held that a marriage without it was not void. So a statute which required that contracts "shall be signed by the commissioner" did not render void a contract not thus signed. Again, where a court-martial was to be appointed in June and was not appointed until July, the statute was held to be directory. These illustrations are taken from Sedgwick on Construction of Statutory and Constitutional Law (2d Ed.) p. 318 et seq., where numerous other cases to the same effect are cited by the learned author. My conclusion is that the provision requiring the petition to be filed in duplicate is directory; that it might be corrected on appeal if this court could sit as one of revision, but the failure to so file does not render nugatory the act of a court admitting an applicant without it.

Third. Section 9 provides that every final order which shall be made upon a petition shall be under the hand of the court and entered in full upon a record kept for that purpose, while section 18 in part reads as follows:

"That it is hereby made a felony for any clerk or other person to issue or be a party to the issuance of a certificate of citizenship contrary to the provisions of this act, except upon a final order under the hand of a court having jurisdiction to make such order, and upon conviction thereof," etc.

Whatever may have been in the mind of the framer of this section, it cannot escape notice that it is not made a felony to issue a certificate without the final order under the hand of the court. The offense consists in issuing it contrary to the provisions of the act unless it be upon a final order under the hand of the court. In other words, when the court under its hand orders the clerk to issue a certificate, the clerk is not held responsible if the court falls into an error of law. If he issues the certificate without the order under the hand of

the court, and it is not in compliance with the law, then he is guilty of a felony. It can hardly be supposed that the purpose was to prescribe a rule so productive of delay and inconvenience as that contended for and at the same time overturn procedure so well understood and long acquiesced in. The judgment of a court is its pronouncement from the bench. The written order is but the evidence of what the court has decided. Freeman on Judgments (4th Ed.) § 38. The requirement that the judge sign is directory. Id. § 50e. Judgments duly pronounced, but not entered are entitled to record. Id. § 61. It seems that the court pronounced its judgment, but had not signed the order at the time the certificate was issued. Since that time it has corrected this by entry nunc pro tunc thereby expressing the finding made at the time, but not placed of record. These objections to the certificate are but irregularities. They do not affect the power of the court; and, where jurisdiction exists, unless a court acts in excess of its power, it is not competent for another court of co-ordinate jurisdiction to inquire of its mistakes, nor to overrule its erroneous construction of the law unless clearly without authority. In other words, the general rule applicable to judgments applies to those judgments which admit persons to citizenship. This rule is that they are not subject to attack unless they are void or obtained through fraud. If voidable only, they must be corrected by application in the court of original jurisdiction, and by appropriate appellate proceedings if relief be there denied. Occasion arose in this court to consider the rule applicable to such cases in *Re Meyer*, 170 Fed. 983; where the conclusion was reached that there must be a want of jurisdiction, or action in excess of the power authorized by the statute, before one court will undertake to treat as null the action of another possessed of equal authority. Several cases were there cited, and to those the following are added as holding that a judgment admitting to citizenship is entitled to the same sanctity as any other adjudication. *Campbell v. Gordon and Wife*, 6 Cranch, 175, 3 L. Ed. 190; *Stark v. Chesapeake Ins. Co.*, 7 Cranch, 420, 3 L. Ed. 391; *Spratt v. Spratt*, 4 Pet. 405, 7 L. Ed. 897. Judge Dietrich in *United States v. Anderson* (D. C.) 169 Fed. 201, in expressing practically the same view, also regarded it as a matter of delicacy for one court to thus question the decree of another. He suggested that opportunity is open by way of appeal from the decision of state courts instead of application to the federal courts for the correction of errors; for it is to be remembered, as was there pointed out, that those courts cannot exercise appellate jurisdiction. The court whose action is here complained of can as rightfully supervise a judgment of this court as it can a judgment of that court. The statute provides that certificates may be canceled "on the ground of fraud or on the ground that such certificate of citizenship was illegally procured." The sense in which the illegality mentioned is to be understood is something of a more serious nature than the omission to strictly comply with directory provisions of the statute; otherwise, courts might be kept busy upsetting each other's judgments. Fraud is not charged. Reliance is simply had upon the fact that the court did not proceed literally according to the provisions of the act, and hence this court is asked to regard the action

taken as null and void and send the respondent back to repeat the proceedings, to the end that the technical requirements of the statute may be strictly followed. Thus it stands, for the presumption is that the court so found. Respondent is not disqualified for citizenship. He is long enough a resident. He is attached to the principles of the Constitution and is of good moral character. He is neither an anarchist nor polygamist. He is therefore entitled to admission. He has been admitted by a court fully empowered to act in the premises, but through no fault of his own certain formalities required by the law were omitted. Those safeguards against undesirable persons so explicitly made the very essence of the right to admission have not been overlooked, but unfortunately, while entrance was made by the right door, it was opened in a bungling way. We have very high authority for the proposition that "the letter killeth but the spirit giveth life," and its application seems appropriate in this case for no excess of power has been pointed out.

Petition dismissed.

THE KENNEBEC.

THE STRATHNAIRN.

(District Court D. Maryland. June 21, 1910.)

COLLISION (§ 102*)—STEAM VESSELS IN CHANNEL—MUTUAL FAULTS.

A collision occurred in the daytime between the steamship Kennebec passing down the Brewerton channel from Baltimore and the steamship Strathnairn, which entered the channel on the port side of the Kennebec through the Sparrows Point channel, and had straightened on a parallel course slightly ahead of her, the ships lapping about 75 feet at the time of collision. They were in sight of each other for 20 minutes previously, and the Strathnairn, which had the Kennebec on her starboard, with their courses then meeting at an angle of about 70 degrees, and was therefore the burdened vessel and bound to keep out of the way, signaled with two whistles her intention to pass ahead, to which the Kennebec assented and at once stopped her engines, but, finding herself losing steerageway, she changed to half speed ahead and ported to get as far as possible to the further side of the channel from the Strathnairn. When the signals were exchanged, the vessels were about equally distant from the point where the channels meet. *Held*, that the initial fault was that of the Strathnairn in attempting to pass into the channel ahead of the Kennebec, which was in the privileged position, instead of reducing to half speed and allowing the Kennebec to pass ahead; that the Kennebec was also in fault for not reversing after she had stopped, instead of going ahead at half speed.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 102.*]

In Admiralty. Suit by the steamship Kennebec against the steamship Strathnairn for collision, and cross-libel by the Strathnairn against the Kennebec. Decree against each vessel for half damages.

George Forbes and Convers & Kirlin, for steamship Strathnairn.

Arthur D. Foster and Carver, Wardner & Goodwin, for steamship Kennebec.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ROSE, District Judge. Each of the vessels above named is a steamship. The Kennebec is 250 feet long. Its net register is 1,930 tons. The Strathnairn is 380 feet long, and has 52 feet 2 inch beam. Its net register is 2,811 tons. On the morning of the collision it drew 23 feet 6 inches. The steamers collided in broad daylight at about 8 o'clock in the forenoon of January 26, 1910. The weather was clear, the wind light. For at least 20 minutes preceding their coming together they had been in plain sight of each other. Their movements were not in any wise complicated by the proximity of any other vessel. Each libeled the other. The cases have been consolidated.

The vessels came together in the Brewerton, or main ship, channel leading from the harbor of Baltimore into the Chesapeake Bay. The ships were then a little east of the point at which the channel from Sparrows Point joins the Brewerton channel. The latter is 600 feet wide and 30 feet deep. The Sparrows Point channel is 100 feet wide, and about 25 feet deep. The Kennebec was bound for Boston. It had taken 3,400 tons of coal on board at Port Covington, the western Maryland coal pier in the Baltimore Harbor. It had passed down the Ft. McHenry channel and into Brewerton channel. At the time of the collision it had gone nearly two miles in the last named. The Strathnairn had at Sparrows Point taken on a load of steel rails for Australia. It came down the Sparrows Point channel. The collision took place as or very shortly after the Strathnairn turned into the Brewerton channel. A vessel coming down the Sparrows Point channel sails nearly due south. One bound out through the Brewerton channel is on an east southeast course. The angle made by the two channels is therefore about 70 degrees. The northeast corner formed by this intersection is, however, dredged out to such an extent that vessels can turn from the Sparrows Point channel into the Brewerton channel on a relatively easy curve. At the instant preceding the actual collision the vessels must have been on substantially a parallel course. The Strathnairn was from 250 to 300 feet ahead, so that the stem of the Kennebec overlapped the stern of the Strathnairn for the distance of from 75 to 100 feet. In some way, one or the other, or both, moved towards each other so that the Kennebec's port side for a distance of 75 feet back from the bow came against the starboard quarter of the Strathnairn for a distance of about 75 feet from the stern of the latter. Each vessel was damaged. Neither was disabled. Each, after returning to Baltimore, was able to make temporary repairs and proceeded on her voyage without discharging cargo.

The vessels first sighted each other shortly after the Kennebec passed Ft. Carroll, and when she was still in the Ft. McHenry channel. At this time the tugs which had turned the Strathnairn around had probably been cast off, and she was headed down the Sparrows Point channel. The Strathnairn first moved slow ahead, then half ahead, and then full speed ahead. Its witnesses say that full channel speed for it was between five and six miles an hour. The tide which was just beginning to ebb would not affect the speed of the Strathnairn, as it ran directly across its course. It probably added about a knot an hour to the speed of the Kennebec. The Strathnairn was navigated by a local pilot, a young man who had

served an apprenticeship as a bay pilot for some years. At the time of the collision he had had his license for about seven months. When the Strathnairn had passed spar buoy No. 4 of the Sparrows Point channel, her pilot says he looked at the Kennebec, and made up his mind that he was nearer to the junction of the two channels than was the Kennebec, and that he would get there first. If he is accurate in the positions he now assigns to the two vessels, they were in fact about the same distance from the mouth of the Sparrows Point channel. The Kennebec was moving from one-third to one-half faster than the Strathnairn. It would not seem that the belief of the pilot of the Strathnairn that he would get to the junction point first was well founded. He acted on it, however, by giving two blasts to signify that he proposed to go out ahead of the Kennebec. This in my opinion he had no right to do. The Kennebec was on his starboard side. In that situation it was the privileged ship.

The proctors for the Strathnairn have claimed that the Kennebec should be considered as the overtaking vessel within the meaning of the inland rules. A rule laid down on the chart shows that the Kennebec at no time while the Strathnairn was in the Sparrows Point channel could have occupied the position of an overtaking vessel as defined in the rules. The Strathnairn's pilot in deciding to pass out ahead was doubtless influenced by the fact that he had a large ship of more than 50 feet beam in a channel not more than 100 feet wide. He says he could not have stopped in that channel without going ashore. He certainly could have navigated his ship at half speed as he had already done during part of his descent through that channel. If he could not control his ship while running at full speed in the sense that he could not safely check that speed, he was in error in putting the vessel under full speed when another ship was in sight and in the privileged position. As the other vessel was privileged, it was his business to keep out of the way. If he had not attempted to go ahead into the Brewerton channel before the Kennebec reached a point opposite the mouth of the Sparrows Point channel, the collision would not have taken place. I am clear, therefore, that the Strathnairn was in fault.

Capt. Byrne, in command of the Kennebec, has been at sea for 42 years. During the Spanish-American War he held a commission in the United States navy as ensign and acting lieutenant. He has an unlimited ocean license, a first-class pilot's license from Maine to Virginia, and a British license. He says he was greatly surprised when he heard the two blasts from the Strathnairn. The pilot rules did not allow him to cross signals. He testifies that all he could do was to return the two blasts. He claims that he did not dare to give the danger signal and reverse his engines. He was going at full speed. His vessel did not steer well if when at full speed an attempt was made to reverse. He feared she would go aground. So soon as he gave the two blasts, he stopped his engines. He says the speed of the ship was reduced until he found she was losing steerage way. Up to that time he had been on the port side of the channel. He saw that the vessels were not changing their bearings materially, and he thought there was some danger of a collision. He accordingly gave one blast to signify

that he would go to starboard, ported his helm, put his engines at slow speed ahead, and went over to the starboard side of the channel. If he had reduced his speed so much that his vessel had lost steerage way, it would seem that it might have been practicable for him then to have reversed his engines. He says he can reverse with safety when his ship is running slowly. He did it at the instant of the collision, and did not go aground. If he had reversed earlier than he did, there would have been no collision at all. I recognize that he was put in an embarrassing position by the attempt of the Strathnairn to pass ahead of him; still he knew, or should have known, that a dangerous position had been thereby created. He should have done what the rules required when there is danger of collision. In the interests of life and property, it is so important that the rules shall be obeyed that an excuse for not strictly obeying them cannot be lightly accepted. As to what happened in the moment or two immediately preceding the collision there are the usual contradictions in testimony. Not only do the witnesses for the Strathnairn tell a different story from those for the Kennebec, but it would not be easy to fit into any consistent account everything that the witnesses for either of the ships say. It is very possible that no one really does know all that did happen, much less the precise sequence in which it happened. In coming out of the Sparrows Point channel, the Strathnairn went some distance across towards the starboard side of the Brewerton channel before turning into her course down the channel. There is dispute between the witnesses as to whether or not this movement of hers did not carry her beyond the middle of the channel and clear over to the starboard side. Apparently at the same time that she was crossing, or partly crossing, the Brewerton channel, the Kennebec was also moving across that channel from the port to the starboard side. When the Kennebec had gotten under a port helm as far over on the starboard side of the channel as its captain dared to go, he put his helm to starboard to straighten her course down the channel. Very possibly at the same moment the Strathnairn threw her helm in the same direction and for the same purpose. These movements inevitably tended to bring the stem of the Kennebec and the stern of the Strathnairn close together. The suction did the rest. The witnesses for the Kennebec say that, when the Strathnairn came out the Sparrows Point channel and passed in front or partially in front of their ship, it seemed to them that she, the Strathnairn, stopped. They claim that if she had not done so there would have been no collision. The log of the Strathnairn says that she kept full speed ahead from the time she was first put at full speed until after the collision. Most of the witnesses produced on her behalf say the same thing. One, however, testifies that it appeared to him that her course was retarded just before the collision.

I shall not attempt to reconcile any of these contradictions or inconsistencies. The ships ought never to have gotten so close together as to make a collision imminent. The faults of both contributed to put them there. The damages will be evenly divided. If the parties cannot agree upon the amount, I will sign an order for a reference.

In re BENDHEIM.

(District Court, S. D. New York. July 16, 1910.)

1. BANKRUPTCY (§ 242*)—PRIVILEGE—PROBABILITY OF DAMAGE.

In order to entitle a bankrupt to claim his privilege to refuse to testify on the ground of danger of self-incrimination, there must be something which gives rise to a probability of damage on which a doubt may be based.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 400; Dec. Dig. § 242.*]

2. WITNESSES (§ 305*)—OBJECTIONS—USE OF EVIDENCE RECEIVED.

Testimony objected to, although privileged, may be used for all purposes when once brought out.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 305.*]

3. BANKRUPTCY (§ 242*)—PRIVILEGE—WAIVER—INCRIMINATING STATEMENT.

Where a bankrupt had volunteered on a disclosure of what was in his shop on January 1, 1910, he waived his privilege to refuse to testify fully on such subject on the theory that his testimony might incriminate him by reason of a financial statement previously made in the fall of 1908.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 242.*]

4. BANKRUPTCY (§ 242*)—PRIVILEGE—EXERCISE.

Where a bankrupt testified partially as to his real estate holdings beginning with the year 1909, he was not entitled to protection from testifying further in that regard on the ground that his testimony might incriminate him by reason of a prior financial statement, in the absence of a showing of some of the details to indicate that he would be incriminated.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 242.*]

5. BANKRUPTCY (§ 242*)—PRIVILEGE—WAIVER.

Where a bankrupt voluntarily commenced to testify with reference to his ownership of real estate during the year prior to bankruptcy, he waived his privilege to refuse to testify on the ground that his testimony might incriminate him, and was required to make a full disclosure.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 242.*]

In the matter of Bertold Bendheim, bankrupt. On certificate to review the question of the bankrupt's obligation to answer questions in his examination. Objections overruled.

Jellenik & Stern, for trustee.

Oppenheimer & Arnold, for bankrupt.

HAND, District Judge. Undoubtedly it is always a difficult thing to say at just what point a bankrupt who is compelled to answer, and who claims his privilege, should be allowed the exercise of his own unquestioned judgment of the danger of self-incrimination. A priori no question can be said to be outside of the range of proof of some crime, and to allow him to stand mute in all cases is to give him the privilege of keeping silent as to all his affairs, in the interest of merely pedantic and verbal integrity of principle. While in all cases he must be given the benefit of all doubts, there must be something

which gives rise to a probability of damage upon which a doubt may be based. *Queen v. Boyes*, 1 B. & S. 311, 321.

Here there are two questions which have been certified. The first is as to the amount and character of his stock of goods. He had been a saloon keeper, and the question arose as to what he had had in his shop in January, 1910. The second question is as to whether he had owned any real estate since December, 1908. There is a third question which relates to the making of certain financial statements by him; but, as he answered the only questions that were asked him, any ruling upon them has become academic. It is true that his counsel excepted to the referee's ruling; but nothing is better settled than that the testimony, although privileged, may be used for all purposes, when once it is brought out. *Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575.

Therefore the questions remaining are the first two that I mention. The bankrupt's theory is that his financial statements, which undoubtedly show the amount of property which he had, might tend to incriminate him when coupled with subsequent proof of what property he actually had. So far as concerns the stock of merchandise, he testified that his last statement was in the fall of 1908, and the questions regarding his stock of merchandise refer to the period before he went to the hospital, and that was on the 6th or 8th of January, 1910. The inquiry was, therefore, of a period long subsequent to the last statement which he made. Of course, the evidence would have some bearing upon the condition of his stock at the time of the statement; but he has nowhere suggested that he fears or believes that a disclosure of his stock on hand on the 1st of January would show any contradiction with any written statement which he made; but, in the absence of some claim on his part coupled with some proof of reasonable expectation that that claim has a basis, his danger is in my judgment purely academic. Moreover, I should hold that, having volunteered upon a disclosure of what was in his shop at that time, he had waived his privilege, for it is well settled that, having once embarked upon such a disclosure, he has waived his privilege and cannot thereafter stop halfway. The waiver in this case even went so far as to include an answer on page 138 to the very question which he subsequently refused to answer. The testimony was as follows:

"Q. And how many cases did you have? A. Had 30, 40 cases. Q. What else? A. Had some imported good, imported liqueurs."

There follow some six pages of testimony as to the amount of liquors which he had on hand, and then the question was repeated, "Q. What else?" which he refused to answer. I hold that he must answer fully as to the stock of merchandise which he had on hand at the beginning of January, 1910.

In respect of a disclosure of his real estate the same considerations apply. He was asked about his holdings beginning with the year 1909, a period some time, though not so long, after his last financial statement, and he does not swear in regard to this that he believes his testimony might contradict his written financial statement. He must at least show some details to indicate that he will be incriminated,

before I shall protect him. Moreover, on pages 164 to 167 he testifies quite freely about his own ownership of real estate prior to 1909, and says that the last time he owned any was a couple of years ago. The question which he subsequently refused to answer was only that question in a different form. Having begun to disclose his ownership of real estate and declared that he had none during the period in question, he must continue and must disclose it fully, for he has clearly embarked upon that subject, and by that has waived any privilege in regard to it.

I therefore direct him to answer the questions. If he does not do so, the referee will certify him for contempt.

R. GUASTAVINO CO. v. COMERMA et al.

(Circuit Court, S. D. New York. July 26, 1910.)

1. TRADE-MARKS AND TRADE-NAMES (§ 21*)—NAMES SUBJECT TO OWNERSHIP.

Where the terms "Spanish tile" and "cohesive tile" are synonymous terms in the trade with "Guastavino tile" and "timbrel vault," meaning arches made by complainant, and he has had exclusive user of such terms for nearly 30 years, such names could be used by him and protected as trade-names; and, where another adopts the same names to designate work of the same kind done by him, he may be restrained from using them without adding some sign to distinguish his work.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 24; Dec. Dig. § 21.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 1*)—DEFINITION.

A "trade-mark" or "trade-name" is some symbol by which one man's manufacture is differentiated from another's, and all that is needed for a valid trade-name is that it indicate the manufacture of the owner, whether there are other manufacturers or not.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 1, 3; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7042-7048.]

Action by R. Guastavino Company against John Comerma and another. Decree for complainant.

This is an application for a writ of injunction pendente lite forbidding the defendants from the use of the phrase "Guastavino tile arch," "timbrel vault," "Spanish tile arch," and "cohesive tile arch." The complainant or its predecessors has engaged in the business of making tile arches of peculiar structure continuously since the year 1881, and has always made its vaults and arches under one or other of the names in question during that time. The structures themselves are not wholly new; they are an adaptation made by Guastavino, Sr., of an ancient form of tile arch used in Spain for many centuries, and dating back to Roman and even to Assyrian times. The complainant's modification of this arch is peculiar, in that the surfaces of the tiles are roughened so as to add to the cohesive force between them and the mortar; but they do not claim the exclusive right to the manufacture even of this improvement. There are existing now in Spain and in Mexico arches made upon the same principle as these, and the complainant does not contend that the names "Spanish tile" or "cohesive tile" would make a good trade-mark independently of an exclusive user. In proof of that they show that no one in this country except the complainant or its predecessors has made arches of this structure at all until the defendant set up in business

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

within about a year. There was, it is true, one such arch made some years ago, which soon gave way. Comerma is a Spaniard who had learned the general kind of construction in Spain and came over here some six years ago in the employ of the complainant for 3 or 3½ years. He says that during this time he was a foreman, but the complainant insists that he was only a tile layer upon the same daily wage as that of others in its employ. The affidavits raise a square dispute upon this point. Comerma organized a corporation in the year 1909, and advertises that he will make Spanish tile arches or cohesive tile arches. He has also represented himself as formerly a foreman in the employ of the complainant and has asserted that he can make arches as well as the complainant.

Upon the argument the defendant conceded the right of the complainant to the terms "Guastavino arch" and "timbrel vault," so that the issues are reduced to the phrases "Spanish tile" and "cohesive tile."

Elbridge L. Adams, for complainant.

H. B. Davis, for defendants.

HAND, District Judge (after stating the facts as above). The defendant makes no showing in the papers to contradict the proof that "Spanish tile" and "cohesive tile" are synonymous terms in the trade with "Guastavino tile" and "timbrel vault," and that they mean arches made by Guastavino. The complainant has had exclusive user for now nearly 30 years and presents affidavits of substantial builders and architects who say that "Spanish tile" and "cohesive tile" mean Guastavino's work. A secondary meaning is therefore in my judgment shown clearly enough even for a preliminary writ.

I have had two doubts, but I think neither is substantial. The first is this: Here is a name which has never been used to distinguish the complainant's work from any other man's, because no one else has ever made the structure. A "trade-mark" or "trade-name" is some symbol by which one man's manufacture is differentiated from another's and if the goods were never made by another no mark applied to them can be the personal mark of manufacture which is the only subject of monopoly. This argument is wholly sophistical, because all that is needed for a valid trade-mark is that the name should indicate the manufacture of the owner, whether there are other manufacturers or not. If the name has come to mean both the article and its manufacturer, it is none the less a misapplication to apply it to the article when made by another. Strictly speaking the article has never yet got a generic name at all; usage has heretofore not found it necessary to distinguish between product and manufacturer. That does not change the fact that the work in question does mean the product of Guastavino. The name has not become generic, because the thing has not yet become a genus.

The only troublesome analogy is the invalidity of a trade-mark upon a patented article acquired before the patent expires. However, those cases are to be explained upon the theory that the name, e. g., "Singer's sewing machine," *prima facie* means a machine made in accordance with the patent. I know of no case in which it is held that a patentee could not protect his mark if he showed that the name meant not only the patented structure, but also that he made it himself. Suppose no one but the patentee had ever made the patented article, and it was shown that the name meant not only a machine made after the patent,

but made by him. There seems no good reason to forbid the allowance of such a mark, if that were shown, merely because it applies to a patented article, and I do not believe that it will be so decided when it arises. In any case, this is not a patented article, and I shall not extend any such supposed reasoning to this case.

The second doubt is from the use of the names in making building contracts with architects and builders who always know independently of the name with whom they are dealing. However, the complainant has a good answer to this, when it suggests that, though contracts are made explicitly enough, its general reputation in the trade depends upon the character of the work which goes under its name. If Comerma's arches are called "Spanish tile," Guastavino must bear the chance of their miscarriage. Whether Comerma makes them better or worse, he is certainly not entitled to tack Guastavino's name to them. Each man must be allowed to make his own name on his own work, and it is plain enough that, even though the contracting architects and builders know with whom they are dealing, the profession and trade who merely followed the results of the work through the gossip of their colleagues might well attribute Comerma's bad work, if it were bad, to Guastavino. Therefore, in spite of the way in which the business is done, there is ground to expect confusion.

Let a writ *quod pendente lite* against the use of "Spanish tile" or "cohesive tile" in any form without some distinguishing sign to indicate Comerma. If the parties cannot settle between them the proper addendum, they may bring the dispute to me. The writ should be explicit, as it saves litigation upon contempt proceedings.

In view of the conflict of evidence the writ will not include any provision regarding Comerma's representing himself as a former foreman of the complainant.

In re JOHN A. BAKER NOTION CO.

Ex parte TALCOTT.

(District Court, S. D. New York. July 25, 1910.)

1. BANKRUPTCY (§ 311*)—INVALIDATION OF PREFERENCE—PAYMENT—RIGHT TO FILE CLAIM.

A preferred creditor of a bankrupt, after the bankruptcy court has declared void the preferential payments received by him, may file a claim in such court for the amount thereof, without having the validity of the preference determined in another tribunal.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 497-500; Dec. Dig. § 311.*]

2. BANKRUPTCY (§ 342½*)—REFUSAL TO ACCEPT PROOF OF CLAIM—REMEDY OF CREDITOR—PROCEDURE.

Act of a referee in bankruptcy in refusing to accept a claim is not a judicial act, requiring an order and petition of review; but the creditor may move to compel him to accept proof thereof.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 530; Dec. Dig. § 342½.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

In the matter of John A. Baker Notion Company, bankrupt. On motion by James Talcott to compel the referee to accept proof of claim. Referee ordered to file claim.

This is a motion on behalf of Talcott to compel the referee in bankruptcy to accept a proof of claim tendered by him on June 24, 1910, and refused acceptance by the referee. The bankrupt was adjudicated on January 9, 1903, upon petition filed December 16, 1902. On December 15, 1902, Talcott seized all of the assets of the bankrupt under the claim of a factor's lien for advances which arose under contract more than four months prior to December 15, 1902. A trustee was appointed in April, 1903, and instituted a suit in equity in the District Court against Talcott on April 20, 1904, to declare void Talcott's lien as a voidable preference under the bankruptcy act, and to compel him to deliver to the estate all the property that he had seized, or to account for its value. A final decree was entered in that suit May 17, 1910, in favor of the trustee, declaring Talcott's lien void, and directing him to make payment in the sum of over \$24,000. Talcott appealed from the decree.

The proof of claim in question is a voluminous document, which contains annexed to it the original contract between the bankrupt and Talcott, and which sets forth in great detail all the proceedings, and asks that, if his lien be validated upon appeal, his claim may be allowed to the extent of any deficiency, and, if the decree be affirmed, it may be allowed for its full amount. The trustee, as preliminary objections, raises the question that the procedure was improper, in that only a petition of review lay from the decision of the referee, that the claim itself was improper in form, and that in any event the time had expired within which Talcott had a right to file any claim under section 57n. No order was entered by the referee upon refusal to accept the claim, and the petition for this motion was made more than 10 days after the objection. A rule in the Southern district of New York requires petitions for the review of a referee's order to be made within 10 days after entry of the order.

George W. Schurman, for claimant.
Frederick M. Czaki, for trustee.

HAND, District Judge (after stating the facts as above). Under *Keppel v. Tiffin Savings Bank*, 197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 790, the Supreme Court finally decided that the surrender requisite to enable a preferred creditor to prove his claim might be after the termination of a judgment in a suit between himself and the trustee. It is true that in that case the determination was in a suit in the state court; but in *Re Oppenheimer* (D. C.) 140 Fed. 51, Judge Reed decided that the creditor might file a claim in bankruptcy, and be allowed the full amount, after the bankruptcy court itself had declared void certain preferential payments which he had previously received. This was the English law as quoted by Mr. Justice White in *Keppel v. Tiffin Savings Bank*, supra, and unless it be the law under the present act, the result, after *Keppel v. Tiffin Savings Bank*, supra, will be to make it necessary for a creditor, claiming a disputed preference, to fight out its validity in some other tribunal than the bankruptcy court, which would be a most undesirable conclusion. In my judgment, therefore, a claimant need not avoid the bankruptcy court to get advantage of the rule in *Keppel v. Tiffin Savings Bank*, supra.

Therefore the trustee here argues, with much force, that there is no reason why such a creditor should not prove his claim at once within the year, and wait for the allowance of his dividends till the deter-

mination of the litigation upon which depends the validity of his preference, whether that litigation be in the bankruptcy court or out of it. The trustee further says that such a creditor is in precisely the same position as a secured creditor, who, if he delays filing his claim until after the year, because the security is being liquidated, loses all right to file it at all. In *re Sampter*, 170 Fed. 938, 96 C. C. A. 98. I confess that this would be my ruling, were I free to decide the question, because it seems to me that, after *Keppel v. Tiffin Savings Bank*, *supra*, a creditor having a questionable preference or security is precisely like any other secured creditor, except that the validity of the security must be determined before his dividends can be finally allowed. In short, it makes no difference whether his security is voidable under the bankruptcy act or by the local law. In either case he may prove for the whole claim, and get dividends upon so much as shall in the end prove to be in fact unsecured. The limitation of section 57n would therefore apply to such a claim. I should therefore regard myself as bound by *In re Sampter*, *supra*, rather than by *Powell v. Leavitt*, 150 Fed. 89, 80 C. C. A. 43, in the First circuit, and should deny this application.

Moreover, the question was in no sense up in *Keppel v. Tiffin Savings Bank*, *supra*, whether the claim could be proved after more than a year from the adjudication. However, it was up in *Page v. Rogers*, 211 U. S. 575, 29 Sup. Ct. 159, 53 L. Ed. 332, and the Supreme Court *sua sponte* reversed the decree below for the sole purpose of permitting the claim to be proved. That, of course, settles beyond peradventure any doubts that may be raised as to the authority of *Powell v. Leavitt*, *supra*; and whatever effect, if any, it has on *In re Sampter*, *supra*, I need not here decide. Nor is it of consequence whether it depends upon the singularly blind language of the second sentence of section 57n. Upon the merits of this application, Talcott must therefore succeed, and the sole question remaining is whether the formal objections raised by the trustee are valid.

First, as to the procedure adopted. The referee has refused to accept the claim at all, and I agree with Talcott that this was not a judicial act, requiring an order and a petition of review. Indeed, the claim might under the general orders have been filed with the clerk, in which case no review would have been admissible, and this would have been the only procedure possible. Of course, it by no means follows that an act is judicial because it requires some consideration of the meaning of a law. Indeed, all acts prescribed by law require its interpretation. Here, no doubt, the referee might have taken the claim and upon objection considered and determined upon it. He very wisely took the other course, so saving much time by raising the question directly. The practice here adopted is that followed in *Re Strobel* (D. C.) 163 Fed. 787, and it is the only practice that could be followed under the circumstances.

As to the conformity of the claim in form with the general orders and its validity in substance, I can have no concern here. They will be matters upon which the referee must pass judicially when he comes to allow it. I might say, however, that as there has been a judgment

against Talcott it would seem that he might safely stand upon the claim for full dividends, and if he obtains a reversal in the Circuit Court of Appeals credit upon the claim such amounts as his security, when so validated, has in fact brought him.

Let an order pass directing the referee to file the claim as of the date of its presentation.

OMMEN v. TALCOTT.

(District Court, S. D. New York. July 23, 1910.)

1. EQUITY (§ 428*)—DECREE—ENROLLMENT.

In federal courts, and in the American equity practice generally, there has never been an enrollment of the decree in the old English sense; but the decree is regarded as recorded and enrolled at the conclusion of the term.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1015-1019; Dec. Dig. § 428.*]

2. EQUITY (§ 428*)—DECREE—ENTRY—FEES.

Under Rev. St. § 828 (U. S. Comp. St. 1901, p. 635), providing that the clerk shall be paid his fees for entering a decree, the clerk may refuse to enter a decree until his fees are paid, and the decree, though remaining physically in the clerk's office, is neither effective nor entered until the fees are paid.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 428.*]

3. EQUITY (§ 428*)—DECREE—SIGNATURE.

Though the practice exists in the federal courts of signing decrees, a decree may pass on an oral direction by the judge in open court to enter it; the judge's signature being only evidence to the clerk that it has in fact been passed, so that he may safely enter it.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 428.*]

4. APPEAL AND ERROR (§ 440*)—CORRECTION OF JUDGMENT AFTER APPEAL TAKEN.

The court has power to correct a misprision of the clerk as to the date of entry of a decree, though the term has expired and an appeal has been taken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2201; Dec. Dig. § 440.*]

5. EQUITY (§ 428*)—ENTRY OF DECREE—DATE—CORRECTION.

Final decree was signed by the judge April 25, 1910, and was taken at once to the clerk's office, and there remained until May 17, 1910, when complainant's attorneys paid the fees for entry, and it was then marked "Filed"; the "record of the case" containing the statement that the court caused the final decree to be entered "on the 25th day of April, 1910." *Held*, that the recital as to the date of entry was a misprision, and should be corrected nunc pro tunc to recite that it was entered May 17, 1910.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 428.*]

Action by Alfred E. Ommen, as trustee of the estate in bankruptcy of the John A. Baker Notion Company, against James Talcott. On petition to amend the final record. Granted.

See, also, 175 Fed. 259, 261.

Fried & Czaki, for complainant.

Rounds & Schurman, for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HAND, District Judge. The question raised by this motion is as to the change in the "final record of the case" in an equity suit in this court. I signed a final decree for the complainant on April 25, 1910, and it was then at once taken to the office of the clerk and left there, where it remained until May 17, 1910. On that day the attorney for the complainant paid the fees, which are, under Rev. St. § 828 (U. S. Comp. St. 1901, p. 635), necessary to procure its entry, and it was marked "Filed" May 17, 1910. Subsequently and in due course it was entered upon the minutes of the clerk. An appeal has been taken and citation allowed to the Circuit Court of Appeals. The clerk, as is the custom in equity cases in this circuit, both in the District and Circuit Courts, has made up a "final record of the case," which consists of the pleadings, a copy of the decree as entered, and a final statement showing the proceedings and adjudging the costs, which are entered in this final record. All this was done in the May term, and contained the words: "On the 25th day of April, 1910, the said court caused a final decree to be entered herein." The defendant wishes the words "the 25th day of April, 1910," changed to "the 17th day of May, 1910."

According to the ancient practice in equity, the registrar took minutes of the decree as delivered in court, and from these, if the parties did not object, the clerk upon his own minutes entered the final decree. Correction of that decree before entry could be made by the registrar or the court. The entry of the decree, however, was not, under ancient equity practice, enough to make it effective, or at least it was not final until it had been enrolled. Enrollment took place when the solicitors procured a copy of the decree from the minutes, called the "docket," which was signed by the Chancellor after being carefully compared with the decree as entered, and the docket was finally copied upon parchment rolls by the clerk of the court and deposited with the keeper of the rolls for preservation. This made it a final decree. Street, Federal Equity Practice, §§ 1971-1979 (a most estimable book). In our courts, and in American equity practice generally, there has never been an enrollment in the old English sense; but the bill is regarded as recorded and enrolled at the conclusion of the term. *Whiting v. Bank of the United States*, 13 Pet. 6, 10 L. Ed. 33.

Moreover, there has been a practice in this circuit for a period, as Mr. Shields tells me, of 55 years, to add to the final decree, as it is signed by the judge and entered, a paper, signed by the clerk and known as the "final record of the case," which may have been intended as the equivalent of the enrollment of the decree, although I cannot ascertain what was its origin. This "final record" is the paper which I am now asked to correct in this case, and it recites that the final decree was entered on the 25th day of April. The question is whether that entry was correct or not. I think it was not correct. The statute (Rev. St. § 828) provides that the clerk shall be paid his fees for entering a decree, and those fees were not paid until the 17th of May. Had they never been paid, the clerk would have been justified in refusing to enter the decree at all (*Steever v. Rickman*, 109 U. S. 74, 3

Sup. Ct. 67, 343, 27 L. Ed. 861), and, although it remained physically in the office of the clerk, the condition precedent upon its entry would never have arisen, unless the clerk chose to waive it and pay the fees himself.

Of course, the date might be held to relate back after the fees were paid, but such relation back is a fiction, and I see no ground in justice for implying a fiction in such a case. The date of entry is important, generally speaking, only in respect of the time to appeal, and if the successful party fails to pay his fees there is no reason in justice to set the time to appeal running against his opponent before he does so. Mr. Shields tells me that he has some recollection of a decision of Mr. Justice Blatchford, while Circuit Judge, that the date of entry was to be taken as the date of the caption of the decree, which is presumptively when it passed. His recollection is, however, too uncertain to serve as a safe precedent, and I see no reason to adopt the fiction of a relation, especially as the entry of the decree is by all the authorities different from the date when it passes. It has been suggested that there are authorities to the effect that in equity a decree becomes effective for all purposes upon its signature by the judge. But this was certainly not the case in the ancient English equity practice, upon which ours is founded, and I find no authorities which change it.

The complainant, in the citations of New York cases, has failed to distinguish between entry and enrollment. All those decisions, which were made before the Code went into effect, and while anybody knew anything about the matter, were to the effect that, after entry, but before enrollment, of a decree, it might yet be accepted in evidence by another court. The cases after the Code are of no authority. No case have I found, or has Mr. Shields been able to find for me, which decides that a decree has any effect at all before entry. Indeed, it ought not, strictly speaking, to be signed at all. Although the practice exists in this circuit of signing decrees, a decree would pass upon an oral direction by the judge in open court to enter it, and the signature is only evidence to the clerk that it has in fact passed, so that he may safely enter it. While, of course, the date of physical entry upon the minutes is of no consequence, all the conditions precedent to entry must be fulfilled before the entry itself may be deemed made.

In regard to the power of a court to change its records after appeal, the complainant is mistaken. The fact of an appeal has nothing to do with the right of this court to change its record so as to conform to the facts and to correct a misprision of the clerk. *Hovey v. McDonald*, 109 U. S. 150, 157, 158, 3 Sup. Ct. 136, 27 L. Ed. 888. The only question in this case which could arise is the fact that this is the July term of the District Court, and the final record was made in the May term. Does the power to correct such mistakes expire at the end of the term? Although the clerk, after the expiration of the term, has no right to make even clerical corrections in the record, a court always has power over its own records to make the truth appear, and if the clerk, as here, has been guilty of a misprision, the court may at any time, upon petition, correct that record. In *re Wight*, 134 U. S. 136, 10 Sup. Ct. 487, 33 L. Ed. 865; *Lincoln National Bank v. Perry*

et al., 66 Fed. 887, 14 C. C. A. 273. This is quite different from changing the actual judgment of the court after the term is passed, as was denied in the case of Wetmore v. Karrick, 205 U. S. 141, 27 Sup. Ct. 434, 51 L. Ed. 745.

An order may be entered, therefore, correcting nunc pro tunc the misprision of the clerk in this case, by which the final record shows that the decree was entered "on the 25th day of April." Those words may be changed to the words "on the 17th day of May."

FAYETTE TITLE & TRUST CO. v. MARYLAND, P. & W. V. TELEPHONE & TELEGRAPH CO.

(Circuit Court, W. D. Pennsylvania. August 5, 1910.)

No. 34.

1. REMOVAL OF CAUSES (§ 97*)—PROCEEDINGS IN STATE COURT—APPOINTMENT OF RECEIVER.

An appointment of a receiver by a state court will be vacated by the federal Circuit Court as without jurisdiction where proper proceedings had been taken to remove the cause.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 206-211; Dec. Dig. § 97.*]

2. REMOVAL OF CAUSES (§ 86*)—PETITION—SIGNATURE—SUFFICIENCY.

A petition by a company to remove a cause signed by an agent on whom the bill was served is sufficiently signed.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 132, 166-179; Dec. Dig. § 86.*]

3. REMOVAL OF CAUSES (§ 88*)—BOND—SIGNATURE—SUFFICIENCY.

A bond by a company to remove a cause signed by an agent of the company on whom the bill was served is sufficient, though his authority does not appear.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 132, 184-188; Dec. Dig. § 88.*]

4. PRINCIPAL AND SURETY (§ 66*)—NATURE OF LIABILITY.

Ordinarily the liability of a principal and his surety are identical, and recovery against one depends on the right to recover against the other.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 108-112; Dec. Dig. § 66.*]

5. REMOVAL OF CAUSES (§ 88*)—BOND—SUFFICIENCY.

A bond to remove a cause is sufficient where there is a good and sufficient surety for payment of costs.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 184-188; Dec. Dig. § 88.*]

Suit by the Fayette Title & Trust Company, trustee, against the Maryland, Pennsylvania & West Virginia Telephone & Telegraph Company. On petition by defendant to restrain plaintiff from acting as receiver. Petition granted.

Evans, Noble & Evans, for complainant.

Robinson, McKean & Martin, for defendant.

ORR, District Judge. This matter comes before the court upon a petition by the defendant to restrain the plaintiff from performing the duties of receiver of defendant's assets under an order of the court of common pleas of Fayette county, in this district. In that court the complainant filed a bill for the foreclosure of a mortgage given and executed by the defendant to secure the payment of certain corporate bonds. Upon the day following the filing of the bill the defendant presented to the state court a petition and bond for the removal of the litigation thus begun to this court. Objections were made by the complainant to the form of the petition and to the bond. At the time of presenting the petition for the removal and the bond, the complainant made a motion for the appointment of a receiver. Proceedings were so had that the state court subsequently refused approval of the petition and the bond, and on the same day appointed the complainant as receiver of the assets of the defendant, the same being embraced in the said mortgage. The defendant forthwith procured a certified copy of the proceedings in the state court and filed the same in this court, and presented its petition to this court for an order restraining the said receiver from acting under the said appointment.

The first question to be determined is whether the proceedings have been properly removed into this court, notwithstanding the refusal of the state court to approve the petition and bond filed. If the proceedings have been properly removed to this court, then it must follow that the appointment of the receiver by the state court, following as it did, although upon the same day, the steps taken by the defendant for the removal of the proceedings must be vacated. The learned judge of the state court filed no opinion in support of his action in refusing the order for the removal and the approval of the bond. His reasons must therefore be found in the arguments of plaintiff's counsel in resisting the application made to this court for the restraining order. The petition for the removal was signed in the name of the defendant by "T. J. Burke, Agent," and the petition was verified by Mr. Burke. In all respects the petition was in proper form. The authority of Burke to sign the petition for removal should not be questioned by the complainant for the reason that the bill was served by the sheriff upon Mr. Burke as the duly authorized agent of the defendant company. The sheriff's return shows that the residence within Fayette county of any of the executive officers cannot be ascertained. In *Removal Cases*, 100 U. S. 457, 471, 25 L. Ed. 593, it appears that the petition for removal was not signed, yet on its face it purported to be the petition of the proper persons. In *Shaft v. Phoenix Mutual Insurance Co.*, 67 N. Y. 544, 23 Am. Rep. 138, in *Wormser v. Dahlman*, Fed. Cas. No. 18,048, and in many other cases, a petition signed by the attorney at law was deemed sufficient. There seems therefore to be no vital defect in the petition for removal. And so too with respect to the bond. The acts of Congress do not specify the exact form of bond or phraseology to be used. The bond in this case was a joint and several obligation. It purported on the face of it to be the bond of the defendant company as principal and the Bank-

er's Surety Company as surety. It was signed on behalf of the principal just as the petition was signed. No question is raised with respect to the execution of the bond by the surety, nor is any question raised as to the sufficiency of the surety. It was argued by counsel for plaintiff that, because the authority of Burke did not appear, therefore the principal might not be bound and the surety would escape liability. But, while ordinarily the liability of the principal and surety are identical, and where there cannot be a recovery against the one there may not be a recovery against the other, yet in a case such as this we are of the opinion that the surety would be estopped from denying the execution of the bond by the principal. There was good and sufficient surety for the payment of the costs, and that is all that is required. See Removal Cases, *supra*. I am further of the opinion that no order of the state court was necessary to effect the removal of the case to this court. The formalities described by the act of 1875 (Act March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 508]) relating to removal of causes are not conditions precedent to the jurisdiction of the federal courts. Dillon, on Removal of Causes, § 134. See opinion of Judge Brawley in *Mutual Life Insurance Co. v. Langley* (C. C.) 145 Fed. 419, and cases there cited. An important case on this point is found in *Madisonville Traction Company v. St. Bernard Mining Company*, 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462.

The case then being properly removed to this court, the subsequent appointment of a receiver by the state court was without jurisdiction, and this court may restrain the plaintiff from exercising the authority contemplated by the order making the appointment. *Madisonville Traction Co. v. St. Bernard Mining Co.*, *supra*. It must not be supposed that this court believes that the appointment of the receiver would have been improper had the petition and bond not been filed previously. The defendant by the neglect of the conditions in the mortgage as to the payment and adjustment of taxes for a long period of years gave full warrant to the bondholders to request the trustee in the mortgage to declare the full amount of the debt to be due, and that in conjunction with the fact admitted by the defendant that the check for the last installment due on the bonds had gone to protest, although subsequently paid. I am of the opinion that this matter is not now before the court, but, as before stated, this court having found that the case was properly removed, all subsequent proceedings in the state courts leading to the appointment of a receiver were without jurisdiction. It follows that the defendant is entitled to an order restraining the plaintiff from exercising any control over the property and assets of the defendant by virtue of the appointment by the state court and from further prosecuting the suit brought by it in said state court. Let an order be drawn in conformity with this opinion.

THE RAYMOND.

(District Court, E. D. New York. July 19, 1910.)

TOWAGE (§ 15*)—INJURY TO TOW—IMPROPER MOORING.

An injury to a barge towed by a tug to the end of a pier over mud flats in Jamaica Bay, where she was left in such position that when the tide ebbed she rested on the bottom diagonally across the dredged channel and was strained, *held* due to the fault of both vessels, the tug as in charge of the maneuver being in fault for not seeing to it that the barge was not left in such position, and the barge because her master refused to obey the directions of the tug master as to mooring his vessel.

[Ed. Note.—For other cases, see Towage, Dec. Dig. § 15.*]

In Admiralty. Suit by the Clinton Point Stone Company against the steam tug Raymond. Decree against the tug for half damages.

Foley & Martin, for libellant.

Alexander & Ash, for claimant.

CHATFIELD, District Judge. Upon June 15, 1908, the tug Raymond undertook to tow a scow loaded with stone to a dock, some 60 feet long and 15 feet in width, extending out over a mud bank, from a bulkhead back of which building operations were being conducted, at a point on the east side of Jamaica Bay. A narrow channel, running near what is known as Aunt Sally's drain, had been dredged to a width of about 50 feet along the face of the bulkhead. This dredged channel was some 800 or 900 feet long, and curves around at a distance of 50 or 60 feet from the bulkhead for a considerable distance beyond the dock in question. The barge was 108 feet long, 30 feet wide, and had a draft of 7 feet. Upon the day of the occurrence, it was low tide at about 2 p. m., and the towing operation was undertaken by the Raymond at such a time as to arrive off the face of the dock at about 9 a. m. The witnesses agree that the tide turned ebb almost at the time that the barge arrived off the face of the dock. The captain of the barge was not familiar with the locality, and had no knowledge of the handling of boats. The captain of the tug was experienced in the waters of Jamaica Bay and familiar with the locality, but not with the exact dimensions of the narrow curved channel around the front of this dock. At low tide the mudbanks on each side of the dredged channel are considerably out of water, while at high tide the channel could only be definitely located by soundings. It would appear that there had been some argument between the captain of the tug and the captain of the barge over occurrences upon the voyage to the wharf, and it is apparent from the testimony that neither of the captains yielded to the judgment of the other. But the responsibility for the towing and the giving of directions as to what should be done with the barge rested upon the captain of the Raymond. No serious mishap occurred until the boat had arrived off the front of this dock or wharf, which as has been said presented a square end 15 feet in width, with light piles at each corner, and being at high tide about

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6 or 8 feet above the water. To that point the tide had apparently helped the towing operation, and the barge was drawn by the tug in the middle of the dredged channel, until it extended about 45 feet beyond the dock and back an equal distance, while the tug, on a very short hawser, was lying ahead of the barge, with her nose substantially against the outside curve of the dredged channel. It would have been possible for the tug in this position to have drawn the barge further up the channel and beyond the dock, but to do so it would have been necessary to turn the scow so that its side would not be parallel to the end of the dock, and there was no other way of getting the line from the barge for the temporary mooring than to make fast to the end of the dock. A permanent mooring could be made, as was subsequently done, by carrying a line over the intervening 60 feet of mud flat to the bulkhead, but the set of the tide and the narrowness of the channel did not give opportunity to get out such a line, either by wading or with a skiff, in time to hold the barge in the position in which the tugboat placed it. The tug captain's object and his directions to the captain of the barge were to throw a line to a man working on shore, who came down to the dock, and thus temporarily hold the scow against the inside edge of the channel and parallel to the face of the dock. The depth of the water immediately off the face of the dock necessitated keeping the barge some 10 feet away, and the tug captain apparently put the barge in the exact position where she should have been at the time. The captain of the barge did not think that the dock would hold the boat, and did not think that the tug had put the barge in the position where she could be moored. He did not follow the directions of the tug captain, and while none of the witnesses give a detailed account of the argument between the two captains, it is apparent that they disagreed or discussed the situation just long enough for the tide to turn or to run out sufficiently to swing the bow of the barge away from the dock toward the outside of the channel, and to swing the tug across the channel, where both were helpless. Later, the lowering tide left the barge diagonally across the channel, its starboard forward corner and its after port corner resting upon the mud, thus causing a bad sagging and warping of the timbers, necessitating a considerable expense for repairs. The damage resulting and the situation which caused the damage do not need discussion, as they are not in dispute, and are apparent from a mere statement of the position of the boat.

A consideration of the surroundings indicates that the captain of the tug could not have brought the barge much closer to the face of the dock nor into any different position than as he did. He could not have changed the position of the barge after the short delay in which his tug and the barge lost their direction in the course of the channel. The captain of the barge could do nothing to hold his boat, so long as he did not follow the directions of the tug captain and get out a line to the dock, even if that line were insufficient for a permanent mooring. The captain of the barge seems to have been at fault both in failing to obey the directions of the man who was familiar with the situation and in charge of the towing operations, and also in

not doing what was evidently the best and necessary thing under the circumstances, even if he did not consider that it would be of permanent use. On the other hand, the captain of the tugboat knew the location to which he was taking the boat. He knew what would have to be done upon arrival, and he neither instructed the captain of the barge nor attempted to see that the situation was made plain to him, nor did he have any one in readiness to take care of the tow if assistance should be necessary. The accident was an unusual one, in that a boat would not be likely to go aground in such a fashion and be severely injured under ordinary circumstances. But the captain of the tugboat should have realized (as is apparent) that if the barge rested upon both sides of the narrow channel, the fall of the tide would cause a severe strain, and he should have prevented the barge from being put in such a position, either by seeing that the barge captain was ready to avoid danger, or by keeping his tugboat and the tugboat's crew in readiness to prevent the boat from swinging, if the line were not carried to the dock promptly. The fault would seem to be primarily that of the barge captain, but the captain of the tugboat was also negligent in the way in which he failed to provide against accident in carrying out the maneuver, and it would seem that both the tug and the barge should be held responsible for the loss.

The damages will therefore be divided.

RALPH BROWN CO. v. NORWICH UNION FIRE INS. SOC.

(Circuit Court, N. D. California. June 27, 1910.)

No. 14,989.

INSURANCE (§ 579*)—ADJUSTMENT OF LOSS—SETTLEMENT—CONSTRUCTION—
"VOLUNTARY."

An insurance company, pursuant to a settlement by which it paid 50 per cent. of the loss, stipulated that if at any time in the future it adopted any other plan of settlement under or by reason of which the rate of payment was "voluntarily" raised by the company in the district in which plaintiff's property insured at the time of the fire was situated, or if as to any policy holder of the company having a claim for loss in such district under similar conditions a payment at a higher rate was made, plaintiff should be given the benefit of that rate and the settlement increased to that extent. *Held*, that the clause "if as to any policy holder * * * a payment at a higher rate is made" should be construed in connection with the provision that if the rate of payment was "voluntarily raised," etc., and hence the fact that defendant was compelled to pay judgments recovered for losses in the district, imposing full liability, did not entitle plaintiff to recover the unpaid portion of his loss, payment of such judgment not being "voluntary" within the terms of the settlement.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 579.*

For other definitions, see Words and Phrases, vol. 8, p. 7342.]

At Law. Action by the Ralph Brown Company against the Norwich Union Fire Insurance Society. On motion to strike out as irrelevant and redundant certain portions of the answer. Denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Mastick & Partridge, for plaintiff.

T. C. Van Ness and Chas. W. Slack, for defendant.

VAN FLEET, District Judge. This is a motion to strike out, as irrelevant and redundant matter, certain portions of the answer.

The complaint counts upon a demand claimed to have arisen under certain policies of fire insurance issued by the defendant upon the property of the plaintiff. It is alleged, in substance, that a loss having occurred under said policies through the destruction of the property in the fire of April 18, 1906, the defendant refused to pay the full amount of the claim therefor, but offered by way of settlement and compromise to pay plaintiff 50 per cent. of the loss in full of all demands thereunder, and at the same time offered to stipulate with plaintiff in writing that:

"If at any time in the future the company adopts any other plan of settlement than that under which the settlement has been made with you and under or by reason of which the rate of payment is voluntarily raised by the company in the district in which your property insured with us at the time of the fire was situate, or if, as to any policy holder of this company having a claim for loss in said district under conditions similar to yours, a payment at a higher rate is made then you will be given by said company the benefit of that rate and the settlement with you increased to that extent."

It is alleged that this offer of defendant was accepted by plaintiff; that subsequently the defendant did pay to certain other of its policy holders having claims arising under conditions precisely similar to that of plaintiff and on property situated in the same district the full face value of such claims, and has thereby become liable to plaintiff under its contract for the balance of its claim, which defendant has failed after demand to satisfy.

The defendant by its answer, while admitting the making of the compromise settlement with plaintiff as alleged, sets up that the payments made by it to other claimants at a higher rate as alleged in the complaint were not voluntarily made, but were made only in satisfaction of judgments which were duly given, made, and entered in favor of such claimants and against the defendant in cases where the compromise offered by defendant had been refused, and that it made no other or further payments to said claimants or either of them than such as were compelled in satisfaction of such judgments.

These averments as to the circumstances under which the payments were made by defendant to such other claimants the plaintiff now asks to have stricken from the answer as wholly immaterial and irrelevant and not tending to constitute any defense upon the theory that, under its contract of compromise as above set forth, any payment by defendant of an increased rate no matter what the circumstances, fixes its right to and entitles plaintiff to demand the same rate.

As tentatively suggested at the argument, I think this attitude involves a misapprehension of the scope and effect of the composition. The contract is to be construed with reference to the transaction or subject-matter to which it relates, and upon which the minds of the parties were centered at the time it was entered into. The matter in hand as disclosed by the facts alleged in the complaint was the amica-

ble adjustment of the plaintiff's claim out of court and without litigation; and the stipulation for any further payment by its very terms had reference to a "voluntary" raising by defendant of the rate of payment in any subsequent settlements as the contingency upon which plaintiff's right to such increase should depend. It would be an unwarranted distortion of the terms of the writing to hold that it related to or included payments that might be made by defendant under the compulsion of hostile judgments such as counted upon in the answer. Plaintiff places reliance for its contention largely upon the last clause of the contract to the effect that, "if as to any policy holder * * * a payment at a higher rate is made," then plaintiff shall have a like increase; it being urged that this is a distinct and unequivocal stipulation unaffected by the preceding clause relating to a voluntary raising of the rate for the whole district. But obviously this construction cannot obtain. The contract must be construed as a whole. You cannot separate a clause or a sentence from its context and give it a meaning foreign to the purpose of the parties as gathered from the entire writing.

I am satisfied that the matter sought to be stricken out constitutes, if established, a substantive defense and cannot competently be eliminated.

As to the other matter sought to have stricken out, I am satisfied that plaintiff is mistaken as to the purpose of the denials involved. They are not intended as denials of the fact elsewhere admitted that plaintiff held the policy upon which its original claim was based and are not in their effect inconsistent with such admission. Taken as a whole and reading the denials and affirmative averments of the answer together, it sufficiently appears that all that is intended by defendant is to deny that there was ever on its part any liability to the plaintiff other than such as arises under the compromise agreement, the circumstances and conditions of which it was perfectly proper for defendant, upon its theory of the case, to set up.

The motion will be denied.

PERKINS CO. v. UNITED STATES.

(Circuit Court, S. D. New York. July 13, 1910.)

No. 3,514.

1. CUSTOMS DUTIES (§ 37*)—CLASSIFICATION—ANTHRACITE COAL.

Held, that certain anthracite coal does not contain 92 per cent. of fixed carbon, and is therefore within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 415, 30 Stat. 190 (U. S. Comp. St. 1901, p. 1674), for "all coals containing less than ninety-two per cent. of fixed carbon."

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 37.*]

2. CUSTOMS DUTIES (§ 5*)—RETROACTIVE LEGISLATION—"HEREAFTER."

Under Free Coal Act Jan. 15, 1903, c. 189, § 2, 32 Stat. 773 (U. S. Comp. St. Supp. 1909, p. 656), prescribing that the provision in the tariff act of 1897 for a duty on coal "shall not hereafter be construed to authorize the imposition of any duty upon anthracite coal," the term "hereafter" was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

not intended to be retroactive, and did not apply to coal imported before that date.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 4; Dec. Dig. § 5.*

For other definitions, see Words and Phrases, vol. 4, pp. 3277-3279.]

On Application for Review of a Decision by the Board of United States General Appraisers.

The case was submitted on briefs, without oral argument.

Shearman & Sterling (Carl A. Mead, of counsel), for importers.

D. Frank Lloyd, Asst. Atty. Gen. (John A. Kemp, Asst. Atty., of counsel), for the United States.

HAZEL, District Judge. The question presented by this appeal from the decision of the Board of General Appraisers arises from the classification by the collector of importations of anthracite coal by the vessels Devonshire and Glencoe, and the assessment thereof by him at the rate of 67 cents per ton under the following provision of Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 415, 30 Stat. 190 (U. S. Comp. St. 1901, p. 1674):

"415. Coal, bituminous, and all coals containing less than ninety-two per centum of fixed carbon and shale, sixty-seven cents per ton of twenty-eight bushels, eighty pounds to the bushel."

The importer claims that the merchandise is entitled to free entry under section 2, Free List, par. 523, 30 Stat. 197 (U. S. Comp. St. 1901, p. 1682), which reads as follows:

"523. Coal, anthracite, not specially provided for in this act, and coal stores of American vessels, but none shall be unloaded."

The record shows that the entry by the Devonshire was liquidated on September 20, 1902, and the entry by the Glencoe was liquidated on October 16, 1902, and protest filed by the importers on October 27, 1902. On January 15, 1903, Congress passed an act substantially authorizing the Secretary of the Treasury to make full rebate of duties imposed by law on all coal of every form and description imported into the United States from various countries for the period of one year from and after the passage thereof. Section 2, c. 189, 32 Stat. 773 (U. S. Comp. St. Supp. 1909, p. 656), provides that the provisions of paragraph 415 of the tariff act of July 24, 1897, "shall not hereafter be construed to authorize the imposition of any duty upon anthracite coal." Accordingly, the importers claim to be entitled to a refund of the duties paid on the cargoes of the steamers Glencoe and Devonshire, amounting to \$5,040.66.

Three objections to the refund are urged by the government in the brief submitted: (1) That the coal in fact contained less than 92 per cent. of fixed carbon; (2) that the protest on the importation by the steamship Glencoe was filed more than 10 days after the entry was liquidated; (3) that the act of January 15, 1903, was not retrospective in its operation. While these objections were earnestly controverted by the importers, a careful consideration of the facts constrains me

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to agree with the board in its findings of fact. The pertinent inquiry is, Did the coal contain more than 92 per cent. of fixed carbon? Dr. Elliott, for the importers, testified that it did; he made the test in his laboratory on the pier from 64 samples at the time the cargo was discharged; but his method of making the analysis is attacked by the government, in that he did not determine the percentage of ash contained therein, although admitting that such element, to the extent at least of 1 per cent., is always present. Dr. Moore, testifying for the government, extended his examination and used a blast lamp in the crucible, burning away all the carbon, thus eliminating the ash which was present in quantities of 2 per cent. His analysis in its finality showed that the coal contained from 84 to 89 per cent. of fixed carbon excluding the ash. He further estimated the average of ash in Welsh anthracite to be at least 2 per cent. His testimony is challenged by the importers on the ground of indefiniteness, but some corroboration thereof is found in the case of *In re Coles* (C. C.) 93 Fed. 954, affirmed 100 Fed. 442, 40 C. C. A. 478. In that case it was held as an incontrovertible fact that samples of anthracite coal, taken and tested, show variation in the amount of fixed carbon ranging from 86 to 94 per cent., and the Court of Appeals for the Ninth Circuit, when the case came before it for decision said:

"All cargoes of coal whatever, including all cargoes of anthracite coals as they come from the mine, or are loaded or imported in ships or dealt in commercially, contain less than ninety-two per cent. of fixed carbon, although sample lumps for custom house, picked at random from such imported cargoes, have averaged as high as ninety-four per cent. in fixed carbon."

And from prior adjudications by the board (*G. A.* 5,330, *T. D.* 24,392), involving the question of duties on anthracite coal, it appears that it was regarded as established that Welsh anthracite coal naturally contains less than 92 per cent. of fixed carbon. In view of the foregoing testimony and decisions this court is disinclined to disturb the decisions of the board on the question of whether anthracite coals contained less than 92 per cent. of fixed carbon. Indeed, such finding, unless additional evidence is brought in for the consideration of the court or where the finding is plainly unsupported by the evidence, is not reviewable. *Leerburger v. United States* (C. C.) 113 Fed. 976; *Vandiver v. United States*, 156 Fed. 961, 84 C. C. A. 522; *Apgar v. United States*, 78 Fed. 332, 24 C. C. A. 113.

The next question is whether the act of January 15, 1903, is retroactive. The words "shall not hereafter be construed to authorize the imposition of any duty on anthracite coal" can have no relation to past importations, and the criticism by the importer of the phrase quoted is not maintainable. It is inconceivable that Congress, by the use of the word "hereafter," intended to impart to it a past application. The statute was enacted after the importations of the coal in question, and the language used cannot be construed differently than to authorize a refund or rebate of duties for one year following the passage of the act. Hence the provision under which the assessments on coal were theretofore levied cannot be construed as to future importations so as not to authorize the assessment of any duty on anthracite coal. I think that if Congress had intended to authorize a refund of duties

on importations upon which the right to levy duties had attached, it would have expressed such intention in plain words. Reading the statute in its ordinary sense, it seems to me obvious that any other construction is precluded than that no duty would be imposed or levied on anthracite coal from and after the passage of the act. Such a construction of section 2 seems to me to be entirely in consonance with section 1, which, as has been stated, empowers the Secretary of the Treasury to make the rebate for the period of one year following the enactment.

The decision of the board is affirmed.

TAYLOR PROVISION CO. v. GOBEL.

(Circuit Court, E. D. New York. August 15, 1910.)

1. TRADE-MARKS AND TRADE-NAMES (§ 7*)—SUBJECTS OF VALID TRADE-MARKS—PORK ROLL.

The words "Pork Roll" or "Roll of Pork," not registered, could not be the subject of a valid trade-mark unless they were so well known and thoroughly recognized by the public for a sufficient length of time to be a distinctive use of the words.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 11; Dec. Dig. § 7.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 95*)—UNFAIR COMPETITION—PACKAGES—PRINTING.

Where complainant put up an article of food made of pork, known as "Pork Roll," packed in a cylindrical cotton sack or bag, marked with outline letters, defendant could not be guilty of unfair competition in using a cotton bag and similar letters for his product so as to entitle complainant to an injunction on a preliminary hearing because of the similarity of the letters, where it appeared that they were used to prevent the ink from striking through into the product.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. § 95.*]

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

3. TRADE-MARKS AND TRADE-NAMES (§ 95*)—IMITATION OF PACKAGE—ARTICLE COPIED—PRELIMINARY INJUNCTION.

Imitation of complainant's package in the sale of pork roll would be sufficient to entitle complainant to a temporary injunction only in case complainant could show clearly that the article copied was of a specific make possessed of a valuable trade reputation, and of an individual peculiarity sufficient to identify it as an article of trade rather than a common product of a certain kind, for which there was a general demand.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. § 95.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 95*)—PACKAGES—SIMILARITY—TEMPORARY INJUNCTION.

Where complainant's evidence did not show that the words "Pork Roll" as used by him, or "Taylor's Pork Roll," in connection with the sale of pork in cylindrical cotton packages, had acquired a distinct meaning in the eyes of the public for the particular article of food described before defendant put his product on the market in similar packages, complain-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ant was not entitled to a preliminary injunction to restrain defendant's use of such packages and dressing.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. § 108; Dec. Dig. § 95.*]

In Equity. Action by the Taylor Provision Company against Adolph Gobel for trade-mark infringement. Application by complainant for temporary injunction. Denied.

Durand, Mahony & Kreischer, for complainant.

Einstein, Townsend & Guiterman, for defendant.

CHATFIELD, District Judge. The complainant is successor to one John Taylor, who conducted a provision business for a considerable time and placed upon the market a food article made of pork, packed in a cylindrical cotton sack or bag in such form that it could be quickly prepared for cooking by slicing without removal from the bag. This preparation was known as "Taylor's Prepared Ham," but with the passage of the pure food law by the Congress of the United States it became necessary to change the label of this article in order to avoid a violation of the statute, as it did not consist of ham. The complainant therefore adopted the name "Pork Roll," and has had large sales of the article under the name of "Taylor's Pork Roll," or "Trenton Pork Roll," the preparation still being sold in cotton bags, and having red letters in outline printed upon the bags, with a detachable paper label, fastened by a rubber band, which paper label is in the form of the trade-mark registered by the complainant on the 31st day of October, 1906. A similar label was also registered on March 19, 1907.

The defendant is a manufacturer of meat products, and has placed upon the market a similar article of food, made of pork, resembling the Taylor product in its preparation, taste, and use. The defendant's product is evidently planned to supply the same trade as the complainant's product, and it is apparent from the affidavits that persons intending to buy one might be given the other, and even might be deceived thereby, as the defendant's product is marked "Roll of Pork," and also has an oval detachable label, fastened with a rubber band upon the outside of the cotton bag, with red outline type used for the marks upon the bags.

The complainant has brought an action, alleging substantially unfair competition and also a violation of the trade-mark label, but, inasmuch as the use of the words "Roll of Pork" (in a manner which the complainant alleges is intended and is likely to injure his business in the sale of his "Pork Roll") is made the basis of the action, and as neither the words "Pork Roll" nor "Roll of Pork" are registered by themselves, we can here disregard any question depending solely upon possible infringement of trade-mark. In fact, unless so well known and so thoroughly recognized by the public as to be a distinctive name for a sufficient length of time, such words could not be the subject of a valid trade-mark. The *Thaddeus Davids Co. v. Cortland I. Davids et al.* (decided April 18, 1910, C. C. A., Second Cir.) 178 Fed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

801. It might further be noticed that in registering this trade-mark the complainant registered the label for a pork roll, the words "Pork Roll" evidently being understood to mean a roll made of pork, and to be an article of common usage rather than an object needing definition or distinctive identification.

There would seem to be no reason why the defendant should on preliminary hearing be held guilty of unfair competition for using a cotton bag or red outline type, instead of solid letters upon these bags. In the absence of proof to the contrary, the affidavits seem to satisfactorily show that the use of bags or sacks for the packing of such products, of outline type so as to prevent the ink from striking through as when impressed in solid letters, and of red ink in order that any possible traces might not show upon the product, are all old and frequently used for similar purposes. Such marks upon the bags are required under the pure food law. The loose label, fastened with a rubber band, is not of itself a trade device of the complainant, and the only basis upon which the complainant would seem to have any reason to charge the defendant with unfair competition would be upon the allegations that the defendant was putting out a similar article to meet an identical demand that people ignorant of the precise name or careless in purchasing might be deceived, and that the defendant makes it possible for such deception to be so intentionally and unwittingly committed against customers.

Such imitation would be sufficient for the issuing of a temporary injunction if the complainant could show clearly that the article copied was a specific thing, possessed of a valuable trade reputation, and of individual peculiarity sufficient to identify it as an article of trade rather than a common product of a certain kind, for which there was a general demand. *Yale & Towne Mfg. Co. v. Alder*, 154 Fed. 37, 83 C. C. A. 149. The use of the cotton bag, of the red ink type, the detached label, and general likeness in the product itself and in the methods of packing and marking make it likely that the complainant would prevail upon final hearing, if the words "Pork Roll" as used by him, or "Taylor's Pork Roll," could be shown to have acquired for the particular article of food so described, a distinctive meaning in the eyes of the public, before the defendant put his product on the market, and unless the article so packed and marked were one of free and common use at earlier dates than the imitation.

Many cases can be cited in which trade-names have been held not to be ordinary terms and to be identified with a particular product sufficiently not only for the purposes of registration as a trade-mark, but also for the purpose of calling the purchaser's attention to some particular article merely by the use of the name; and imitation thereof has been held to be with wrongful intent and not for legitimate competition. Such a name might not only call attention to some particular article, but might be so well advertised as to give a trade-name or popular appellation to a firm's entire products, and imitation of such name, with the intent to put a product upon the market which would take the place of the original, would be unfair competition. But in the absence of conclusive proof that the words "Pork Roll" had ac-

quired more meaning than the words "Pork" and "Roll" would convey to the ordinary purchaser, and without testimony that the words "Pork Roll" are so well known as identifying the particular product of the complainant that a like phrase or name should not be used by any merchant or butcher who wished to put a preparation of pork upon the market for this particular kind of trade, it would not seem that a preliminary injunction should issue.

As the matter stands upon the affidavits, the value of the business of the complainant rests upon the popularity of the name "Taylor," due to the reputation which that particular product has because of appealing to individual tastes. There is no evidence that the defendant's product is similar to the complainant's roll and to nothing else; that is, that no similar product has been commonly made by the trade, and the court is not prepared to enjoin an apparently solvent and responsible defendant merely because careless or unscrupulous dealers might substitute one product for the other. If the proof showed that this was the purpose of placing the product upon the market, such relief ought to follow; but that can hardly be determined upon preliminary hearing upon the situation here presented.

The motion will be denied.

J. LOEWENTHAL & CO. v. UNITED STATES.

SUNDHEIMER BROS. v. SAME.

(Circuit Court, S. D. New York. August 4, 1910.)

Nos. 5,502, 5,503.

CUSTOMS DUTIES (§ 35*)—CLASSIFICATION—"GALLOONS OR TRIMMINGS."

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 390, 30 Stat. 187 (U. S. Comp. St. 1901, p. 1670), for galloons or trimmings, includes narrow strips of silk having interwoven thereon ornamental designs, which are chiefly used to decorate and embellish women's apparel.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 110; Dec. Dig. § 35.*

For other definitions, see Words and Phrases, vol. 8, p. 7109.]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below affirmed the assessment of duty by the collector of customs at the port of New York. Affirmed.

The opinion filed by the Board of General Appraisers, G. A. 6,909 (T. D. 29,761), reads as follows:

FISCHER, General Appraiser. The merchandise consists of lengths of narrow woven fabrics of silk, classified as silk trimmings or galloons under Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 390. These narrow woven strips have superimposed ornamentations of a different color from the ground fabric worked thereon, and some of the articles have scalloped edges. Duty was assessed at the rate of 60 per cent. ad valorem, and the merchandise is claimed by the importers to be dutiable (1) under paragraph 389, as bandings or belt-ings; or (2) under paragraph 391, as manufactures of silk on the ground that the goods are ribbons.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

This identical question has been passed upon by the courts in the Second Circuit and in regard to merchandise differing in no particular from the exhibits that we have before us in the cases at bar. In *Naday v. U. S.* (C. C.) 155 Fed. 303, T. D. 28,329, the court said: "It has become well established that ribbons that must be made up into bows, rosettes, and the like before being used for the purpose of trimming or ornamentation are not to be included under the provisions of paragraph 391 as trimmings; but if the article in question is manufactured with ornamentation and with characteristic design, to be used as a trimming and intended to be sewed directly upon a garment, without being made into something else before being appended thereto, it is specifically provided for in paragraph 391 as a trimming." This ruling applies directly on the so-called ribbons that we have before us. It affirmed a ruling of the Board, G. A. 5,923 (T. D. 26,049), wherein such merchandise was held to be dutiable under paragraph 390 as "trimmings" or "galloons." The decision of the Circuit Court was affirmed in *Naday v. U. S.*, 164 Fed. 44, 90 C. C. A. 462, T. D. 29,252. Note also rulings of the Circuit Court following the *Naday Case* (suits 3,916-7, 3,919-21, and 4,039; T. D. 28,330).

The rule of *stare decisis* puts upon the importers in these cases the burden of proving clearly by new evidence that the previous rulings were wrong. In an apparent effort to meet this, it is sought to distinguish between articles of the kind here in question shipped from Germany and similar articles shipped from France. The former may be termed the "Barmen" variety and the latter the "St. Etienne." The exhibits in the case represent both kinds. We are of the opinion that no distinction can be drawn. We find from the testimony and the samples in evidence that the goods are narrow woven fabrics composed of silk, with ornamental designs worked thereon, used in the trimming and adornment of women's garments; and we find further from the testimony here offered that these silk articles were at and prior to the passage of the present tariff act known, generally dealt in, and commercially recognized as "galloons" or "trimmings." The collector's assessments are affirmed; the protests being hereby overruled.

Comstock & Washburn, for petitioners.

D. Frank Lloyd, for the United States.

HAZEL, District Judge. The merchandise in question was properly assessed for duty as silk trimmings or galloons under paragraph 390 of the tariff act of 1897, and I am content to affirm the board on its opinion. The additional testimony by the importers in this court tending to show that the articles were not galloons or trimmings, and were in fact commercially known as bands, fancy bands, Persian bands or ribbons, is in conflict; the witnesses for the government testifying that they were trimmings and were similar to the goods involved in the case of *Naday v. United States*, 164 Fed. 44, 90 C. C. A. 462, T. D. 29,252, No. 3,918. In that case the Circuit Court of Appeals decided that similar articles were galloons or trimmings within the trade meaning.

The articles before the court are narrow strips of silk having interwoven thereon ornamental designs, and are chiefly used to decorate and embellish women's apparel. The silk strips in the *Naday* and *Fleischer Cases*, exhibited to this court, were probably not as wide as the silk strips in suit nor as bizarre in design. But there is no substantial difference in quality, texture, or appearance; and, moreover, I agree with the witnesses for the government that the goods are known in trade as "trimmings."

The decision of the Board of General Appraisers is affirmed.

In re NEW AMSTERDAM MOTOR CO.

(District Court, S. D. New York. July 23, 1910.)

1. BANKRUPTCY (§ 7*)—STATUTES.

The act of Congress of 1910, amending Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), was not intended to be retroactive.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 7.*]

2. BANKRUPTCY (§ 195*)—LIENS—ATTACHMENT—EXECUTION.

An attachment or execution levied against a corporation not in the classes mentioned in Act Cong. Feb. 5, 1903, c. 487, 32 Stat. 797 (U. S. Comp. St. Supp. 1909, p. 1308), amending Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), created an unconditional right of payment out of the property levied on and an actual lien not subject to be defeated by bankruptcy adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 195.*]

3. BANKRUPTCY (§ 38*)—ACT OF BANKRUPTCY—CONSENT TO ADJUDICATION—VOLUNTARY PROCEEDINGS.

Where a corporation within the classes mentioned in Act Cong. Feb. 5, 1903, c. 487, 32 Stat. 797 (U. S. Comp. St. Supp. 1909, p. 1308), amending Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), passed a resolution consenting to be adjudicated a bankrupt in involuntary proceedings instituted against it, such proceedings thereupon in substance became voluntary proceedings, though involuntary in form.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 38.*]

In the matter of the New Amsterdam Motor Company, bankrupt.

Herman Goldman, for judgment creditor.

Thomas & Oppenheimer, for bankrupt.

HAND, District Judge. I think that the amendments of 1910 were not intended to be retroactive, in spite of the change in phraseology from section 70 of the original act (Act July 1, 1898, c. 541, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3451]), as I shall show below. An attachment or execution levied against a corporation not in the classes mentioned in the amendments of 1903 (Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1909, p. 1308]) created an unconditional right of payment out of the property levied on, an actual lien not subject to defeat by bankruptcy adjudication of any sort. Under well-settled rules I should construe the statute so as not to affect such a right unless the language clearly requires it. *Auffmordt v. Rasin*, 102 U. S. 620, 26 L. Ed. 262, *Murphy v. Murphy*, 126 Iowa, 57, 101 N. W. 486, and *In re Lee*, 14 Nat. Bankr. R. 89, Fed. Cas. No. 8,179, are the nearest cases, and bear out this construction, although none is exactly on all fours with this case.

The only ground for doubt in my mind is because section 70 of the act of 1898 contained a provision that no involuntary petitions should be filed within four months of the passage of the act and no voluntary petitions within one month. Although I can find nothing on it in the books, there can be little doubt that a lien within three months prior to July 1, 1898, would have been invalidated under the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

old act by a voluntary petition. Section 70 may be read, therefore, as expressly providing against the retroactive effect of the act generally, and it might be argued that the subsequent amendments, which had no such clause, were on that account intended to be retroactive. Even if this was so, I think it would be more in conformity with the usual canon to construe the words *ex abundanti cautela*; but it is not so. Section 70 was necessary to give the statute a limited retroactive effect; i. e., as to voluntary petitions, but not as to involuntary petitions. Therefore, construed as a limited retroactive clause, the omission of any analogue in either amendment is no ground for inference that they were meant to have a retroactive effect, and they may be construed as any other act should be construed.

If the corporation was within the scope of the amendments of 1903, it could have become bankrupt by passing a resolution that it was willing to be so adjudged. In short, although the form was involuntary, the substance of such proceedings was voluntary. The inquiry may therefore be confined merely to whether the bankrupt was within the old act, and need not include whether it had in fact committed an act of bankruptcy. It is clear enough from the papers that the conditions had already arisen which would have invalidated the lien if the corporation was within the amendments of 1903.

Take a reference upon the question whether the corporation was one which could formerly have been adjudicated.

In re ULLMAN et al.

(District Court, S. D. New York. July 25, 1910.)

1. BANKRUPTCY (§ 387*)—COMPOSITION.

A composition of a bankrupt with creditors is at once a settlement and a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 607-616; Dec. Dig. § 387.*]

2. BANKRUPTCY (§ 377*)—COMPOSITION—INDIVIDUAL COMPOSITION BY CONSENT OF FIRM CREDITORS.

A composition of a bankrupt partner of a bankrupt firm individually, without the consent of a majority in number and amount of his individual creditors, cannot be effected by the consent of the firm creditors, though the consenting majority be more than a majority of number and amount of all creditors, firm and individual; Bankr. Act July 1, 1898, c. 541, § 5f, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), providing that the net proceeds of the partnership property shall be appropriated to the payment of partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 377.*]

In the matter of Louis Ullman and others, individually, and composing the firm of L. Ullman & Sons. Proceedings for confirmation of composition. Affirmed in part, and proceedings dismissed in part.

Olcott, Gruber, Bonyng & McManus, for bankrupt Ullman.

Goodale & Hanson, for objecting creditors.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HAND, District Judge. The only point raised on this confirmation of a composition with firm and individual creditors is whether the court has the power to entertain a composition of a partner individually without the consent of a majority in number and amount of his individual creditors. The firm has in the case been adjudicated, and so has the partner. A composition of the firm creditors has been effected, and is now confirmed without opposition. In the offer of composition was also a provision for composition with the individual creditors, and that the master has reported on favorably, but without the consent or approval of a majority of the individual creditors. No question has been raised that the offer is single, and, therefore, may not be accepted in part and rejected in part. I shall therefore treat the offers as separate, and consider the bare question of whether an individual composition may be effected by the consent of the firm creditors, if the consenting majority be more than a majority of number and amount of all creditors, firm and individual.

No one has been able to find any authority, except some obiter remarks of Judge Gresham under the act of 1867 (*In re Spades*, Fed. Cas. No. 13,196), which make against the right to compel such a composition. A composition is at once a settlement and a discharge. So far as the element of discharge goes, the consent of the majority binds no one, because any single creditor, here a single individual creditor, could stop the whole composition, if he could prove any facts upon which a discharge should be denied. The only material element, therefore, is that of the settlement of the estate.

In this case the firm creditors have no interest whatever in the individual estate, under Bankr. Act July 1, 1898, c. 541, § 5f, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424). The question is simply whether they may compel the individual creditors to submit themselves to the court's decision upon whether their own property shall be given back to the bankrupt upon an offer satisfactory to the firm creditors and unsatisfactory to themselves. The question is to my mind answered as soon as it is stated. If this be the law, it must work against the firm creditors also, if they be few and small, and the individual creditors outvote them. Grotesque cases readily occur to one, in which the injustice would be too obvious for any toleration, were it not that the court would protect any class from plain spoliation.

But it is not enough that the court will do this. The act does not mean the court to step in at all till the majority of those interested agree. Now, the majority of the firm creditors care only about what they get as compared with the firm assets. For the individual creditors they cannot, of course, be supposed to have any concern. If they are unanimous and outnumber the individual creditors, the court has not had the consent of anybody to the terms offered to the individual creditors. There is no presumption at all that it is fair to them, and the whole matter becomes one for the court's discretion. The act certainly never meant to effect compositions in that way.

The case is especially a proper one for the application of the theory of a firm entity. I do not say that it would be so, if under section 5f the firm creditors had been allowed to prove against individual assets.

That provision seems never to have been used. If the entity theory were consistently carried out, there should be a proof for deficiency on firm debts against the individual assets. As that, however, contradicts the long history of bankruptcy administration, and is not suggested here, the firm creditors may be said to have no interest in the individual assets.

The report of the master will be confirmed as to the firm, and the proceedings for composition of the individual estate be dismissed.

In re KITTLE.

(Circuit Court, S. D. New York. July 23, 1910.)

1. GRAND JURY (§ 33*)—SUPERVISION—EVIDENCE.

The evidence that shall be received before a grand jury is not subject to judicial control.

[Ed. Note.—For other cases, see Grand Jury, Dec. Dig. § 33.*]

Review by trial court, of evidence given before grand jury, see note to *McGregor v. United States*, 69 C. C. A. 488.]

2. GRAND JURY (§ 36*)—SUPERVISION—WITNESSES.

That a witness called to testify before a grand jury is interrogated with reference to an offense against the Sherman act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), which is the subject of a crime and of an offense laid in an existing indictment, does not confer on the witness a privilege to refuse to testify, as an answer when given is a complete bar to the pending prosecution, or any further prosecution for the offense, if it be pertinent to the subject-matter.

[Ed. Note.—For other cases, see Grand Jury, Dec. Dig. § 36*]

3. WITNESSES (§ 304*)—SELF-INCRIMINATING TESTIMONY—PRIVILEGE OF WITNESS.

The constitutional privilege of a witness against incrimination cannot be claimed, if all prosecution is barred from the date of the testimony, regardless of whether he has been indicted or not.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 304.*]

4. CRIMINAL LAW (§ 42*)—PRIVILEGE—IMMUNITY—SHERMAN ACT.

The provision of the act granting immunity to a witness testifying to violations of the Sherman act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) is not retroactive; the constitutional guaranty being satisfied by a construction that the witness is not subject to future prosecution after giving his testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 45-48; Dec. Dig. § 42.*]

In the matter of Charles Kittle. Petition to relieve petitioner from examination. Denied.

Joline, Larkin & Rathbone, for petitioner.

Felix Frankfurter, Asst. U. S. Dist. Atty.

HAND, District Judge. The first point of the petitioner is certainly not valid. I cannot say what the purposes of the grand jury are in this inquiry. The mere fact that the names in each indictment are the same is of no consequence whatever. The same defendants may very well have committed two crimes, even two crimes against

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the Sherman act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). Since the proceedings of the grand jury are not open to scrutiny, and certainly will never become so, so far as I can lawfully prevent, I cannot say that they are about to indict the same defendants for the same offense. Nor, even if I could, should I try to interfere with their proceedings. Their bills are at most only accusations, and when they are found the courts will deal justly with the defendants and prevent their being twice harried.

One purpose of the secrecy of the grand jury's doings is to insure against this kind of judicial control. They are the voice of the community accusing its members, and the only protection from such accusation is in the conscience of that tribunal. Therefore, except in sporadic and ill-considered instances, the courts have never taken supervision over what evidence shall come before them, and, with certain not very well-defined exceptions, they remain what the Grand Assize originally was, and what the petit jury has ceased to be, an irresponsible utterance of the community at large, answerable only to the general body of citizens, from whom they come at random, and with whom they are again at once merged. A court shows no punctilious respect for the Constitution in regulating their conduct. We took the institution as we found it in our English inheritance, and he best serves the Constitution who most faithfully follows its historical significance, not he who by a verbal pedantry tries *a priori* to formulate its limitations and its extent. So much for the first point.

The second point is of the scope of the immunity clause in the Sherman act. The argument is that, since the immunity prescribed by the act includes prosecution, it is too late to question any one after he has been indicted, because part of the consideration for his testimony has already been taken from him. All this rests upon the assumption that I must infer that the present inquiry relates to the subject-matter of the present indictment, and that I should not have the right to do till the questions were asked. However, as in all probability they do relate to that subject-matter, I may as well dispose of it now, though out of order, and so obviate at least some of the constant recourse to the court. Therefore I shall assume that the inquiry is of the subject-matter of some crime, and, indeed, of the crime laid in the existing indictment. When so questioned, the witness must answer. *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819. And, when given, his answer will thereafter protect him from further prosecution. It will be a good bar to this very pending prosecution, if it be pertinent to the subject-matter.

The petitioner's theory goes further than this, and requires that the government should elect at the outset whether the person is to be witness or defendant, and, having once elected, that it should remain consistent. We must remember at the outset that the question raised has nothing whatever to do with the constitutional privilege against incrimination, because that privilege could not be claimed, if all prosecution were barred from the date of the testimony (*Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819), regardless of whether the witness had already been indicted or not. The only necessary pro-

tection is that by no peradventure could the disclosure result in conviction (Mr. Justice Day, *obiter*, in *Heike v. United States*, 217 U. S. 425, 431, 30 Sup. Ct. 439, 54 L. Ed. —), and to provide against that possibility it was enough to forbid any future criminal proceedings as soon as the testimony came out.

The question is, therefore, of the meaning of the statute, not of the scope of the Constitution. Is there any ground for saying that the bargain with the witness is, as it were, retroactive, so that he cannot get his *quid pro quo* by testifying, if he has already been indicted? I think not. As I have said, the statute would be constitutionally broad enough, if it forbade any future prosecution, and its scope is fairly inferable from its purpose. As the purpose was only to compel such testimony, and the Constitution was satisfied by the more limited construction, the fairer interpretation of the will of Congress is that it went no further than it had to go, and that they meant to give only a future immunity. No one has found any authority upon the question, but I think there can be small doubt of the correctness of this construction.

The petition is denied, and the petitioner directed to be sworn at 2 o'clock on Tuesday, July 26, 1910.

UNITED RAILROADS OF SAN FRANCISCO v. CITY AND COUNTY OF
SAN FRANCISCO et al.

(Circuit Court, N. D. California. July 18, 1910.)

No. 15,149.

INJUNCTION (§ 137*)—TEMPORARY RESTRAINING ORDER—RIGHT TO.

Under Rev. St. § 718 (U. S. Comp. St. 1901, p. 580), providing for a temporary restraining order only when danger of irreparable injury is apparent, and under Circuit Court rule 30, providing that such order shall be granted without notice only when such danger exists, a municipality should not be temporarily restrained without notice, at the suit of a street railway company, from taking further proceedings to construct a competing road, where the bill fails to show that any threatened injury is likely to result before a hearing on the application can be had.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 307-309; Dec. Dig. § 137.*]

In Equity. Bill by the United Railroads of San Francisco against the City and County of San Francisco and others. On application for temporary restraining order. Application denied.

Wm. M. Abbott, Joseph D. Redding, and Tirey L. Ford, for complainant.

Percy V. Long, City and County Atty., and Thomas E. Haven, for respondents.

VAN FLEET, District Judge. Complainant has presented and filed in this court its bill in equity seeking to enjoin the defendant municipality, its mayor and board of supervisors, and certain other

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

officers from taking further proceedings looking to the construction and equipment of a street railroad upon certain streets of this city, commonly designated and referred to as "the Geary Street road," to be owned, operated, and conducted as a street railroad by the defendant city and county under its municipal authority. Application is made upon the bill for an order upon defendants to show cause why an injunction pendente lite should not issue, and that in the meantime, and until a hearing can be had upon the application, a temporary restraining order issue without notice to the defendants to stop further prosecution of the project.

The application for a temporary restraining order is the only matter for present consideration, since the order to show cause will usually issue as of course. The statute provides (section 718, Rev. St. [U. S. Comp. St. 1901, p. 580]) that a temporary stay order may be granted upon application for an injunction only where "there appears to be danger of irreparable injury from delay"; and rule 30 of this court, made in pursuance of that section, provides that no such restraining order shall be granted without notice to the other side "unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that irreparable damage will result to the applicant before the matter can be heard on notice."

An examination of the averments of the bill in the light of these requirements fails to disclose a case which would authorize this feature of the relief asked. The bill proceeds upon the theory that the proceedings being taken by the city authorities looking to the building of the road in question are in violation of certain contract relations alleged to exist between complainant and the defendant municipality, growing out of franchises heretofore granted complainant and its predecessors in interest for the construction and operation of street railroads within the city and county, and that the further prosecution of such proceedings will tend to impair the obligation of those contracts, destroy the value of complainant's rights thereunder, and deprive it of its property without due process of law, in contravention of the Constitution of the United States.

As indicated, we are not at present concerned with the merits of the controversy as they may be eventually presented for determination, but only with those averments of the bill which would tend to disclose irreparable injury to result to complainant if defendants be not restrained pending a hearing. In this respect the bill is essentially lacking in any tangible detail. It proceeds with a recital of the various steps taken by the city authorities, beginning with the adoption on October 26, 1909, of a bill or ordinance "determining and declaring that the public interests and necessity demand the construction of street railways upon and along the following streets, to wit," defining the project in question, and including the adoption at a special election of a proposed bond issue for its prosecution. It is then alleged "that, unless restrained and enjoined from so doing as herein prayed, the defendants threaten to and will proceed to construct and operate a street railroad in the city and county of San Francisco" as projected, and that unless such construction be enjoined the city will proceed to build said road, "and will cause continued and irreparable injury to

your orator, and will occasion a constantly occurring grievance and injury against which your orator is without recourse, except by intervention of this honorable court"; and it is alleged "that said proceedings will depreciate the value of your orator's property, will decrease the value of its bonds, will impair the obligations of the contract entered into by the state of California, through the authority delegated by it to the city and county of San Francisco," etc., and will take complainant's property without due process of law.

While it may well be that these averments are quite sufficient to show that complainant will be injured if its theory of its wrongs be finally established as a correct one, they entirely fail to show that any threatened injury from defendants' proceedings is so imminent that it is likely to result before a hearing on its application may be had, nor that it cannot as well be prevented after an opportunity for defendants to be heard as now. There are no averments to show when the next steps are proposed or threatened to be taken, or that they can or will be taken before a hearing may be had and determined; and there is, therefore, an entire want of that showing of threatened irreparable injury required by the statute as a basis for the order asked, since no injury, however threatened, is irreparable which may be prevented before it occurs.

The application for a temporary restraining order will therefore be denied. An order to show cause why a temporary injunction should not issue will be granted, returnable on Monday, July 25, 1910, at 10 a. m.

POLLITZ v. WABASH R. CO. et al.

(Circuit Court, S. D. New York. April 7, 1910.)

1. JUDGMENT (§§ 299, 342*)—AMENDMENT—TIME—END OF TERM.

Courts of the United States have no power to vacate or amend their own judgments for errors of law or fact after the term.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 583, 668; Dec. Dig. §§ 299, 342.*]

2. JUDGMENT (§ 342*)—VACATION—JURISDICTION.

Where a federal court had no jurisdiction to render a judgment as subsequently determined by the Circuit Court of Appeals, the Circuit Court from which the appeal was taken had inherent power thereafter to vacate the judgment after the term and after the time to appeal had expired.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 668; Dec. Dig. § 342.*]

Suit by James Pollitz against the Wabash Railroad Company and others. On motion to vacate an order sustaining demurrer of the defendant Metropolitan Trust Company of New York, and a judgment dismissing the bill, and to reinstate that company as a defendant in the cause and remand it to the state court. Motion to vacate the judgment allowed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Stephen M. Yeaman and J. Aspinwall Hodge, for complainant.
Parsons, Closson & McIlvaine, for defendant Metropolitan Trust Company.

WARD, Circuit Judge. The complainant moves to vacate an order sustaining the demurrer of the defendant the Metropolitan Trust Company of the city of New York, and a judgment dismissing the bill as to it; also to reinstate the company as a defendant in the cause and remand it to the state court.

The material facts are as follows: February, 1907, the complainant moved to remand the cause, which motion was denied. 153 Fed. 941. Thereafter all the defendants demurred to the bill. The demurrers were overruled except that of the Metropolitan Trust Company; the bill being dismissed as to it January 10, 1908. From this judgment the complainant took no appeal, and his time to do so has long since expired. Thereafter the other defendants filed answers, and January 25, 1909, final judgment was entered dismissing the bill of complaint. From this judgment the complainant appealed to the Circuit Court of Appeals, which handed down a mandate directing the Circuit Court, among other things, to remand the cause to the Supreme Court of the state of New York. 176 Fed. 333. February 28, 1910, Judge Ray entered the order of the Circuit Court under the mandate against the defendants, who were parties to the record on the appeal to the Circuit Court of Appeals, specially providing that it should not apply to the defendant the Metropolitan Trust Company.

It is true, as counsel for the Metropolitan Trust Company contend, that courts of the United States have no power to vacate or amend their own judgments for errors of law or fact after the term has passed (*Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797; *Phillips v. Negley*, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013), but all courts have the inherent power to vacate at any time their own judgments rendered without jurisdiction (*Black on Judgments*, § 307; *Freeman on Judgments*, § 98; *Harris v. Hardeman*, 14 How. 334, 14 L. Ed. 444; *Kingsbury v. Buckner*, 134 U. S. 650, 10 Sup. Ct. 638, 33 L. Ed. 1047; *Shuford v. Cain*, 1 Abb. U. S. 302, Fed. Cas. No. 12,823; *United States v. Wallace* [D. C.] 46 Fed. 569; *Bruce v. Strickland*, 47 Ala. 192; *Baker v. Barclift*, 76 Ala. 414; *In re College Street*, 11 R. I. 472).

Under the ruling of the Circuit Court of Appeals, the Circuit Court was without jurisdiction to render the judgment in question. It is too late for the complainant to appeal from it, and to allow it to stand and regulate the rights of the parties would be an absurdity. It must be treated as a nullity, and I will grant the motion to vacate it.

If the complainant thinks himself entitled to further relief, he must apply to the judge who entered the order to remand. Motion to vacate the judgment granted.

CHARLES E. HIRES CO. v. XEPAPAS.

(Circuit Court, D. South Carolina. July 1, 1910.)

TRADE-MARKS AND TRADE-NAMES (§ 61*)—INFRINGEMENT.

Complainant manufactured two preparations for making root beer. One was in syrup form, to be prepared as a beverage by the addition of carbonated water, and the other was an extract intended to be prepared as a beverage by the addition of sugar and water and fermented with yeast. Complainant had extensively advertised its fountain syrup preparation, and the beverage prepared therefrom was called by consumers "Hires" or "Hires Root Beer." Defendant purchased the extract, and made a beverage therefrom by the addition of simple syrup and carbonated water, without following the directions to prepare it by fermentation with yeast, and sold the beverage as "Hires" or "Hires Root Beer." *Held*, that defendant's action constituted a violation of complainant's trade-name rights in the name "Hires."

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 61.*]

In Equity. Action by the Charles E. Hires Company against Nicholas John Xepapas. Judgment for complainant.

Oliver Mitchell, for complainant.

Wm. H. Townsend, for defendant.

BRAWLEY, District Judge. The complainant is a manufacturer of two preparations used for making root beer. One is prepared in syrup form, ready to be prepared as a beverage by the simple addition of carbonated water. The other preparation is an extract intended to be prepared as a beverage by the addition of sugar and water and fermented with yeast. The complainant has extensively advertised its fountain syrup preparation, and the beverage prepared therefrom is called for by the ultimate consumers as "Hires" or "Hires Root Beer." The defendant purchases the extract made by the complainant, and makes a beverage therefrom by the addition of simple syrup and carbonated water, without following out the directions of the complainant to prepare it by fermentation with yeast.

Both articles bear the complainant's trade-mark and trade-name Hires; it being indorsed upon the package containing the extract that it is the same article formerly put up under the name of "Hires Improved Root Beer." It appears from the testimony in this case that the defendant purchased the extract above mentioned, and prepared a beverage therefrom by the addition of a sugar syrup and carbonated water, which he sold in answer to calls at his fountain for "Hires" or "Hires Root Beer."

While a purchaser of "Hires Root Beer," or household extract, undoubtedly would have the right to resell the extract as an extract, under the trade-mark it bears, there seems no reason why he should use the complainant's trade-name "Hires" or "Hires Root Beer," in selling the beverage which he (the defendant) makes from this extract, since the beverage is an article entirely distinct from the extract which is used in making it—a beverage made by the defendant, and not by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the complainant. No authority can be implied for applying the complainant's trade mark or name in selling the beverage from the fact that the complainant's root beer flavoring extract is used as one of the ingredients of the beverage made by the defendant.

It appears, therefore, that the defendant's acts are a violation of the complainant's trade-name rights in the word "Hires."

A decree may be prepared in conformity with this opinion.

SCHRADER & EHLERS v. UNITED STATES.

(Circuit Court, S. D. New York. July 1, 1910.)

No. 5,178.

CUSTOMS DUTIES (§ 26*) — CLASSIFICATION — "PENHOLDERS" — INCOMPLETE FOUNTAIN PENS.

Fountain pens without the pen points are not "penholders," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 187, 30 Stat. 166 (U. S. Comp. St. 1901, p. 1645).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 26.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below related to articles which were claimed by the importers to be dutiable as "penholders," under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 187, 30 Stat. 166 (U. S. Comp. St. 1901, p. 1645). The Board of General Appraisers overruled this contention, holding that the articles had been properly assessed as manufactures of hard rubber, under Schedule N, par. 450, 30 Stat. 193 (U. S. Comp. St. 1901, p. 1678), of said act.

Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for importers.

D. Frank Lloyd, Asst. Atty. Gen. (Charles D. Lawrence, Sp. Atty., of counsel), for the United States.

HAZEL, District Judge. The articles in question are fountain pens without the pen points, and not "penholders," as that term is commonly understood in trade and commerce. According to the Century Dictionary a penholder consists of—

"A holder for pens or pen points; a handle or stock, with a device for retaining the pen; usually socket of metal."

There is no satisfactory evidence in the record to show that the article has any different commercial understanding. Duty was properly assessed at 35 per cent. ad valorem, under paragraph 450 of the tariff act of 1897, as manufactures of hard rubber.

The decision of the Board is affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

RIVER & HARBOR IMPROVEMENT CO. v. PHILADELPHIA & R. RY. CO.

(District Court, E. D. Pennsylvania. June 1, 1910.)

No. 41.

COLLISION (§ 74*)—TUG AND ANCHORED SCOW—FAULT OF MOVING VESSEL.

A tug *held* solely in fault for a collision in the night with a dump scow anchored in a proper place on the eastern side of the Delaware river: a preponderance of the evidence showing that the scow was displaying a proper anchor light.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 104; Dec. Dig. § 74.*]

In Admiralty. Suit by the River & Harbor Improvement Company against the Philadelphia & Reading Railway Company. Decree for libellant.

Henry R. Edmunds, for libellant.

James F. Campbell, for respondent.

J. B. McPHERSON, District Judge. About half past 4 o'clock in the morning of December 27, 1908, the respondent's tugboat Penllyn, while towing a loaded car float down the Delaware river upon a course which led through the Greenwich anchorage ground on the eastern side of the river, came into collision with a dump scow belonging to the libellant. The scow was anchored to a permanent and well-known buoy in front of the libellant's yard. The night was dark and slightly hazy, but was clear enough to permit lights to be seen at about the usual distance. The scow was sunk at her moorings, and was afterwards raised and repaired. Aside from the presumption of negligence which is always to be charged against a moving vessel when she collides with a vessel at rest, there is other evidence quite sufficient to establish the fault of the tug. It need not be discussed, however, since her negligence is admitted; the only question being the disputed point whether the scow had a proper anchor light set and burning at the time of the collision. About this matter the evidence is conflicting, but in my opinion it preponderates in favor of the libellant; and accordingly I find as a fact that a proper anchor light was displayed and burning on board the scow from the afternoon of December 26th, when she was moored, until after the collision on the following morning. In her position, she was not obliged to maintain an anchor watch; and, as no other fault than the absence of a proper light is charged against her, the libellant is entitled to a decree.

No objection to the claim for damages was presented, either at the hearing or in the respondent's brief, and the amount of the claim may therefore be embodied in the decree, unless the respondent should signify its desire for the appointment of a commissioner.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

R. L. COCHRAN & CO. v. UNITED STATES.
ROSENBLUM & SENTNER v. UNITED STATES.

(Circuit Court, S. D. New York. June 28, 1910.)

Nos. 4,717, 4718.

CUSTOMS DUTIES (§ 44*)—CLASSIFICATION—IMITATION HORSEHAIR HATS—SIMILITUDE.

Untrimmed hats of imitation horsehair, which is a material of vegetable origin, resemble untrimmed hats of straw more than silk wearing apparel, and are accordingly dutiable at the rate provided for the former, under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 409, 30 Stat. 189 (U. S. Comp. St. 1901, p. 1673).

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 148; Dec. Dig. § 44.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

For decision below, see G. A. 6,487 (T. D. 27,743), in which the Board of General Appraisers affirmed the assessment of duty by the collector of customs at the port of New York on imported merchandise.

Brooks & Brooks (Frederick W. Brooks, Jr., of counsel), for importers.

D. Frank Lloyd, Asst. Atty. Gen. (Charles Duane Baker, of counsel), for the United States.

HAZEL, District Judge. The articles in controversy concededly consist of untrimmed hats of imitation horsehair. They were assessed for duty at 60 per cent. ad valorem under paragraph 390 and section 7 of the tariff act of 1897, by similitude, as silk wearing apparel. The articles are not enumerated in the tariff act and the assessment at 60 per cent. was approved by the board. The question now raised by the protest is whether such merchandise is not properly dutiable under paragraph 314 at 50 per cent., or paragraph 409 at 50 per cent. or 35 per cent., or section 6 at 20 per cent.

The government claims that the evidence shows that hats of imitation horsehair more nearly resemble hats made of silk braid than hats made of cotton braid, and therefore they were dutiable under paragraph 390, by similitude, to silk wearing apparel, while the importers contend that the evidence shows that the material of which the hats are made is of vegetable origin, and accordingly should have been assessed by similitude under paragraph 409.

In view of the decision by the Circuit Court of Appeals for this circuit in *Paterson v. United States*, 166 Fed. 733, 92 C. C. A. 524, and followed by the decision of Judge Holt, in *Rheims v. United States* (C. C.) 169 Fed. 662, it would seem to me that the importers are right, and that the hats in question have been improperly assessed. The evidence before the court, taken since the decision by the Board of General Appraisers, indicates that in trade imitation horsehair hats are classed as straw hats; and moreover, in appearance and quality,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

it is readily perceivable that they are not of silk or silk braid, but that they bear similitude to hats of straw. It is uncontradicted that the material of which the hats are made is chiefly of vegetable fiber or origin, and under the circumstances I think the duty should have been assessed at 35 per cent. ad valorem under paragraph 409, the provision relating to the assessment of duties on hats, and not the more general provision under which the assessment was levied.

An order reversing the decision of the Board of General Appraisers may be entered.

UNITED STATES v. HEMPSTEAD.

(Circuit Court, S. D. New York. July 1, 1910.)

No. 4,796.

1. CUSTOMS DUTIES (§ 85*)—APPEAL—ASSIGNMENT OF ERROR.

On appeal from the Board of General Appraisers the Circuit Court will not consider whether a protest decided by the board was sufficient, unless the question of insufficiency is raised by the assignment of errors.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 201; Dec. Dig. § 85.*]

2. CUSTOMS DUTIES (§ 85*)—APPEAL—ASSIGNMENT OF ERROR.

On appeal from the Board of General Appraisers, error was assigned on the point that the board had erred in holding the merchandise in question to be free of duty. *Held*, that this assignment related to the merits, and was not sufficiently comprehensive to include the point of the sufficiency of the protest passed on by the board.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 201; Dec. Dig. § 85.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

D. Frank Lloyd, Asst. Atty. Gen. (Thomas M. Lane, of counsel), for the United States.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

HAZEL, District Judge. The importation is claimed to be entitled to free entry as paraffin under paragraph 633 of the free list of the tariff act of 1897. Act July 24, 1897, c. 11, § 2, 30 Stat. 200 (U. S. Comp. St. 1901, p. 1686). There has been no question raised as to the merits, and therefore it may safely be held that the paraffin oil was imported from Belgium, where it had been manufactured from crude petroleum, the product of Russia. Belgium does not impose a duty upon products of petroleum exported thereto from this country.

The government objects to the classification, on the ground that the importers, under the doctrine of *United States v. Schoellkopf*, 146 Fed. 56, 76 C. C. A. 376, in their protest did not make it clear that they claimed free entry of the product on the specific ground that it came from a country which does not tax American petroleum. The importers contend that the government is precluded from urging

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

such an objection, on the ground that the assignment of errors is silent in relation thereto, and the objection must be deemed to have been waived. It will not be necessary to here decide whether the objection urged by the government is controlled by the decision in the Schoellkopf Case, as on examination of the contention of the importers I have arrived at the conclusion that the issue of defective protest has not been raised by the assignment of errors, and that the government has accepted the protest as sufficient.

Reliance is placed by the government upon the first assignment of error, which reads as follows:

"That the said board was in error in holding said paraffin to be free of duty under paragraph 633 of said act."

This assignment, I think, relates to the merits, and is not sufficiently comprehensive to include the point of law which is now insisted upon. In the case of *United States v. Brown, Durrell & Co.*, 127 Fed. 793, 62 C. C. A. 473, there was a similar assignment of errors, and the Circuit Court of Appeals for the First circuit held that the language was too general to indicate an intention to question the validity of the protest. The claim is made that in this circuit it was held in *United States v. Loewenthal*, 175 Fed. 777, 99 C. C. A. 349, that such an assignment was sufficiently explicit to justify the indicated objection to the insufficiency of the protest; but on examination of the said decision I find that in that case there was a specific reference made to the protests, while in this case none of the assignments of error specify any defect for insufficiency thereof.

The decision of the board is affirmed.

IN re LEVENSTEIN.

(District Court, D. Connecticut. May 24, 1910.)

No. 2,135.

1. BANKRUPTCY (§ 404*)—DISCHARGE.

One seeking to avoid his debts under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), must comply strictly with its provisions.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 679; Dec. Dig. § 404.*]

2. BANKRUPTCY (§ 410*)—PETITION FOR DISCHARGE—FILING—TIME.

Bankr. Act July 1, 1898, c. 541, § 14a, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), provides that any person, after the expiration of 1 month and within the next 12 months subsequent to being adjudged a bankrupt, may file an application for a discharge in the bankruptcy court in which the proceedings are pending, and if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it in such time, it may be filed within the next 6 months. *Held*, that where a bankrupt failed to file a petition for discharge within the time fixed, and within the succeeding 6 months did not apply for nor obtain an extension of time, his right to a discharge was barred.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 694; Dec. Dig. § 410.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the matter of Joseph Levenstein, a bankrupt. On motion to restore to the files the discharge stricken therefrom April 18, 1910. Denied.

Stoddard, Goodhart & Stoddard, for petitioner.

David Strouse and Ralph O. Wells, for respondents.

PLATT, District Judge. The essential facts which control this matter are few and simple. Levenstein filed in this court on December 29, 1900, a petition for discharge, based upon his adjudication as a bankrupt, dated November 20, 1899. Specifications of objection were filed against it by certain creditors, and at the hearing thereon it was discovered that the statutory time for filing said petition was more than a month overpassed and that no extension of time had been granted by the judge. The referee reported the situation to the court, and thereupon the petition for discharge was dismissed. No attempt was made to have the time for filing extended, as is provided for by the statute.

On December 29, 1908, said Levenstein filed his petition in the court asking to be adjudicated a bankrupt, presenting the identical list of creditors shown in his first petition. His second adjudication followed automatically and at once, and on January 29, 1909, he filed his petition for discharge, which was recommended by the referee, and entered by the court on April 2, 1909. On March 25, 1910, Cutler & Porter, of Springfield, creditors in both petitions, set up the foregoing facts and asked that the discharge of April 2, 1909, be revoked and annulled. On March 28, 1910, a rule was issued from the court ordering said Levenstein to appear on April 18, 1910, at 11 o'clock a. m., and show cause why said petition should not be granted. On April 18th, the petitioners appeared by counsel, but the bankrupt made default of appearance, and, the facts alleged being found true, the discharge was revoked and annulled.

Levenstein by the present motion asks the court to restore the discharge; his only reason therefor being that his first petition for discharge was not decided upon the merits, but was dismissed upon a technicality, and the action thereon cannot therefore be invoked as a bar to the discharge granted on the later petition. To decide this question properly, it is necessary to have a full understanding and thorough comprehension of the scope, extent, and purpose of our bankrupt law.

That law furnishes the only method by which one can escape the payment of his debts, except by actually paying them in full or settling them by compromise. Neither this law nor any of its predecessors was passed by Congress for the particular purpose of enabling the debtor to cancel his debts. The primary purpose of all such laws is to distribute the assets of the bankrupt equally and fairly amongst his creditors, and as an incident thereto the present law provides that he may, if his dealings have been fair and honest, be discharged from the balance of his indebtedness as an incentive to further honest effort to obtain a livelihood. It must be obvious, then, that he who seeks to avoid his debts under the bankrupt act (Act July 1, 1898, c.

541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]) must comply strictly with its provisions.

Section 14a says that:

"Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within, but not *after* the expiration of the next six months." (The italic is mine.)

Now just one moment's thought about the petitions for adjudication and discharge. They are in form and in fact proceedings in equity, in which the bankrupt is petitioner and his creditors are respondents. The bankrupt undertakes to show that he is an honest man, but has been unsuccessful; that he has committed no fraud, but has been the victim of misfortune. If he can establish these facts, he goes free; if he cannot, he has wasted his time and bothered the court to no good purpose. Congress has pointed out to him the way to go about it, and he is bound to follow that path with precision and exactness. If, after adjudication, he shall fail to file a petition for discharge within the time fixed by the statute, his right to such discharge is lost to him forever. Both reason and authority sanction this statement of the law. *Kuntz v. Young*, 131 Fed. 719, 65 C. C. A. 477; *In re Kuffler*, 151 Fed. 12, 80 C. C. A. 508; *In re Bramlett*, (D. C.) 161 Fed. 588.

If, as in the case before us, he files it shortly after the year has expired, and when apprised of his error by the respondent creditors fails to obtain from the judge any extension of the time within which he may file it and after which he may not, he appears to be in even worse plight than if he had never filed his petition at all. This case is especially lacking in equity, because he was told about his error in time. He had several months within which, upon a favorable showing, he might have obtained from the judge an extension of his time for filing. He failed to obtain such extension, and his right to any further day in court was thereby wiped out as with a sponge.

It would lead to a multitude of evil practices, and place a premium upon laches, if at this late day the respondents in the original petition were compelled to fight again the battle upon which they had entered in 1900. The discharge in this case was properly revoked, and the motion herein discussed is without merit.

Let it be denied.

BOKER v. UNITED STATES.

(Circuit Court, S. D. New York. July 1, 1910.)

No. 4,976.

CUSTOMS DUTIES (§ 26*)—CLASSIFICATION—WELDED SHEETS—"SHEETS COATED WITH METALS"—"SHEETS OF IRON OR STEEL, COMMON OR BLACK."

Sheets consisting of a plate of iron or steel with a sheet of nickel welded thereto, the material being rolled to the desired thickness after welding, are not sheets "coated with * * * metals," within the mean-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing of Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 132, 30 Stat. 160 (U. S. Comp. St. 1901, p. 1637), nor "sheets of iron or steel, common or black," within the meaning of paragraph 131, 30 Stat. 160 (U. S. Comp. St. 1901, p. 1637).

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 52; Dec. Dig. § 26.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

For decision below, see G. A. 6,613 (T. D. 28,230), affirming the assessment of duty by the collector of customs at the port of New York. Affirmed.

Walden & Webster (Howard T. Walden, of counsel), for importers.

D. Frank Lloyd, Asst. Atty. Gen. (Martin T. Baldwin, Special Atty., of counsel), for the United States.

HAZEL, District Judge. The decision of the board was based upon the testimony of the importers that the method of producing the article in question consists of taking a plate of iron or steel three-eighths inch thick, welding thereon a sheet of nickel and then rolling the composite metals down to the thickness in which the article was imported. In this finding I concur. The merchandise is not sheets of iron or steel and dutiable under paragraph 131 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 160 [U. S. Comp. St. 1901, p. 1637]). Nor is it dutiable under paragraph 132, for the process of welding nickel and a plate or sheet of iron is not similar to galvanizing or coating with metals as mentioned in said paragraph. As stated by the board:

"To fall within the provisions relied on by the importers the coating or plating must be made on such sheets only, and if made on any other material those provisions do not apply."

The importers deny such limitation, and point to the case of *United States v. Boker*, 176 Fed. 730, T. D. 30,276 recently decided by the Circuit Court of Appeals for this circuit. But that case is not applicable to the provisions under consideration. There the court construed the scope of paragraph 137 dealing with round iron or steel wire and a coating thereof, and not with a process of welding a sheet of nickel on a plate of iron or steel.

I think the board properly held that duty was assessable at 45 per cent. ad valorem under paragraph 193, which reads as follows:

"Articles or wares not specially provided for in this act, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum, or other metal, and whether partly or wholly manufactured, forty-five per centum ad valorem."

At the hearing the question of the sufficiency of the protest was waived by the government, and therefore has not been considered by me.

The decision of the board is affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

McKEMY et al. v. SUPREME LODGE A. O. U. W.

(Circuit Court of Appeals, Sixth Circuit. July 13, 1910.)

No. 2,025.

1. PARTIES (§ 39*)—INTERVENTION—ACTION AT LAW.

Parties interested in a fund sought to be recovered in an action at law cannot intervene for their own protection; the court in such action having no jurisdiction to distribute the funds among the various beneficiaries entitled thereto.

[Ed. Note.—For other cases, see Parties, Dec. Dig. § 39.*]

2. COURTS (§ 342*)—JURISDICTION—LAW OR EQUITY—FEDERAL COURTS.

The distinction between actions at law and suits in equity in courts of the United States is matter of substance and not of form only.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 912, 913; Dec. Dig. § 342.*]

3. PLEADING (§ 236*)—APPEAL AND ERROR (§ 959*)—AMENDMENT OF PLEADING—DISCRETION OF COURT—REVIEW.

After an order has been made sustaining a demurrer to an original petition, it is within the discretion of the trial court to grant or refuse leave to file an amended petition, the exercise of which discretion will not be interfered with unless plainly abused.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. § 236,* Appeal and Error, Cent. Dig. §§ 3825-3833; Dec. Dig. § 959.*]

4. EQUITY (§ 267*)—BILL—AMENDMENT.

Equity rule No. 29, relating to amendments, does not entitle the complainant as of right to amend his bill after a demurrer thereto has been sustained.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 267.*]

5. INSURANCE (§ 697*)—MUTUAL BENEFIT INSURANCE—STATE AND SUPREME BODIES—GUARANTY FUND—OBLIGATION OF SUPREME LODGE.

A beneficial association maintained a grand lodge in most of the states and a supreme lodge which was the legislative head of the organization. Each grand lodge which was set off as a separate beneficiary jurisdiction had power to issue benefit certificates, to collect benefit assessments, and to pay claims, except that no more than 12 assessments could be levied in one year. It being found that these, in some instances, were not sufficient to pay the claims against the grand lodge, guaranty fund assessments were levied and remitted to the supreme body. The by-laws of the latter provided that its board of directors from the guaranty fund should extend such relief to the overburdened jurisdiction "as might be right, proper and necessary," and that all relief extended to the several grand lodges for claims allowed by the board of directors of the supreme lodge should be paid from the guaranty fund, and that should the latter be exhausted, and there remain unpaid claims, the board of directors should levy additional assessments to pay the same; the charter of the supreme lodge providing that grand lodges may accept the privileges and benefits of the act of incorporation of the supreme lodge and that the payment of the beneficiary certificates issued by the grand lodge "shall be by the act of such acceptance guaranteed by" the supreme lodge, it "not to be liable primarily on such beneficiary certificates, but only as guarantor or surety." *Held*, that such guaranty was not absolute nor unconditional, but that the supreme lodge held the fund as trustee, and hence an action at law was not maintainable by the receiver of a state lodge to compel the payment of unpaid benefit claims out of such guaranty fund, though the claims had been allowed by the directors of the supreme lodge.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 697.*]

6. INSURANCE (§ 697*)—MUTUAL BENEFIT INSURANCE—RELATION OF STATE AND SUPREME LODGE—MALFEASANCE.

Where the supreme lodge of a beneficial association maintained a guaranty fund out of which unpaid claims of overburdened state lodges might be paid, allegations that the supreme lodge had power to levy assessments to meet all guaranty fund requirements, and that the assessments fixed each year were understood by the supreme lodge to be adequate to realize a sufficient sum to extend the relief provision of the guaranty fund to the several beneficiary jurisdictions entitled thereto, and that accordingly no additional assessments for said fund would be needed, and none were in fact made, and that the supreme lodge collected or should have collected for the guaranty fund the amount determined to be necessary, and either had or should have had in its possession the amount due and payable to each of the beneficiary jurisdictions on all valid claims, and hence was liable to pay the amount of its allowed claims against such fund, did not charge misappropriation, maladministration, or bad faith on the part of the supreme lodge, nor was the allegation inconsistent with an honest exercise of judgment by the supreme lodge in an unsuccessful attempt to raise sufficient funds to meet the benefit certificates issued by plaintiff in connection with those issued by other jurisdictions.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 697.*]

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Action by William D. McKemy, as receiver of the Grand Lodge of the Ancient Order of United Workmen of the State of Ohio, and others, against the Supreme Lodge of the Ancient Order of United Workmen. From a judgment of dismissal, plaintiffs bring error. Affirmed.

P. A. Reece, for plaintiffs in error.

O. A. Berman, for intervening petitioner.

M. F. Galvin and G. W. Winstead, for defendant in error.

Before WARRINGTON and KNAPPEN, Circuit Judges, and SANFORD, District Judge.

KNAPPEN, Circuit Judge. The Grand Lodge of the Ancient Order of United Workmen of the State of Ohio brought suit in the court below to recover the sum of \$136,000 and upwards from the Supreme Lodge of that order, which sum was claimed to be owing by the latter to the Grand Lodge on account of beneficiary certificates issued by the Grand Lodge. The original petition alleged: That the Supreme Lodge of the order is a corporation organized under the laws of Texas, a citizen of that state, and engaged in business in all or nearly all of the states of the Union. That under its charter it has authority to adopt and has adopted a constitution, laws, rules, and regulations, with power to amend the same as may be proper and necessary to carry out its objects, which are, among other things, to create funds in aid of its members during sickness or disability, to care for the living and bury the dead, and to pledge the members to the payment of a stipulated sum to the beneficiaries of deceased members. That the laws of the order provide for the setting off of a Grand Lodge as a "separate beneficiary jurisdiction," "with power to collect the beneficiary fund and disburse the same subject to the laws" of the order.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

That the plaintiff Grand Lodge was so organized and set apart, and duly constituted as such separate beneficiary jurisdiction on August 31, 1872. That the plaintiff Grand Lodge has power to make laws, rules, and regulations for its own government and control, subject to the constitution and laws of the Supreme Lodge. That the rate of assessment is fixed by the Supreme Lodge, under a limitation imposed by the constitution and laws that no more than 12 such assessments may be made in any one year. That in some jurisdictions (including the plaintiff Grand Lodge) the mortality has been so great, from climatic or other causes, as to make the claims against the beneficiary fund greater than the amount which can be realized under the 12 beneficiary fund assessments authorized to be collected by the Grand Lodge as a separate beneficiary jurisdiction. That the laws were accordingly made to provide that:

"To protect the order from exigencies which may arise, increasing its rate to an extent which would make assessments for a time oppressive upon its membership, to maintain a maximum rate to all assessments herein provided (the number thereof not to exceed twelve in any one calendar year), to strengthen and sustain the order to enable it to meet every emergency by giving the assistance of the whole to any part entitled to relief under the laws of the order, a guaranty fund shall be raised and managed and disbursed as herein provided,"

—the provisions set out in the petition being in effect that the Grand Lodge should raise all guaranty fund assessments required and forward the same to the Supreme Lodge treasurer. That the board of directors of the Supreme Lodge "shall from the guaranty fund extend such relief to the overburdened jurisdiction as may be right, proper and necessary." The allegation is further made that under the laws of the order all relief extended to the several grand lodges for claims allowed by the board of directors of the Supreme Lodge shall be paid from the guaranty fund, and that should the latter become exhausted, and there remain unpaid claims, the board of directors "shall levy sufficient additional assessments, at the foregoing schedule of rates, to pay the same." The petition further alleged that the plaintiff Grand Lodge during the period in question collected the maximum of 12 assessments permitted by the laws of the order; that the number of deaths in the jurisdiction was so great during the period stated that the beneficiary fund resulting from those assessments was insufficient to pay death claims in full; that it also promptly collected, accounted for, and paid to the Supreme Lodge all guaranty fund assessments provided by the laws of the order; that plaintiff furnished proofs of deaths as required by the Supreme Lodge, and complied with all the laws, rules, and regulations of the order entitling it to participate in the guaranty fund; that application has been made to the Supreme Lodge for relief from the guaranty fund; that defendant, through its board of directors, passed upon and allowed the claims in question as valid claims against the guaranty fund, and agreed to pay the Grand Lodge the amount of the same out of said fund, but that it has paid thereon only a fraction thereof, leaving a large balance which the Supreme Lodge has failed and refused to pay. By permission of the court, two beneficiaries under certificates

or policies issued by the plaintiff Grand Lodge were permitted to intervene on behalf of themselves and others similarly situated; the specific prayer being:

"That the fund due said plaintiff (the Grand Lodge) be brought into this court and distributed in the proper proportions among all the persons it is found to be due."

The petition was demurred to upon the ground that it "does not state a cause or causes of action against this defendant, upon which this plaintiff can recover." The demurrer was sustained; the court holding that:

"The Supreme Lodge is not the debtor of the subordinate lodges, or of their members, for their share of the guaranty fund, but is their agent and trustee for the disbursement of the fund in accordance with the constitution and laws of the order.

"It is not alleged that there are any, or sufficient moneys in the guaranty fund to pay the claims of the plaintiff, nor is it alleged that the Supreme Lodge or any of its officers have misappropriated the moneys of the fund.

"If there is money in the guaranty fund, it should be disbursed to those entitled to it, and resort should be had to the equity side of the court to compel such disbursements, and, if the fund be insufficient, then to require the board of directors to levy additional assessments 'to pay the same.'"

Meanwhile the receiver of the plaintiff, appointed by an Ohio state court, was substituted as plaintiff. Upon the sustaining of the demurrer to the original petition, the receiver asked leave to file an amended petition; the latter containing several allegations in addition to or in amplification of those in the original petition, the more important of such further allegations being these: That the charter of the Supreme Lodge provides that all Grand Lodges, whether corporate or incorporate, shall have the right to accept the privileges and benefits of its act of incorporation, and that "the payment of the beneficiary certificates of the members of such accepting Grand Lodge outstanding at the time of such acceptance as well as those subsequently issued, shall be by the act of such acceptance guaranteed by this corporation. This corporation shall not be liable primarily on such beneficiary certificates, but only as guarantor or surety." That the Grand Lodge duly accepted the privileges and benefits of the act of incorporation of the Supreme Lodge. That after being so set apart as a beneficiary jurisdiction, the Grand Lodge had power to assess, collect, manage, and disburse to beneficiaries the guaranty fund under its jurisdiction and was "responsible for the claims of the beneficiaries of such members." That the Supreme Lodge, under its charter and through its board of directors, was given the power to create, hold, and disburse the funds and transact all other business named in its charter. That the board of directors of the Supreme Lodge is vested with the general management and control of the entire business matters of the Supreme Lodge, and the exercise of all powers and functions of the Supreme Lodge when the same is not in session. That the constitution and laws of the order further provide that whenever it should be made to appear to the satisfaction of the board of directors of the Supreme Lodge that the number of deaths in any beneficiary jurisdiction is such as to require more than 12 maximum assess-

ments in any calendar year "then relief to an amount equal to such excess shall be extended *as may be determined by the board of directors*, proper application being made therefor, and full investigation by said board being made," the recorder of the Grand Lodge being required, in order to carry into effect the foregoing provision, to forward monthly to the recorder of the Supreme Lodge a list of all death claims against the guaranty fund "as soon as completed, audited and paid," each claim to be accompanied by proofs required by the regulation prescribed by the Supreme Lodge, the recorder of the Supreme Lodge being required to submit to the board of directors of that lodge the applications for relief so received, the laws requiring this board to extend from the guaranty fund "*such relief to the overburdened jurisdiction as may be right, proper and necessary as herein provided* to maintain the integrity and preserve the perpetuity of the order, and such relief may be extended at any time *within the discretion of the board of directors.*" That the Supreme Lodge determined the number, amount, and time of payment of each assessment to be paid by each member in the Grand Lodge beneficiary jurisdiction. That the guaranty fund assessments so fixed for each year were at the time of being so fixed "agreed and understood by the Supreme Lodge to be adequate to realize a sufficient sum to extend the relief (provision of the guaranty fund) to the several beneficiary jurisdictions entitled thereto," and that accordingly "no additional assessment for said fund would be necessary to be made, and that none in fact were made." That "said defendant collected, or should have collected, from each of said beneficiary jurisdictions, for said guaranty fund, the amount so fixed and determined by it, and at the commencement of this action said defendant had, or should have had, in its possession in cash in said guaranty fund, the amount due and payable to each of said beneficiary jurisdictions upon all valid beneficiary claims in excess of the amount realized by each of said beneficiary jurisdictions" from the beneficiary fund assessments. (The italics used in all the above quotations are ours.) The amended petition further set up the plaintiff's ouster from the exercise of its franchise by the Ohio state court, the appointment, duties, and powers of the receiver, alleging that the action was brought for the benefit of all the creditors of the Grand Lodge, including all the unpaid beneficiaries thereof for claims for death losses; it being alleged that such beneficiaries were numerous and that it was impracticable to bring them all before the court. Leave to file the amended petition was denied; the court holding that plaintiff's only relief was in equity, and the opinion being also expressed that the receiver had no authority under the insurance laws of Ohio to bring suit in the courts. The plaintiff not desiring to plead further, its original petition, as well as the intervening petitions (including one filed after the application for leave to amend the plaintiff's petition), was dismissed.

So far as the rights of the intervening petitioners are concerned, it is to our minds clear that they have no right to complain of the dismissal, either of the original petition or of their own petitions in intervention, or of the refusal of the court to permit the filing of the plaintiff's proposed amended petition. This is a suit at law. We

know of no principle which permits parties interested in a fund sought to be recovered in a suit at law to intervene in such suit for their own protection. If a court of law can administer relief in this case, such relief is limited to the recovery and collection of judgment. A court of law cannot distribute the fund among the various beneficiaries entitled thereto. The writs of summons issued upon the intervening petitions contain this indorsement: "Summons in action for money and equitable relief." This indorsement, in connection with the practice adopted in filing petitions in intervention, suggests that counsel regarded the principal suit as in equity. Whatever practice might be permissible in the state courts, the distinction in the courts of the United States between causes of actions at law and in equity is matter of substance and not of form. *Courtney v. Pradt* (Sixth Circuit) 160 Fed. 561, 562, 87 C. C. A. 463, and cases there cited. The intervening petitions were, in our judgment, rightly dismissed.

That the court rightly sustained the demurrer to the original petition is, to our minds, plain. The original petition alleged no guaranty on the part of the Supreme Lodge of the certificates issued by the Grand Lodge. The Ancient Order of United Workmen is in substance alleged or conceded to be a fraternal beneficiary society, organized and carried on for the mutual benefit of its members. There is no allegation that it was carried on for profit. The Supreme Lodge is, substantially at least, alleged to be the highest legislative body of the order. There is no allegation that it has any capital, or that, apart from the guaranty and beneficiary funds, it has any source of income except that it receives, as is conceded in argument, certain fees and dues designed to meet the expenses of the governing body. The original petition does not allege the relation of debtor and creditor between the Grand Lodge and the Supreme Lodge, but, on the other hand, states a case consistent only with the status of the Supreme Lodge as that of trustee for the disbursement of the guaranty fund in accordance with the constitution and laws of the order. As held by the court below, there is no allegation that the guaranty fund contains any or sufficient moneys to pay the claims of the plaintiff, nor is it alleged that the Supreme Lodge or any of its officers misappropriated the moneys of the fund.

We construe the allegation that the Supreme Lodge agreed, through its board, to pay the claims in question as intended to charge merely an assurance or promise that the claims would be paid in due course, and not as creating a contract relation to do any act outside of the performance of the duties imposed upon the Supreme Lodge under its laws, in connection with the due disbursement of the fund. We agree with the Circuit Court that the original petition did not state a cause of action at law.

With respect to the refusal to permit the filing of the proposed amended petition, it is to be noted that at the time the motion therefor was made the demurrer to the original petition had been sustained; that no order has been made dismissing the proposed amended petition, the order in respect thereto being simply a refusal to permit it to be filed. No order has been made expressly adjudicating its insufficiency. It was within the discretion of the trial court, especially after the order

had been made sustaining the demurrer to the original petition, to grant or refuse leave to file an amended petition, and it is the general rule that the granting and refusals of amendments to pleadings are within the discretion of the court, and that this discretion will not be interfered with unless plainly abused. See Rev. St. § 954 (last clause) (U. S. Comp. St. 1901, p. 696); *United States v. Buford*, 3 Pet. 10, 12, 7 L. Ed. 585; *Smith v. Vaughan*, 10 Pet. 366, 9 L. Ed. 457; *Jackson v. Ashton*, 10 Pet. 480, 9 L. Ed. 502; *Chapman v. Barney*, 129 U. S., at page 681, 9 Sup. Ct., at page 427, 32 L. Ed. 800, and cases there cited; *Stevens v. Nichols*, 157 U. S. 370, 15 Sup. Ct. 640, 39 L. Ed. 736, and cases there cited; *Union Central Life Ins. Co. v. Phillips* (Fifth Circuit) 102 Fed. 19, 23, 41 C. C. A. 263. Even under equity rule No. 29 complainant is not entitled as of right to amend his bill after demurrer has been sustained. *National Bank v. Carpenter*, 101 U. S. 567, 568, 25 L. Ed. 815.

But in view of the fact that the refusal to permit the filing of the proposed amended petition was put upon the ground that the petition failed to state a cause of action at law, we shall consider the important question whether the guaranty provision contained in the charter of the Supreme Lodge amounts to an absolute guaranty of payment of the certificates issued by the Grand Lodge. It may be conceded that, if the provision in question is an absolute guaranty of payment by the Supreme Lodge of the beneficiary certificates issued by the Grand Lodge, action at law could be maintained by the plaintiff for its violation. It may also be conceded that the language of the guaranty in question, if unaffected by the circumstances under which it was made, including the provisions of the constitution and laws of the order relating to the subject of the guaranty, would justify a construction of absolute guaranty of payment. But the elementary rule that contracts are to be construed in the light of the circumstances under which they are made applies to contracts of guaranty (*The Cambria Iron Co. v. Keynes*, 56 Ohio St. 501, 47 N. E. 548); and in this case we must take into account the constitution and laws of the order, which also evidence the construction given by the organization upon this charter provision. We are obliged, in this connection, to disregard certain provisions of the charter and laws of the order cited in the brief of defendant, other than those contained in the plaintiff's petition. We must also leave out of consideration certain other matter of history stated in plaintiff's brief, which is not within the record or the concessions of counsel. The provisions of the constitution and laws referred to in the plaintiff's petition vest in the board of directors of the Supreme Lodge large discretionary powers with regard to the affording of relief to overburdened jurisdictions, which, in view of the fraternal and representative nature of the association, make the Supreme, Grand, and subordinate lodges practically a single organization (although each has its own individuality and distinctive rights and liabilities—1 Bacon on Benefit Societies, § 74), including the fact that there are many beneficiary jurisdictions entitled to participate in the guaranty fund distribution by the Supreme Lodge, are, in our judgment, inconsistent with a construction of this guaranty provision as an absolute and unconditional guaranty of payment of the beneficiary

certificates issued by each separate beneficiary jurisdiction. The Supreme Lodge is made the trustee of the guaranty fund, and, in our opinion, the charter guaranty in question should be construed as an assurance that the fund will be raised, collected, managed, and disbursed in accordance with the constitution and laws of the order, and that all beneficiary organizations, whether Supreme or Grand, are entitled and will be permitted to participate in the fund to the extent that "may be right, proper and necessary"; in other words, the guaranty is not an absolute and unconditional guaranty of payment in the sense that term is generally used in the law of contracts, but its performance is intended to be had only through the medium of the guaranty fund to be maintained and disbursed by the Supreme Lodge under its constitution and laws. The Supreme Lodge is thus not the debtor of the Grand Lodge, but is its trustee in relation to the guaranty fund and the obligations pertaining thereto, as well as the trustee for all the other beneficiary jurisdictions whose needs, in the judgment of the board of directors of the Supreme Lodge, justify their participation therein.

In determining the extent of the right of the plaintiff Grand Lodge to participate in the guaranty fund, it is therefore necessary for the Supreme Lodge to determine the rights of other parties, to wit, the other beneficiary jurisdictions. It follows that the fact that plaintiff's claims have been approved and ordered paid is not conclusive that they are to be paid in preference to other claims of other parties. The general rule is that a trustee is not suable at law for the enforcement of the trust while it is still open, although, when the trustee is guilty of misfeasance or malfeasance whereby the rights of the beneficiary are lost or impaired, he may thereby become personally subject to suit at law. 2 Perry on Trusts, § 843. We must not be understood as holding that the mere fact that the order in question is a fraternal beneficiary organization, representative in character, and without capital stock, relieves it from liability to action at law. On the contrary, beneficiary organizations of this character are generally suable at law upon their certificates of insurance whenever the elements of an absolute undertaking are present, for example: Where the certificate contains an express covenant to pay a specific sum, or where the contract provides for payment from an accumulated surplus when the proceeds of the association prove insufficient (*Warner v. National L. Ass'n*, 100 Mich. 157, 58 N. W. 667), or where by statute the policy is required to state the exact amount to be paid (*McFarland v. United States Mutual Accident Ass'n*, 124 Mo. 204, 27 S. W. 436).

If the plaintiff's construction of the guaranty is the correct one, viz., that the Supreme Lodge is under an absolute obligation to raise sufficient funds to enable it to comply with this guaranty, then no reason is apparent why action at law could not be maintained. But, as already said, such is not, in our opinion, the true construction of the guaranty. It is urged by plaintiff's counsel that the judgment which it seeks to obtain, if rendered, should be paid from the guaranty fund. Conceding that the proposed amendment states a case entitling plaintiff to share in the guaranty fund, that is, in our opinion, the only case made by the petition. That equity has jurisdiction of such a case is

clear. 1 Bacon on Benefit Societies, § 39; *Burke v. Roper*, 79 Ala. 138; *Colley v. Wilson*, 86 Mo. App. 396; *Blair v. Supreme Council*, 208 Pa. 262, 57 Atl. 564, 101 Am. St. Rep. 934.

The proposed petition does not, in our judgment, contain sufficient allegation of misfeasance or malfeasance on the part of the Supreme Lodge as to render it liable at law for failure to collect assessments. The allegations that the Supreme Lodge had power to levy assessments to meet all guaranty fund requirements, and that the assessments fixed each year were at the time they were fixed, agreed and understood by the Supreme Lodge to be adequate to realize a sufficient sum to extend the relief provision of the guaranty fund to the several beneficiary jurisdictions entitled thereto, and that accordingly no additional assessments for said fund would be needed and none were in fact made, and that the defendant collected or should have collected from each of the beneficiary jurisdictions for the guaranty fund the amount fixed and determined by it, and had or should have had in its possession the amount due and payable to each of the beneficiary jurisdictions upon all valid claims, do not, in our judgment, charge misappropriation, maladministration, or bad faith on the part of the Supreme Lodge, nor are they inconsistent with an honest exercise of judgment by the Supreme Lodge in an unsuccessful attempt to raise sufficient funds to meet the beneficiary certificates issued by the plaintiff Grand Lodge, in connection with those issued by other jurisdictions.

In our opinion the amended petition fails to state a right of action at law. The case of *Commissioners v. Gardiner Savings Inst.* (Sixth Circuit) 119 Fed. 36, 55 C. C. A. 614, is not opposed to the conclusion we have reached. In that case the bonds were the absolute obligations of the county, and the holder was properly held entitled to judgment at law thereon, without regard to the question of the means by which such judgment could be enforced.

The conclusion reached makes it unnecessary to consider the defenses of *ultra vires* and the alleged incapacity of the plaintiff receiver to maintain suit at law.

It follows, from the views we have expressed, that the order of the Circuit Court should be affirmed.

THE NO. 1.

(Circuit Court of Appeals, Second Circuit. June 14, 1910.)

No. 243.

1. COLLISION (§ 90*)—RULES TO PREVENT COLLISION—EFFECT OF VIOLATION.

Disobedience of Consolidation Act N. Y. (Laws 1882, c. 410) § 757, requiring vessels passing up and down the East River to navigate as near as possible in the center of the river, is not a fault which precludes recovery for an injury, if it was only a condition and not a cause of the injury.

[Ed. Note.—For other cases, see *Collision*, Dec. Dig. § 90.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. NAVIGABLE WATERS (§ 23*)—OBSTRUCTION BY VESSEL—LIABILITY FOR INJURY TO ANOTHER VESSEL.

A dredge, while working at a place 140 feet out from a Long Island City pier, was moored to the pier by two wire cables stretched above the water, with nothing to give notice of their presence, except the cables themselves and a sign on the dredge to "look out for anchor cables." A New York City fireboat, attempting to pass between the dredge and pier in answering a call to a fire, did not see the cables until too late to stop or avoid them, and was injured by running into them. *Held*, that the dredge was in fault for not giving a better warning of such an unusual obstruction, and the fireboat was not chargeable with contributory fault because she was not in the center of the river, as required of all vessels by a state statute.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 23.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by the City of New York against the steam dredge No. 1; S. Pierson & Son, Incorporated, claimant. Decree for libellant, and claimant appeals. Affirmed.

The following is the opinion of Adams, District Judge, in the court below:

ADAMS, District Judge. This action is brought by the city of New York against the steam dredge No. 1 to recover for damages she suffered by reason of a collision with a cable running from the dredge to a dock at the foot of Flushing street, Brooklyn. The damage was not very great but there is rather an important principle involved.

The city claims that the dredge was in fault in numerous particulars, one of which is that a cable was dragged in and out of the water and suddenly up before their fireboat, but I think the testimony shows rather the contrary. The testimony from the dredge is very convincing. The witnesses were intelligent men and evidently tried to state the truth, therefore I will view the case from the standpoint of the dredge, as to the facts. These facts seem to be, according to the dredge, that she was anchored in this place with two anchors on her port side and one leading astern, and then by two cables running to Flushing street. A city fireboat, the David A. Boody, was coming up the river to a fire in the immediate vicinity and one of these two cables struck her pilothouse, doing some damage, fortunately not very great and without injuring any persons on board.

It is contended on the part of the dredge that the fireboat should have gone around the dredge and then into the place for which she was bound to overcome the fire. It is contended that it would not have taken her more than a minute longer to do so, but I do not think that fireboats are bound to go outside of another vessel in order to reach a fire which they can get at in a more direct way. We all know that a minute or two in a fire is of very great importance, and it is the duty of a fireboat, to get to the scene of the fire as soon as she can, without, of course, coming in collision with other vessels. If she had run into the dredge in this case it might have made a case of fault on the fireboat's part. She did not run into the dredge, but into a cable which led from the dredge to the wharf, into the down river cable which, it has been testified, started from a place on the dredge about eighteen or twenty feet above the water—I am not sure but that it was above the deck, the dredge probably had three or four or five feet freeboard, so it would have been higher than seventeen or eighteen feet—and then ran in a pretty straight line to the pier; that is, the line was straight when the dredge was working so that the digger was outside of it. But when the digger was on the inside, the weight deflected the dredge to a certain extent so that the cable, from an altitude of, say, ten or twelve feet was reduced, at the place of collision, to five or six feet from the water. This cable was fastened to a vessel which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was lawfully anchored in that place. The vessel gave warnings of cables generally—she said: "Danger, look out for anchor cables," at least that was the intimation.

It is argued by the city, and I think with great force, that that was no notification to the fireboat which should cause her to look for a cable leading from her upper works to the pier. That warning merely meant to look out for cables leading from the boat under water, not for cables leading in the air. The fireboat saw the warning that was there and perhaps if the warning had been more definite it might have been a notification to her of the existence of this cable in that particular place, running several feet above the water so that it was in danger of striking the pilothouse of the fireboat. The fireboat going along up there was bound, as I have said before, to a fire at a pier which was practically at the stem of the dredge, very little above it perhaps. When she got up near the dredge towards the open space she intended to go through—and properly I think—she did not see this cable until she was within one hundred or one hundred fifty feet of it. She was keeping a lookout, perhaps not as efficient a lookout as we can imagine but an ordinarily good lookout, and this lookout was the first one on the fireboat to see the cable. Its position probably changed the few feet mentioned while he was looking. He notified the men in the wheelhouse and as soon as the notification was received the pilot stopped the fireboat and reversed but it was not enough to enable the boat to avoid the contact. The damage might have been very much greater if the fireboat had been going faster and might have caused great injury to those on board if not, indeed, loss of life.

That brings us back to the question whether the dredge had a right to use her cables to run to the pier in this way. The testimony on her part that she was obliged to use the pier in that way, because there was not space enough between her and the pier to use the same kind of anchor she was using on the other side and astern is probably true. The question is whether the fireboat, coming up, had notice of this cable because the dredge, while she had permission to be in that particular place, was required to use the precautions of ordinary vessels in such a place. She had no right to do things there which other vessels would not be privileged to do. She was entitled to lie there but she was not entitled, as I understand it, to subject other vessels to any unnecessary risk, without warning in any event. Even if we assume that this cable running to the pier was necessary on the part of the dredge—it has been so testified and I think that it is so—the dredge did not give proper notice that the cable was there. It seems to me the least she could have done would be to put something on the cable itself which would be visible to vessels navigating there, some kind of a large sign on the cable which would have attracted attention to it.

It has been stated on the part of the city that it was bright in some places and dark in others, but I do not think that is entirely credible. I think it is more than likely that the cable was of uniform color throughout; it was a steel cable and probably was the color of ordinary steel but not a color that would constitute a notice to a vessel coming up or coming in that vicinity. It was a small cable, about an inch in diameter—not a great deal larger than a good-sized finger. It is true that it has been stated by witnesses from the dredge that the cable could be plainly seen fourteen hundred feet away. While I think the witnesses who have testified to that are entirely credible, they went that distance away for the special purpose of seeing how far the cable could be seen. I do not think that a vessel, keeping an ordinary lookout, should be required to see that cable fourteen hundred feet away or any such distance. In short, I think those people on the fireboat, and the lookout, saw the cable as soon as they could and I think they were exercising as much vigilance as could be expected of them as far as a cable used in that way is concerned. If the dredge had put a large sign on the cable itself which could have been seen the case would present a very different aspect to me, but I do not believe that any ordinary lookout should be expected to have seen that cable.

It has been argued here that a lookout is put on board to see unusual things, but I have not had my notice called to a case where a lookout was found to be lacking, because he did not see a rope, or a thing of that kind in

the air. There was not much to attract the attention of the eye—a slight cable of neutral color. Taking that view of the case I am unable to see how the fireboat was negligent.

I think the fault in this case lies in the use of that kind of cable without some special notice on the cable itself which would be visible to boats having occasion to navigate where the cable stretched. I think this boat was entitled to go there. I, therefore, order a decree for libellant with order of reference.

Mr. Benedict: Will your honor rule in regard to the East River statute?

The Court: In reference to the East River statute, I think I have in substance covered that. I do not see that the statute is binding on fireboats going to a fire. It is intended to apply to ordinary vessels going up and down the river, with respect to each other, not as going to a fire. Of course, if the fireboat came in collision with another vessel that was on the side of instead of near the middle of the river, it might be argued with some force, but I do not think the statute is designed to prevent fireboats from going in the most direct course to their destination. It is true it is said here by the pilot of the fireboat that it is customary to avoid an adverse tide. I think that is quite likely. But it was his duty to steer in a way that would bring him as quickly as possible to the fire, the place which he was seeking to find. That was what he was doing here and it carried him between the dredge and the pier.

Robinson, Biddle & Benedict, for appellant.

Archibald R. Watson, Corp. Counsel (Theodore Connolly and Geo. P. Nicholson, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. October 26, 1907, steam dredge No. 1 and her scow were lying in the East River about 140 feet off the pier at the foot of Flushing street, Long Island City, by permission of the War Department, engaged in removing a blanket of clay which had been deposited on the bottom of the river over the tunnel being excavated between New York and Long Island City to prevent the escape of compressed air. The dredge was moored by anchors on her off-shore side, and by two one-inch wire cables extending from her upper works at the bow and extended through the air to the pier. Nothing was hung upon these cables to indicate their presence, nor any lookout kept to warn approaching vessels. The only notice, other than the cables themselves, to any vessel coming up the East River, was a large sign on the dredge reading, "Danger! Look out for Anchor Cables!" About 2:30 p. m. the city fireboat David A. Boody, hurrying to an alarm of fire at the next street above Flushing street, ran into the first cable and sustained considerable damage.

The trial judge found that the Boody, though keeping a reasonable lookout, did not discover the cable until within 100 or 150 feet of it, and that the danger notice, which was seen by those on the fireboat, instead of assisting was calculated to mislead them, by causing them to look for cables leading into the water instead of through the air. He found the dredger at fault for not giving a better warning of this dangerous and not to be looked for obstruction, and the fireboat free from fault. We fully concur in this conclusion. The only question causing doubt is whether the fireboat was at fault for violating section 757 of the consolidation act (Laws 1882, c. 410), which is still in force and reads:

"All the steamboats passing up and down the East River between the Battery * * * and Blackwell's Island shall be navigated as near as possible in the center of the river, except in going in and out of the usual berth or landing place of such steamboat," etc.

We have heretofore had occasion to pass upon this and a similar statute, and to hold that violation of such statutory obligations is not a fault, if it be only a condition and not a cause of the injury complained of. *The Clara*, 55 Fed. 1023, 5 C. C. A. 390; *The Benjamin Franklin*, 145 Fed. 13, 76 C. C. A. 43; *B. & O. R. R. Co. v. La Bretagne*, 179 Fed. 286. We do not connect the *Boody's* violation of the statute causally with the accident.

The decree is affirmed, with interest and costs.

COXE, Circuit Judge. I concur in the result. I think, however, that from the very nature of her occupation a fireboat cannot render efficient service and at all times obey the rule requiring steamboats to navigate in the center of the river. The *Boody* was answering an alarm and it was her duty to reach the fire by the shortest possible route.

HUDSON v. NEW YORK & ALBANY TRANSP. CO. et al. (EMPIRE TRUST CO., Intervener.)

(Circuit Court of Appeals, Second Circuit. July 12, 1910.)

No. 321.

1. MARITIME LIENS (§ 60*)—JURISDICTION OF CIRCUIT COURT—SALE OF VESSEL FREE FROM LIENS.

While proceedings against vessels in rem to enforce maritime liens are vested exclusively in the District Courts, a Circuit Court could sell vessels free from such liens, if the lienors voluntarily submitted themselves to the Circuit Court's jurisdiction.

[Ed. Note.—For other cases, see *Maritime Liens*, Cent. Dig. § 98; Dec. Dig. § 60.*]

2. MARITIME LIENS (§ 60*)—JURISDICTION OF CIRCUIT COURT—SALE OF VESSEL FREE FROM LIENS.

If holders of maritime liens against vessels come into the Circuit Court having possession of the res, and ask for adjudication upon their liens, they should be held to have assented to the jurisdiction of the Circuit Court for all purposes, including a substitution of the proceeds of sale for the res whenever in the sound discretion of the court, such substitution is necessary to preserve the property from deterioration or secure a better price for it.

[Ed. Note.—For other cases, see *Maritime Liens*, Cent. Dig. § 98; Dec. Dig. § 60.*]

3. MARITIME LIENS (§ 68*)—SALE—CONFIRMATION—MISREPRESENTATION BY AUCTIONEER.

Claims amounting to \$62,710.16 were filed against the owner of vessels, of which \$54,310.16 represented claims for which maritime or state liens were asserted. A receiver's sale of the vessels subject to such liens was ordered. Prior to the sale certain lien claims had been rejected or withdrawn, leaving only \$34,226.33 outstanding, so far as was known. The auctioneer by inadvertence gave notice to proposing bidders that the amount of liens claimed against the vessels was between \$55,000 and \$60,-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

000. *Held*, that the bidders were entitled to rely upon the representations of the auctioneer as the mouthpiece of the receiver; the receivership having been in existence for six months, and a special master having been appointed to consider claims, and the sale should not have been confirmed on account of the misrepresentation.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 106; Dec. Dig. § 68.*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Action by George P. Hudson against the New York & Albany Transportation Company and others, in which the Empire Trust Company, as trustee, intervenes. From an order directing a receiver's sale of property, and an order confirming the sale, the intervener appeals. Order of confirmation reversed and order directing the sale affirmed.

See, also, 175 Fed. 519.

This cause comes here upon appeals from an order directing the sale by a receiver of certain property and from an order confirming said sale.

Complainant, as a stockholder of the New York & Albany Transportation Company and the holder of 90 per cent. of its bonds, brought suit against the company alleging waste, insolvency, and threatened litigations, and praying that its assets be marshaled and distributed according to the practice of equity. Certain lienors of record were joined as defendants. The Empire Trust Company, as trustee under the mortgage, intervened and filed bill of foreclosure. Various claims of alleged creditors were filed which were sent to a special master to take proof as to validity and priority. Hearings thereon were concluded about July 9, 1909; the total amount of claims considered by the special master being \$62,710.16. Claimants to the amount of \$54,310.16 asserted that they were preferred most of them on the ground that they were secured by maritime liens or liens under state law for labor, materials, and supplies furnished, on the credit of the vessels, to steamboats owned by the company.

The company owned two large river steamboats, the Saratoga and the Frank Jones, which constituted its principal asset. On July 9, 1909, after the conclusion of the hearings before the special master, but before he had filed his report, the Morse Dry Dock & Repair Company, a creditor to the amount of about \$13,000, and one of the lienors under the state statutes, filed a petition. It set forth that the steamers were then lying at the wharf, greatly in need of repairs, especially painting, and that, unless these repairs were speedily effected, the boats would deteriorate rapidly in value, that the boats were used for passenger traffic on the Hudson river during the summer season, already far advanced, and that it would take two or three weeks to put them in commission. The petition prayed that an order of sale be made, subject to confirmation by the court and that such sale be not held until after the determination of the amount and priority of the liens, so that the various lienors might be intelligently advised as to how much they would be required to bid to protect their claims.

Upon due notice to all parties the petition came on for hearing with a "special report dated the ——— day of July" from the special master. No trace of this report is found in the record, but it is evident from the briefs that it was not a report: "determining the amount and priority of the liens" which the petition asked for. On July 19th the court made an order directing the sale on July 27th of these two vessels "subject only to maritime liens or liens under a state law for supplies, labor or materials furnished on the credit of said vessels." The Empire Trust Company at once moved for a resettlement of this order, objecting that by its terms "the said property although of large value may be sold subject to said unascertained maritime liens, etc., for a nominal price." The motion came on for hearing on July 26th, and was apparently denied. We find no formal denial of it in the record, but, since the sale

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

was had under the order of July 19th, it is safe to assume that there was such denial.

The sale took place on July 27th, and both boats sold, subject to state and maritime liens, for \$7,500. Upon the application for an order confirming the sale, various affidavits giving estimates of the value of the boats and reciting what took place at the sale were submitted; also a petition of the Hudson Navigation Company, which was represented at the sale, stipulating upon a resale to make a bid for the vessels, subject to all liens, of \$16,000, and accompanied with the offer of a cashier's check for that amount as a guaranty. On July 29th order was entered confirming the sale, with a brief opinion indicating the reasons for doing so. On August 27, 1909, the special master filed his report rejecting all claims of preference except for \$18,550.40, all of the preferences so allowed being still a subject of contest in another branch of this suit.

The Empire Trust Company duly appealed from the order directing a sale and from the order confirming the sale.

Cowing, White & Wait (H. C. White, and Rufus B. Cowing, Jr., of counsel), for appellant.

Kelley & Connelly (N. E. Kelley, P. M. Brown, J. D. Fearhake, and C. S. Lorentzen, of counsel), for appellees.

Before LACOMBE and NOYES, Circuit Judges, and HAND, District Judge

LACOMBE, Circuit Judge (after stating the facts as above). We think it was most unfortunate that the sale was had subject to all maritime and state liens. The circuit judge so ordered evidently because he was satisfied that he had no power to sell the res free from any of them, leaving the lien to apply to proceeds. It is undoubtedly true that proceedings against vessels in rem to enforce maritime liens are vested exclusively in the District Courts of the United States. The circuit judge cites *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981, and there are many other authorities on the brief all holding that no court other than the admiralty court can exercise jurisdiction over maritime liens or divest or extinguish them. But in the case cited the court is careful to say that "those courts (other than admiralty) would have no power by a sale under statute to destroy their liens, unless they had voluntarily submitted themselves to that jurisdiction." And elsewhere "(interests) which cannot be displaced by the action of other courts in invitum." But, so far as the record before us discloses, certain of these holders of maritime liens have voluntarily submitted themselves to the jurisdiction of the Circuit Court. The circuit judge says:

"In some of the cases it has been intimated that, if creditors entitled to maritime liens consent to a sale free of liens, a court of equity will have the right to make such decree. Of course, this would apply only to consenting creditors, and I find no evidence of such consent. All persons having been forbidden to interfere with the property in the custody of the court, the appearance of creditors having maritime liens to prove the amount of their claims before the special master in this proceeding in personam cannot be considered such consent. Lien creditors have a right to proceed in personam or in rem on their liens or in both ways until they can obtain full satisfaction."

We have not before us the documents upon which any of these liens came into the controversy, but if any of them pray for a liquidation

and allowance of the lien, as was prayed in *Berwind White Coal Company v. Metropolitan S. S. Company* (C. C.) 166 Fed. 782, we are of the opinion that, by thus coming into the court which had possession of the res and asking for adjudication upon the lien, the petitioner should be held to have assented to that jurisdiction for all purposes, including a substitution of the proceeds for the res, whenever in the sound discretion of the court such substitution was necessary to preserve the property from deterioration or secure a better price for it.

There were circumstances connected with the sale, however, which in our opinion should have induced a refusal to confirm. As has been seen the total amount of claims filed was \$62,710.16, of which \$54,310.16 represented claims for which maritime or state liens were asserted. Since the sale was to be subject to such liens, it was of the utmost importance to bidders to obtain some reasonably accurate information as to how much they aggregated, and they were justified in assuming that, since the receivership had been in existence for six months and a special master had been appointed to consider claims, the officers of the court were able to give such information. Of these lien claims, aggregating \$54,310.16 as filed, there had been rejected or withdrawn prior to sale \$20,083.33, so that on the day of the sale there was only \$34,226.33 outstanding so far as was known.

It appears by an affidavit of the intervener's counsel that the auctioneer—owing to an inadvertence—gave notice to proposing bidders that the amount of liens claimed against the steamers was between \$55,000 and \$60,000. An affidavit of an attorney who was present with intending bidders also states that the auctioneer declared that liens to the amount of \$65,000 were claimed against the vessels, and that his clients declined to bid upon the ground that they could not make any intelligent bid in view of the statement of the auctioneer. These affidavits were before the circuit judge when application was made for confirmation, and we find nothing in the record which controverts these statements. The circuit judge, commenting apparently on this objection, said:

"All the creditors had, or by the exercise of ordinary diligence in examining the testimony taken before the special master might have had, full information as to the character and status of lien claims."

We do not find this suggestion persuasive. The first object of an auction sale is to get bidders for the property, and it would seem well calculated to defeat that object to hold that bidders are to disregard statements of this character made by the auctioneer, and should in advance of bidding have some competent lawyer make a search of several hundred pages of testimony. We are of the opinion that, on the record before us, the sale should not have been confirmed, and for that reason reverse the order of confirmation. Touching the order of sale, we are not sufficiently advised as to the nature of the petitions which accompanied the claims of the several lienors to determine whether or not the Circuit Court had jurisdiction to sell the property freed from any of the liens, preserving such lien on the proceeds. We therefore do not reverse such order. If the Circuit Court should order a resale, it would, of course, have power to fix the terms and conditions of such

sale. What instructions should be given on remanding the cause to the Circuit Court for further action is a different matter. Manifestly the situation now is not what it was a year ago. If the sale be set aside, the property cannot be retaken from the purchaser without paying him the purchase price \$7,500 and whatever further sums may have been expended on the boats in repairs and betterments; indeed, an accounting would be necessary to determine the amount expended in repairs and the difference between the receipts derived from the operation of the boats and the expenses of operation, deterioration, etc. Moreover, in the event of a resale, there would probably be other unknown liens from which the court certainly could not clear the property, viz., liens for labor and materials furnished on the credit of the vessels while operated by the purchaser last season and this year—an element of uncertainty which might well discourage bidders. It would seem that there must be some assurance that a substantial bid will be made before the court should undertake to get the boats back from the purchaser and to resell them.

We have felt that the order should be reversed on this record, so that by affirmance we might not seem to approve a sale where the auctioneer—who is generally considered by bidders to be the mouthpiece of the receiver or master who sells—has made so substantial a misrepresentation. But we are also satisfied that we cannot deal in this court with the complicated situation now presented, but must leave it to the sound discretion of the circuit judge to determine after an examination of existing conditions whether there shall be a resale or whether the former shall be reconfirmed. In the exercise of this discretion the circuit judge should first ascertain what amount, if any, must be paid to the present purchaser as a condition of redelivery of the boats; next, whether the intervening petitions give jurisdiction to sell free and clear of maritime liens; and, if so, then whether there is any purchaser willing to take care of liens which have arisen while the purchaser has had the boats and to pay more than enough to realize net the purchase price after the liens of intervening petitioners have been paid out of his bid. Unless he is satisfied affirmatively that the net result after paying all these charges will be greater than at present, we see no reason for a resale. Should the intervening petitions not authorize a sale free and clear, he can still ascertain whether a resale would be profitable to the estate, subject to all liens, which have arisen before or since the sale.

Costs of this appeal to appellant.

NOTE.—The following is the opinion of Ward, Circuit Judge, in the court below:

WARD, Circuit Judge. The court ordered the sale of these steamers subject to maritime liens and liens under state law for supplies, labor, and materials furnished on the credit of the vessels, because it doubted its right as a court of equity to pass upon and dispose of those liens. Proceedings against vessels in rem are by law vested exclusively in the District Courts of the United States. Rev. St. U. S. §§ 563, 711 (U. S. Comp. St. 1901, pp. 455, 577); *Moran v. Sturges*, 154 U. S. 256, 276, 14 Sup. Ct. 1019, 38 L. Ed. 981. A court of equity, having no power to enforce a maritime lien, has, I think, no power to discharge it.

In some of the cases it has been intimated that if creditors entitled to maritime liens consent to a sale free of liens a court of equity will have the right to make such a decree. Of course, this would apply only to consenting creditors, and I find no evidence of any such consent. All persons having been forbidden to interfere with the property in the custody of the court, the appearance of creditors claiming maritime liens to prove the amount of their claims before the special master in this proceeding in personam cannot be considered such consent. Lien creditors have a right to proceed in personam or in rem on their liens, or in both ways, until they obtain full satisfaction. A court of bankruptcy would apparently have a right to sell free of maritime liens. Such courts are created by statute, and it has been held in decisions under the bankruptcy acts of 1841, 1867, and 1898 that they have this power under those statutes. These courts, however, proceed in rem. They seize the bankrupt's estate and finally distribute it among all his creditors, and as Congress may pass laws impairing the obligation of contracts, they are empowered to discharge the bankrupt from all liability for his debts.

In this case the vessel and other property were sold in one lot for \$7,500, subject to maritime liens as aforesaid, to the owner of \$180,000 of bonds out of an issue of \$200,000 secured by mortgage. A petition is now presented by the Hudson Navigation Company, which was represented at the sale, stipulating upon a resale to make a bid for the vessels, subject to all liens, of \$16,000. All the creditors had, or by exercise of ordinary diligence in examining the testimony taken before the special master might have had, full information as to the character and status of lien claims. If the purchaser were a stranger, who would make a personal profit to the extent in which he defeated creditors claiming maritime liens, I should be inclined to order a resale. There will, however, be nothing for the general creditors, and the entire contest is between the holders of bonds secured by the mortgage to the amount of \$200,000 and creditors who claim maritime liens to the amount of \$36,000. Maritime lien creditors have a priority over the bondholders, and the bondholders have a priority over all general creditors.

The situation accordingly is this: If the vessels are, for the purposes of illustration, worth \$50,000 free of liens, and that is the highest estimate worthy of consideration, the purchaser will be getting a profit of \$24,500 in case he defeats them. This, however, should be regarded really in reduction of his claim as a bondholder. On the other hand, if the creditors claiming liens prevail to the amount of \$36,000, he will have to pay them, and the amount of his bid will be really increased to \$43,500. If, as seems probable, liens to not over \$16,000 are sustained, his bid would be \$23,500. The actual expenses of the receiver now foot up to \$6,000, which may be decreased by the return of insurance premiums to say \$5,000. But after deducting these expenses, and allowances for fees of the receiver, of the special master, of the receiver's counsel, and of the complainant's counsel, it is very unlikely that there would be left enough out of a bid of \$16,000 to give bondholders a dividend of 2 per cent., 90 per cent. of which would go to the present purchaser. Creditors claiming maritime liens are not interested, because if they prevail they will apparently be secured by their liens on the vessels, and if they do not their claims, being subsequent to those of the bondholders, will not be reached.

The object of the sale being to benefit creditors, and not to benefit the officers of the court, I do not think that a resale would be of any advantage. An order may be submitted confirming the sale.

In re KESSLER et al.

(Circuit Court of Appeals, Second Circuit. June 14, 1910.)

Nos. 283, 284.

BANKRUPTCY (§ 324*)—SECURED CLAIM—INTEREST.

A creditor holding security liquidated after the filing of the bankruptcy petition is entitled to interest on his claim after the filing of the petition, where the proceeds of the sales of the security are inadequate to pay the face of the claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 511; Dec. Dig. § 324.*]

Ward, Circuit Judge, dissenting.

Appeals from the District Court of the United States for the Southern District of New York.

In the matter of Alfred Kessler and others, bankrupts. On certificate of the referee to determine the propriety of the payment of interest on the balance of secured claims. From an order directing such payment (171 Fed. 751), the trustee appeals. Affirmed.

See, also, 176 Fed. 647.

The referee certified to the District Court the following question: "Is a creditor holding security which is liquidated after the filing of the petition entitled to interest on his claim after the filing of the petition in bankruptcy, where the proceeds of the sales of the security are inadequate to pay the face of the claim?"

The referee, furthermore, allowed the secured creditors to marshal the proceeds of their collateral securities first against interest on the debts accruing up to the date of the liquidation of such securities and then allowed them to prove the balance of the principal of the claims after deducting the remainder of such proceeds.

The District Court answered the question certified in the affirmative, and affirmed the order of the referee allowing the claims.

Wallace MacFarlane (George H. Gilman and Wallace MacFarlane, of counsel), for appellant.

McLaughlin, Russell, Coe & Sprague and Lorenzo Semple (Rufus W. Sprague, Jr., and Preston Cumming, Jr., of counsel), for appellee. Sharon Graham, for petitioner.

Frank X. Sullivan, for Josephine Watts.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). The majority of the court are of the opinion that the District Court was right in answering the question certified to it by the referee in the affirmative and in approving the allowance of the claims. But we think it unnecessary to add anything to the very careful consideration of the subject contained in Judge Hand's opinion.

The orders of the District Court are affirmed, with costs, upon the opinion of the District Judge.

WARD, Circuit Judge. I dissent from the opinion of the majority in this case. It is true that a creditor selling collateral is entitled to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

apply the proceeds first to the payment of interest. But the act of 1898 provides that interest shall cease to run on claims against a bankrupt's estate after the date of filing the petition. If the creditor comes into bankruptcy to claim upon any unpaid balance, so much of the proceeds of collateral as have been applied to interest accruing after the petition is filed should be deducted from that balance. He should not be allowed indirectly a preference over general creditors which he could not get directly. I think this view, not only carries out the purpose and provisions of the act, but has the additional advantage of conforming to the practice in England.

EXCELSIOR DRUM WORKS v. SHEIP & VANDEGRIFT, Inc.

(Circuit Court of Appeals, Third Circuit. August 19, 1910.)

1. PATENTS (§ 27*)—INVENTION—HORN FOR TALKING MACHINES.

The use of hoops or bands around the horn of a talking machine to hold the longitudinal sections in place does not involve invention in view of the long use of such hoops for the same purpose in other arts.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 31, 32; Dec. Dig. § 27.*]

2. PATENTS (§ 328*)—INFRINGEMENT—HORN FOR TALKING MACHINES.

The Solstmann patent, No. 873,908, for a horn for talking machines, claim 3, which covers as the only novel feature "a reinforcing band surrounding the body of the horn intermediate its two ends," must be limited to a band which envelopes the structure from end to end, either spirally as shown in the specification and drawings, or radially, being otherwise devoid of invention. As so construed, *held* not infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Suit in equity by the Excelsior Drum Works against Sheip & Vandegrift, Incorporated. Decree for defendant (173 Fed. 312), and complainant appeals. Affirmed.

John P. Croasdale, for appellant.

Hector T. Fenton, for appellee.

Before BUFFINGTON and LANNING, Circuit Judges, and ARCHBALD, District Judge.

ARCHBALD, District Judge. The patent in suit is for a talking machine horn. As described by the inventor in the specifications, the horn consists of a series of nonmetallic tapered sections, preferably of hard wood or fiber, beveled longitudinally and so disposed that they overlap each other, the overlapping edges being glued or otherwise fastened together to form a continuous structure. "Upon this structure," as he says, "I then wrap a very thin narrow strip or ribbon * * * of wood or other suitable material, and glue the same securely to said structure. I have found for example that a ribbon of veneering of approximately one-quarter of an inch in width, and about one-twentieth of an inch in thickness makes a satisfactory wrapping. This wrapping extends spirally from one end of a horn

*For other cases, see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

to the other." As represented in the drawings, and as described in the claims, the horn has a flaring mouth, and the twofold warping of the material, which is necessary in order to produce this, being obtained by steaming, the material when dry tends to resume its original shape, and is only prevented from doing so by the exterior wrapping provided for. The claims of the patent are three, the third being the one which is relied upon.

"1. A horn composed of longitudinally extending tapered sections forming a structure contracted at one end and flaring at the other, and a thin band spirally wound about said structure.

"2. A horn composed of longitudinally extending tapered sections, forming a structure contracted at one end and flaring at the other, a thin band spirally wound about said structure, and a ring member provided with an annular channel to receive the flaring end of said structure.

"3. A horn composed of longitudinally extending tapered sections, forming a structure contracted at one end and flaring at the other, and a reinforcing band surrounding the body of the horn intermediate its two ends."

The horn manufactured by the defendants conforms to the structure described in the patent, except that, instead of being wound from end to end, it has two bands of tape encircling it exteriorally, one near the mouth or rim, and the other a short distance from the smaller end. It is contended by the complainants, that this construction offends against the third claim, which, in distinction from the first and second does not require, as it is said, that the band shall be wound about the horn from one end to the other, but is satisfied by a band or bands at any point between the two ends, binding together the strips of which the horn is composed. The defendants claim, however, that, as limited by the specifications as well as by the existing art, the reinforcing band must enwrap the horn completely, or if not, and the third claim is to be read so as to include single hoops or bands, it is devoid of invention, differing in no respect from the hoops of a cask or tub, which it involved no invention to apply.

The most natural view to be taken of the invention is that the reinforcing band is to envelop the structure from end to end, either spirally, as provided in the first and second claims, or radially, by distinction, in the third. That is the form of construction suggested in the specifications and shown in the drawings, and conforms to the general idea. But more than that, it is the one that is required if the patent is to be sustained, there being otherwise no inventive advance on the prior art. This is not to say that there is anything in particular which anticipates it in the references cited. The Cunnus, it is true, has a reinforcing rim, so that the idea of reinforcement, as applied to talking machine horns, may not be new; although, being confined in that case to strengthening the end or mouth, it is employed for a different purpose, and applied to a different part. Neither is there anything anticipatory in the Cockman (British) patent, where clamping rings to hold together the longitudinal strips which compose the trumpet, while the glue is setting, are shown; this being for a temporary purpose, and the clamps being dispensed with when the object is attained. But the difficulty in the case is that, with the reinforcing bands reduced to mere hoops or rings, there is nothing more to them than the hoops, in immemorial use, on barrels or casks.

It is said that barrels and talking machines belong to widely different and nonanalogous arts. But that is not the point. The binding together of strips of material to form a cylindrical structure, by means of hoops or bands, is such a well-known and obvious expedient, that no one can claim anything out of it to whatever it is applied. The whole function and purpose, in every case, is to prevent the loosening and spreading apart of the material, against forces pressing outwardly, and this is as true with regard to bands which tie together the strips of veneer of a talking machine horn, as of the hoops which bind the staves of a barrel, tub, or cask.

It is said, however, that the invention is not to be judged by a single feature, but by all of which it is made up, and that the combination may be inventive even if all the elements are old. But there was nothing patentably novel in constructing a talking machine horn out of thin strips of wood or fiber and gluing the edges together; this being already suggested in the Ruggiero & Bongiorno and the Cockman patents, to say nothing of the Cunnius; and there being nothing inventive in reinforcing this with hooplike bands, the combination with this feature added—which is all there is to the device of the patent—fares just as bad.

But it is further said that a hooplike band is made necessary in order to distinguish from the first claim, where a band wound spirally is called for. A distinction is no doubt to be sought for in order to avoid a duplication, and it is not to be found in the designation of the band as a reinforcing band, as it is denominated in the third claim, that being its function whatever the form assumed, and a merely ornamental band being of course of no account. But a band enveloping the structure radially effects all, by way of distinction, that is asked for, and may thus be taken as intended, which in no way interferes with the requirement, enforced by the considerations just alluded to, that it shall completely surround the horn. Nor, even if this were not so, and a hooplike band were required to make the distinction, would this relieve from the argument that there would be nothing patentably inventive in a horn of that kind.

The claimants are therefore in this dilemma. If, contrary to the views which have been just expressed, the third claim of the patent is held to cover individual circular bands, such as are in use by the defendants, there is nothing inventive in a device of that kind, and the claim is invalid. Or, if it be held to call for a reinforcing band which shall envelop the horn from end to end, which, all things considered, is the most natural, if not the enforced construction, the defendants do not infringe, having adopted an entirely different form. The result in either instance is that no case is made out.

The decree must therefore be affirmed.

'AUTOMATIC SWITCH CO. v. MONITOR MFG. CO. et al.'

(Circuit Court, D. Maryland. June 15, 1910.)

1. PATENTS (§ 129*)—ASSIGNMENT—EFFECT AS ESTOPPEL—CORPORATION ORGANIZED BY ASSIGNOR.

A corporation organized by a patentee, who subscribed for two-thirds of the stock and paid for it with money received from another corporation to which he assigned the patent, is bound by his estoppel, and cannot question the validity of the patent, nor introduce evidence so to limit its construction as to render it worthless.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 182½-186; Dec. Dig. § 129.*]

2. PATENTS (§ 177*)—CLAIMS—COMBINATION—EFFECT.

Every part of a combination claimed in a patent is presumed to be material to the combination, and in a suit for its infringement evidence to the contrary is not admissible.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 253, 254; Dec. Dig. § 177.*]

3. PATENTS (§ 168*)—CONSTRUCTION—ACQUIESCENCE IN REJECTION OF CLAIMS.

A patentee who originally sought broader claims which were rejected, and who acquiesced in such rejection, cannot insist on such a construction of an allowed claim as would cover what had been previously rejected.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 243½-244; Dec. Dig. § 168.*]

4. PATENTS (§ 202*)—ASSIGNMENT—EFFECT AS ESTOPPEL.

In a suit for infringement by the assignee of a patent against the assignor, where it is not shown that the assignor made any representations other than those necessarily involved in the assignment, he is estopped only to deny that the invention presented a sufficient degree of utility to justify the issuance of the patent, and with this limitation the court will apply the same rule of construction which would be applicable between the patentee and a stranger, and, on the question of infringement, the defendant may show the prior state of the art to limit the scope of the claims sued on.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 281-289; Dec. Dig. § 202.*]

5. PATENTS (§ 328*)—INFRINGEMENT—ELECTRIC SWITCHES.

The Whittingham patents, No. 716,504 and No. 757,853, for improvements in electric switches, construed, and held not infringed.

In Equity. Suit by the Automatic Switch Company against the Monitor Manufacturing Company and George H. Whittingham. Decree for defendants.

Clifton V. Edwards and R. Lee Slingluff, for complainant.

Barton, Wilmer, Ambler & Stewart and Robert Watson, for defendants.

ROSE, District Judge. This is a suit in equity for an alleged infringement of certain claims of patents 716,504 and 757,853, both originally issued to George H. Whittingham, one of the defendants.

In 1888 Whittingham, then about 20 or 21 years of age, applied for a patent for an automatic switch for electric motors. He organized the Automatic Switch Company of Baltimore City and sub-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

scribed for all its stock. He paid for it by (1) assigning the patent to be issued, and by agreeing to assign (2) all foreign patents he might obtain for the same invention, and (3) any improvements upon said switch or any contrivance or device whatsoever which he might invent or in any wise become possessed of or interested in, bearing upon a switch for operating electric currents. He remained in the employ of the company for nearly 16 years. During that time he obtained a number of patents. Some, including the two in suit, were for improvements in switches. Some were for other electrical devices. The company at its own cost prosecuted the application for all these patents, and all of them were assigned to it. In 1897 one David H. Darrin became the New York sales agent of the Automatic Switch Company. In 1898 the company gave him for five years the exclusive agency for the sale of its goods in Greater New York and New Jersey. He says as the direct outcome of this agency he went into the elevator business on his own account. Its success, he testifies, depended largely upon his control in the New York territory of the Automatic Switch Company's products. In 1901 Whittingham told Darrin he would like to buy the stock of the Automatic Switch Company, the majority of which was then and had been for many years in other hands. Whittingham says that Darrin asked to share in the purchase. Darrin says Whittingham asked for his help, and to get it showed him the agreement of September 5, 1888, binding Whittingham to assign all future switch inventions to the company. Whittingham denies that he ever showed Darrin that agreement or said anything about it. He claims never to have seen it from the day on which it was executed until it was offered in evidence in this cause. However this may be, Whittingham and Darrin agreed to buy the stock not owned by Whittingham and to pay for it something over \$9 a share. It was planned that each should get one-half of the total issued stock, and that the salary to be paid each by the company should be the same. Nothing was said about the Darrin agency contract. Neither had sufficient ready money to pay for the stock. Each indorsed for the other. Whittingham lent Darrin \$600 in cash. Darrin was elected president. They got along well together until Darrin wanted a renewal of the exclusive agency contract for the D. H. Darrin Company which he had organized and to which he had assigned the contract. Whittingham did not want to renew it. Darrin as president of the company, but without the authority of the directors, gave a new contract to a clerk of the Darrin Company and the latter immediately assigned the contract to that company. At the next election the directors of the Automatic Switch Company declined to re-elect Darrin president and put Whittingham in his place. While Whittingham was president the company sold its switches in the New York territory to anybody who wanted to buy them and could pay for them. Darrin, so long as he did not control the New York agency, would not use the Automatic Company's switches in any elevator built by his company. He testifies that rather than buy Automatic Company's switches when other people in the same territory could buy them he used other switches so inferior in quality that it seriously injured the reputation

of the Darrin elevators. He seems to have persuaded himself that he had the right to the exclusive agency, no matter what the other stockholders of the switch company thought about it.

Meanwhile the struggle between him and Whittingham for the control of the Automatic Switch Company was carried into the courts. Darrin obtained an injunction restraining Whittingham from voting certain shares of stock at the annual election for directors to be held in January, 1904. The company's by-laws said that no election could take place unless a majority of the stock was represented at the meeting. Whittingham stayed away to break a quorum. Darrin came. A little over one-third of the shares were represented. Darrin's friends were elected directors. The Court of Appeals of Maryland finally held that under the state corporation law as it then stood the shares present at an annual meeting could elect whether they were a minority of the whole number or not, and no matter what the company's by-laws might say about it. So soon as this decision was handed down, Darrin took control and put an end to Whittingham's connection with the company in any capacity other than as a stockholder in it. Whittingham swears, and Darrin does not deny, that Darrin said he would never allow the company to make a dollar so long as Whittingham had any stock in it. Whittingham offered to buy Darrin's stock. Darrin would not sell unless given the exclusive New York agency. On those terms Whittingham would not buy. Whittingham began legal proceedings to secure control of the annual election to be held in January, 1905. Then an agreement was made. Darrin was to dismiss all the suits against Whittingham, several of which were pending. He was to pay Whittingham \$20,000, and to pay the agent who negotiated the arrangement \$2,500. In return all the Whittingham stock was to become Darrin's. Darrin dismissed the suits. A time and place for the payment of the money and the transfer of the stock was appointed. Darrin came bringing his money in large part in \$5 and \$10 notes. It took time to count these. While the parties were still together, a deputy sheriff appeared with an attachment in a new suit that Darrin had caused to be brought against Whittingham. Whittingham had taken the precaution to transfer the stock to the name of the agent. The latter claimed that the stock was his, and he had sold it to Darrin, and that the money to be paid for it belonged to him. Darrin dropped the attachment. Whittingham says he feared Darrin would bring other suits against him. Therefore, so soon as he received his \$20,000, he invested it. How he does not say. He at once transferred these investments to his wife. Darrin did bring two other suits. Why the record does not disclose. The defendants' brief says they were fruitless. A very little while after Whittingham sold his stock, he came to Baltimore. He called at the shop of one William C. O'Brien, whom he had known for a long while. Some eight years before O'Brien had been in the employ of the Automatic Switch Company. Whittingham says that O'Brien was working on some original electrical devices for some of which he was seeking patents. O'Brien and Whittingham agreed to form a corporation. Mrs. Whittingham was to pay \$2,400 for two-thirds

of the stock; O'Brien \$1,200 for one-third. The company was to buy O'Brien's business, inventions, patents, and machinery for \$2,200. It was a part of the bargain that the company should employ Whittingham as one of its officers. What was agreed to be done was done. The corporation was organized under the name of the Whittingham Manufacturing Company, and started its career with O'Brien's business and \$1,400 of cash. After the bill in this case was filed, the company changed its name to the Monitor Manufacturing Company. O'Brien still holds one-third of the stock which was issued to him. Mrs. Whittingham still has the two-thirds which were issued to her, less one share transferred to her husband, the defendant Whittingham. The new company manufactures and sells electric switches.

The defendants in this case are George H. Whittingham and the Monitor Manufacturing Company. The complainant is the Automatic Switch Company, a New York corporation, which has succeeded to all the business, property, and patents of the Automatic Switch Company of Baltimore City. The evidence leaves no question that the complainant company is controlled by Darrin. It does not appear that any one else has any substantial interest in it. At the time of the filing of the bill, a motion for a preliminary injunction was made and after hearing upon affidavits was granted. The evidence has now been taken in regular course and the case submitted after final hearing.

The story of the relations of the parties to each other has been told at length, because it is necessary to decide how far the defendants are estopped in this case from making defenses which but for those relations would be open to them. The defendant George H. Whittingham was the patentee of both patents in suit. He assigned them to the corporation under which the complainant takes title to them. He admits that he cannot be heard to question their validity. His codefendant, the corporation now calling itself the Monitor Manufacturing Company, says that it is not bound by his estoppel. Under the circumstances in evidence this contention should not be sustained. A corporation which is alleged to infringe the patents owned by another may show that these patents are invalid in spite of the fact that their vendor is one of its officers and stockholders. *Babcock & Wilcox Co. v. Toledo Boiler Works*, 170 Fed. 81, 95 C. C. A. 363. In the case at bar two-thirds of the capital of the defendant corporation came from money which a few days or a few weeks before had been paid the vendor of the patents for his stock in the company to which he had sold them. The defendant company was in large part organized for the purpose of giving him employment. Two-thirds of the stock is held by him and his wife. The company does whatever he wills it to do. Under such a state of facts the company is bound by his estoppel. *Time Telegraph Co. v. Himmer* (C. C.) 19 Fed. 322; *Alvin Mfg. Co. v. Scharling* (C. C.) 100 Fed. 87; *Marvel Co. v. Pearl* (C. C.) 114 Fed. 946; *Continental Wire Fence Co. v. Pendergast* (C. C.) 126 Fed. 381; *Melior v. Carroll* (C. C.) 141 Fed. 992.

How far does the estoppel against the defendants go? They have the right to say that they do not infringe. In this case that is what they do say. Before the court can tell whether in so saying they say truly, it must find out what the patents in suit cover. The buyer of a patent for one invention has no right to say that the seller shall not use another invention. If A. sells B. Blackacre, B. cannot claim Whiteacre as well. It is sometimes impossible without reference to the prior state of the art to tell what a patent means. In such cases the state of the art may be proved. Until it is proved, no one can say what it is the defendants are estopped to deny. On the other hand, a vendor of a patent when sued for its infringement cannot say that the patent which he sold as good is bad. What he may not do in one way he will not be let do in another. It follows that he may not offer evidence so to limit the construction of the patent as to make it worthless. *Alvin Mfg. Co. v. Scharling* (C. C.) 100 Fed. 87; *Hurwood Mfg. Co. v. Wood* (C. C.) 138 Fed. 835. Courts of high authority differ as to where the line should be drawn between that evidence of the prior art which may sometimes be admissible on behalf of the vendor of a patent subsequently sued for its infringement, and that evidence of such art which when offered by the vendor may never be received.

In this case the complainant says that the defendants infringe claims 1 and 8 of patent 716,504, December 23, 1902, and claims 8, 9, 10, 11, and 12 of patent 757,853, April 19, 1904. Both of these patents are for improvements in the construction of electric switches. While the later in date is said to be an improvement on the earlier, the claims of the younger alleged to be infringed each contain an element not shown or claimed in the older. It is conceded that, if the defendants infringe any one of these claims 8 to 12 of patent 757,853, they infringe all of them. The purpose of an electric switch is to make and break an electric current. When the current is broken, there is an electrical discharge through the air, the visible evidence of which is the electric spark. This sparking or arcing, as it is technically called, if uncontrolled may do damage. It is controlled by placing an electro-magnet close to the point at which the switch opens. Electricians call an electro-magnet, used for making harmless what would otherwise be a dangerous discharge, a blow-out device, because they say it blows out or disrupts the arc which is formed when the switch is open. There is no question that all this was known years before the date of the earlier of the patents in suit. When Mr. Whittingham designed the improvements in electric switches shown in the later of the patents in suit, it occurred to him that it would be a good thing to make the electro-magnet or blow-out device do double duty. In his scheme it not only does its own necessary work, but it forms an arm of the switch itself. He fitted it with a contact surface so that when it touched the other arm of the switch the circuit was closed. He thought so well of this idea that he made it an element of each one of the five claims of patent 757,853 now in suit. The record does not show what special advantage in practical use this arrangement has. Complainant says it has none. It claims that the defendants infringe, although in their

alleged infringing switch the blow-out device is not itself an arm of the switch nor has it a contact surface. The complainant says that the blow-out device serves the same purpose, neither more nor less, whether it has or has not the contract surface and whether it does or does not form an arm of the switch. Whether the complainant is or is not right seems to me immaterial. A blow-out device forming part of the switch and having a contact surface is an element of the combination in every one of the claims in suit. The law is well settled that every part of the combination claimed is conclusively presumed to be material to the combination. No evidence to the contrary is admissible in any case of alleged infringement. Walker on Patents, § 349; Hubbell v. U. S., 179 U. S. 82, 21 Sup. Ct. 24, 45 L. Ed. 95. It follows that the devices used by the defendants are not within any one of the claims 8 to 12, inclusive, of patent 757,853, and that consequently those claims are not infringed by the defendants.

Two questions are still to be answered. First. Do the defendants infringe either claim 1 or claim 8 of patent 716,504? Second. If, in point of fact, they do not infringe either of them, are they estopped to say they do not?

The patent in suit says that the invention relates to improvements in electric switches for reversing the current in electric motors. It declares that the invention is specially applicable for use in connection with electric elevators. It explains that one of its objects is to provide such an arrangement of parts that, when the connection with the supply circuit is broken at one side of the switch for the purpose of stopping or reversing the motor, the armature and field circuits will remain closed, and will not be opened except when the motor circuit contact blades are just about to enter the supply circuit terminals on the opposite side of the switch. This arrangement it is said affords the armature time to slow down and stop and exhaust its electro-magnetic current before the armature and field circuits are broken preparatory to the reversal of the current in the armature, thereby avoiding the destructive arcing of the terminal and contact blades which results when the armature and field circuits are broken while the armature is rotating. Certain other objects are specified, but they do not apparently relate to the particular claims in suit.

After the enumeration of the objects of the patent, the patentee proceeds to say:

"With these and other objects in view the invention consists in certain electrical and mechanical features of construction, arrangements and combinations of the parts hereinafter fully described and claimed."

The first claim in suit is as follows:

"In an electric-elevator system, the combination with a motor-supply circuit and contact blades and terminals for closing and opening the same, of an armature-circuit arranged to remain closed until after said contact-blades have been brought to and past the stop position."

In the defendants' devices which are alleged to infringe, the contact blades are never moved beyond the stop position. The complainant says that all the claim means is that the armature circuit shall remain

closed after in point of time the contact blades have been brought to the stop position, and that the claim does not require that after the contact blades have reached the stop position they shall actually keep moving in the same direction beyond that position. Should this claim be so understood? It is possible to put such a construction upon its words provided the Patent Office history of the patent is ignored. Even, then, the meaning which the complainant would give to the claim is not the obvious or more natural import of its language. But the Patent Office file wrapper has been put in evidence. It shows that the original application for this patent contained a claim numbered 2. This claim read:

"In an electric-elevator system, a motor-reversing switch, comprising supply-circuit terminals and contact-blades; armature-circuit-terminals; and armature-circuit contact-blades adapted to contact with said armature-circuit terminals and arranged to remain in contact therewith when the supply-circuit contact-blades have been moved to the stop position."

It was rejected by the Patent Office examiner. He said it was too broad in view of Cook, 597,265, January 11, 1897, Herdman, 603,849, May 10, 1898, and Shepard, 641,157, January 9, 1900. Each of these patents showed a switch in which the armature circuit remained closed when the supply circuit contact blades had been moved to the stop position. The patentee then canceled the original claim No. 2, and substituted therefor the following:

"The combination of a supply circuit; an armature circuit; a switch adapted to close and open said supply-circuit and reverse said armature-circuit, and arranged to leave said armature-circuit closed after opening the supply-circuit; a brake resistance circuit; and mechanical means arranged to automatically introduce said brake resistance circuit into the armature circuit after the supply circuit has been opened."

This amended claim was also rejected as fully anticipated by Shepard and Herdman.

The patentee then canceled the amended claim No. 2, and gave up the effort to get a claim which would cover a switch in which the supply circuit contact blades were not required to move past the stop position. In the defendant's devices alleged to infringe the supply circuit contact blades do not move past the stop position. It is true that the armature circuit remains closed until a period which in point of time is subsequent to the moment at which the contact blades of the supply circuit have moved to the stop position. But, in spite of this fact, I do not think that the complainant can now be heard to say that the first claim of the patent in suit is infringed by any device in which the contact blades do not move past the stop position. In so saying it is in effect asking that claim No. 1 shall now be given a meaning as broad as the original claim No. 2. This the law will not permit. A patentee who has originally sought broader claims which were rejected and who has acquiesced in such rejection cannot under the authorities be allowed to insist upon such a construction of the allowed claim as would cover what had been previously rejected. *Corbin Cabinet Lock Co. v. Eagle Lock Co.*, 150 U. S. 40, 14 Sup. Ct. 28, 37 L. Ed. 989; *Roemer v. Peddie*, 132

U. S. 317, 10 Sup. Ct. 98, 33 L. Ed. 382. I am therefore of opinion that the defendants do not infringe claim 1 of patent 716,504.

The complainant says that the defendants infringe the eighth claim of the same patent. This claim reads as follows:

"In an electric-switch system for reversing motors that employ series coils, the combination of a supply or line circuit; a switch mechanism adapted to open both sides of said line-circuit; and an armature-circuit-reversing switch arranged to be connected to the line-circuit switch by means of the series coils, whereby when the line-circuit is open, both sides of the motor-circuit, together with the series coils, are entirely disconnected from the line-circuit."

I do not understand that the defendants deny that the language of this claim is broad enough to cover some of the devices made by them if it be read without reference either to the prior art or to the particular structure described in the specifications of the patent in suit. They assert, however, that its language cannot be given a broad construction because, if it were so construed, the claim would be a claim for a mere function and therefore invalid. Second. That, if it be not for a function, it must be limited to the device or combination substantially described in the specifications. Third. That the defendants' devices admittedly differ in some respects from the device described in the patent. In order to determine whether those differences are substantial or merely colorable, it is necessary to examine the state of the prior art and the proceedings in the Patent Office with relation to this particular patent. The defendants say that, if such examination be made, it will show that the differences between defendants' devices and that described in the patent in suit are of such a nature that there is no infringement. It may well be that against other persons than the defendants this claim would be held void because so broadly worded as to amount to a claim for a function, or because, otherwise understood, it covers combinations already old at the time of the application for the patent in suit. The defendants, however, cannot make such a defense. As against them the claim must be conclusively presumed to be valid, and it must further be presumed to cover a construction which the patentee at the time he made the application for his patent supposed to be useful.

Does the estoppel against the defendants go still further? The complainant says it does. The words of the claim do describe switches which the defendants make. That being so, the complainant says it is the end of the case. For so saying the complainant has high authority. In *Siemens-Halske Electric Co. v. Duncan Electric Mfg. Co.*, 142 Fed. 157, 73 C. C. A. 375, Judge Baker delivered the unanimous opinion of the Circuit Court of Appeals for the Seventh Circuit, composed at the time of himself and Judges Grosscup and Seaman. In that case a vendor had been sued for the infringement of a patent sold by him. He contended that he was entitled to prove the prior art to limit the scope of the claims of that patent. He admitted that he could not show that either the patent or any of its claims were altogether invalid. Judge Baker said:

"Why one defense and not the other? They are of as like blood as brothers. One is somewhat larger than the other (sic) is all. Lack of novelty defeats the complainant's title to the whole of the property within the metes and

bounds of the claims. Limitation destroys his title to a part. * * * The grant to [the patentee] was the right to exclude the public from using the inventions described in the claims, subject to the right of the public to strike down, if they could, the claims in whole or in part. The defendants assert that all that the complainant acquired by the assignment was the franchise to exclude, which had been granted to [the patentee]. This may be taken as true so far as the rights of strangers are concerned. But [the patentee's] assignment, in fact and likewise by its very terms, was a conveyance, not only of the franchise to exclude strangers, but was also a conveyance of the inventions described in the claims. The right of [the patentee] to the inventions, if they were inventions, existed prior to, and continued independently of, the issuing of the patents. * * * If, in the face of his sale of the inventions described in the claims, as existent property into the possession of which he purported to induct his grantee, he be permitted to defeat his grantee's right of possession of the whole or a part on the strength of a prior title outstanding at the time of the grant, he would be put on the same footing as a stranger, and the estoppel by deed would again be reduced to nihility. * * * In our judgment the reason of the case leads to the conclusion that between contracting parties extraneous evidence is inadmissible if there is no ambiguity or uncertainty in the language of the description and claims, and that, if there is uncertainty, outside evidence is admissible only to make clear what the applicant meant to claim and the government to allow, and not for the purpose of showing, even in the slightest degree, that the applicant had no right to claim and that the government was improvident in allowing what was in fact claimed and allowed."

On the other hand, the defendants say that the true rule of law is that which has been laid down in a number of cases by the Circuit Court of Appeals for the Sixth Circuit. They rely particularly upon *Noonan v. Chester Park Athletic Club Company*, 99 Fed. 90, 39 C. C. A. 426. Judges Taft, Lurton, and Day sat in that case. One of them is now President of the United States and two of them are Justices of the Supreme Court. The opinion was delivered by the then Judge, now Mr. Justice, Lurton, who spoke for a unanimous court. He said:

"It seems to be well settled that the assignor of a patent is estopped from saying his patent is void for want of novelty or utility, or because anticipated by prior inventions. But this estoppel, for manifest reasons, does not prevent him from denying infringement. To determine such an issue, it is admissible to show the state of the art involved, that the court may see what the thing was which was assigned, and thus determine the primary or secondary character of the patent assigned, and the extent to which the doctrine of equivalents may be invoked against an infringer. The court will not assume against an assignor, and in favor of his assignee, anything more than that the invention presented a sufficient degree of utility and novelty to justify the issuance of the patent assigned, and will apply to the patent the same rule of construction, with this limitation, which would be applicable between the patentee and a stranger."

The case of *Noonan v. Chester Park Athletic Club Co.* was decided some years before the *Siemens-Halske Case*. It was considered by the Circuit Court of Appeals for the Seventh Circuit in the latter case, but the judges who composed that court found themselves unable to adopt its reasoning. Nevertheless, when the question was again re-examined by the Circuit Court of Appeals for the Sixth Circuit several years after the decision in *Siemens-Halske Case*, the court for the Sixth Circuit adhered to its former ruling. Again, it spoke through the mouth of Judge Lurton. *Babcock & Wilcox Co. v. Toledo Boiler Works*, 170 Fed. 85, 95 C. C. A. 363. Before

any of the decisions above referred to the Circuit Court of Appeals for the First Circuit had taken the position subsequently adopted in the Sixth Circuit. *Martin & Hill Cash Carrier Co. v. Martin*, 67 Fed. 786, 14 C. C. A. 642. I do not find that the question has ever been passed upon by the Circuit Court of Appeals for this circuit.

There is nothing mysterious about the doctrine of estoppel. A man is estopped because in equity and good conscience he should not be allowed to say something, although that something may be true. Whether equity and good conscience require that he shall keep his mouth closed may and usually does in large part depend upon the special facts and circumstances. One who knew well the state of the art might sell a patent to one who knew nothing about it. In order to make the sale, he might read the claims to the buyer. He might comment on the breadth of their language. He might assert that he knew that they covered every possible machine by which the wished for result could be attained. Such a seller, I take it, when sued for the infringement of a patent he had sold, would not be permitted to set up the prior art for the purpose of showing that the patent was in fact a very narrow one; that it covered a limited class of machines only and that there were large classes of machines not covered by the patent which would accomplish substantially the same results. The circumstances under which a patent may be assigned may be quite different. An inventor may be in the employ of another. He may turn over his inventions to his employer. The employer may at his own expense prosecute applications for patents for such of these inventions as it may think valuable. When such employé subsequently changes his employment, there seems to be no reason why he should be any more estopped than any one else from showing that the patent he assigned, though valid, must be narrowly construed. The complainant says that there are special facts and circumstances in this case which should estop the defendants from limiting the claims sued on. The special facts and circumstances so alleged are two.

First. The making of the agreement of September 5, 1888, by which the defendant Whittingham agreed to assign to the Automatic Switch Company of Baltimore City all future inventions which he might make or which he might become interested in relating to electric switches. The present complainant is not the company with which Whittingham made the agreement of September, 1888. It is a new corporation to which has been assigned the property and rights of the company with which Whittingham made his agreement. It is unnecessary to inquire whether such a contract could be assigned without Whittingham's consent so as to bind him to the new company. This is not a suit for the specific performance of that contract. The agreement is brought into this case by Darrin's testimony that before he bought the stock in the Automatic Switch Company of Baltimore City Whittingham showed him the agreement of September, 1888, and that the existence of this agreement was one of the inducements which led him to buy that stock.

If I were satisfied that this conversation or anything like it had in fact taken place, I might feel that Whittingham ought to be subject to

the rule of law laid down in *Siemens-Halske Electric Co. v. Duncan Electric Mfg. Co.*, 142 Fed. 157, 73 C. C. A. 375, whatever might be my views as to the applicability of that doctrine to cases in which the vendor had made no representations other than those necessarily involved in the assignment of his patent. No one has testified with reference to this agreement except Darrin and Whittingham. Whittingham denies that any such conversation was had. He says that from the time the agreement was executed in September, 1888, he never heard of it or saw it until it was produced in evidence in this case. The burden of showing that such a conversation took place is on the complainant. Darrin admits that he felt justified in seeking to attach money he agreed to pay Whittingham for his stock, although one of the terms of the agreement of purchase was that all suits he had brought against Whittingham should be dismissed. It further appears in the record that Darrin, after having sworn that the reason the business of the Automatic Switch Company was not profitable was due to Whittingham, was compelled to admit that he had in other litigation between himself and his wife sworn that it was his wife's demands for money that had brought himself and his company to the verge of bankruptcy, and that to supply her demands he had borrowed large sums of money from the Automatic Switch Company.

In view of these admissions, I do not feel justified in basing any decision upon his uncorroborated statement of representations made to him when the fact that such representations were so made is denied by the party alleged to have made them.

Second. Certain bulletins issued by the Automatic Switch Company of Baltimore City during the time Whittingham was connected with that company have been offered in evidence by the complainant. It is said, and not denied, that Whittingham assisted in their preparation. I cannot, however, find anything in those bulletins which make more rigid the estoppel to which the defendants should be subject in this case. I am therefore of the opinion that it is open to the defendants to assert that claim 8, being functional in form, must in any event be limited to the construction substantially identical with that shown in the patent in suit, and that, in order to determine whether the difference between the devices made by the defendants and the construction shown in the patent are substantial or colorable, resort may be had to evidence of the state of the prior art.

The complainant apparently admits that claim 8 must be limited to the particular construction shown in the patent in suit or to some construction substantially identical therewith. In its brief filed in this cause it discusses claims 1 and 8 together, and assumes that 8 is not infringed unless 1 is. I believe that such construction is the proper one to place upon this claim. This is especially true in view of the statement of the patent itself that the invention consists in certain electrical and mechanical features of construction, arrangements, and combinations of the parts in the patent fully described and claimed. If this view be correct, the conclusion already reached that claim 1 is not infringed disposes of the contention that claim 8 is. In any event, claim 8 must be construed as limited by the prior state

of the art. So limited, it appears to me that the difference between the construction described in the patent and the devices made by the defendants are so substantial as to exempt the latter from the charge of infringement.

I will therefore sign a decree dissolving the preliminary injunction and dismissing the bill of complaint, with costs.

FOSTER HOSE SUPPORTER CO. v. TAYLOR.

(Circuit Court, D. Connecticut. June 29, 1910.)

No. 1,243.

1. PATENTS (§ 214*)—LICENSE—CANCELLATION—ROYALTY—DELAY IN PAYMENT—WAIVER.

Where complainant licensed defendant to manufacture under a patent, before the patent had been established by adjudication, by a contract authorizing forfeiture in case of nonpayment of royalties when due, and on May 9, 1907, immediately after the validity of the patent had been established, gave a notice of cancellation for the licensee's alleged default in the payment of royalties, but on the 13th following accepted full payment for all royalty accrued on the day following the notice, he waived his right to enforce a forfeiture.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 214.*]

2. PATENTS (§ 214*)—LICENSES—FORFEITURE—NOTICE.

A provision, in a license to manufacture under a patent, that in case of a failure to pay royalties as agreed the licensor by a written notice may terminate the contract, is unavailable in case of default to enable the licensor to declare and enforce a forfeiture without resort to a court of equity.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 322; Dec. Dig. § 214.*]

In Equity. Suit by the Foster Hose Supporter Company against Thomas P. Taylor. Bill dismissed.

J. J. Kennedy, for complainant.

Morris W. Seymour, David S. Day, and Arthur L. Shipman, for defendant.

PLATT, District Judge. There is one definite distinction between this suit and the usual bill in equity, alleging infringement of a patent and asking for an injunction and accounting, which will be noted as briefly as possible:

In paragraph 8 it is alleged in substance that the defendant had prior to May 9, 1907, long been operating under the patent as a licensee, and that on said May 9, 1907, the license was "duly canceled and terminated," and at the same time defendant was warned not to make or sell any more of the patented hose supporters, under penalty of being sued as an infringer.

It will be noticed that there is no direct statement in the bill that complainant had prior thereto terminated the license in accordance with the terms of the license contract. The defendant in his answer

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

flatly denies the allegations of paragraph 8 and sets forth in extenso a variety of facts which he asserts go to show that the license was not "duly canceled and terminated." The complainant traverses the material allegations of the answer by replication.

The question of where the burden of proof rests seems immaterial, because the important facts are conceded by both parties and may be summarized as follows:

The defendant entered into the license contract before the validity of the patent had been established by adjudication.

In its earlier life the patent had a checkered career. The managing spirit of the present suit was at one time a vigorous and persistent infringer. By using an innocent looking device, viz., the silk loop license, matters were so arranged between complainant and defendant that in fact the defendant's actual outlay for royalties was just one-half what other licensees paid.

On May 7, 1907, the patent in suit was declared valid by court decree, and complainant at once took advantage of the fact that the defendant had delayed his reports on royalties and his payments therefor in the preceding months beyond the dates fixed by the contract. He at once acted under the strict letter of the contract, and, so far as it was in his power to do so, terminated the license contract. The only ground he had to go upon was the delay in reports and payments, and there had been during the prior life of the contract numerous instances of delays of more or less extended duration for which the complainant had never attempted to exercise his claimed right to terminate the contract. The defendant was not in the slightest degree acting in opposition to or derogation of the rights of the owner. He had been careless, as he had been many times before; but on this occasion the complainant pounced upon his negligence as a means to work out a serious injustice to the defendant.

The complainant insists that the motives which influenced him are immaterial, and argues that, no matter how inequitable his action may have been, the license must be treated as having been terminated prior to the filing of the bill, because he was acting strictly within his legal rights and in compliance with the very letter of the contract into which the parties had entered with wide open eyes.

Before looking into the general situation, let me say in passing that, if there were no other way to do equal and exact justice to the parties, it does not seem strained or unreasonable to say to the complainant: You have endeavored to make use of the defendant's failure to pay on time and to exact your pound of flesh, but in view of the fact that after trying to do so, on May 9th, you accepted from him on May 13th full payment for every dollar of royalty due on the preceding 10th, and also that which came due on the day following your notice, you have waived the right to carry your notice into full and final effect, and your relations with the defendant have continued to be those of licensor and licensee.

Having stated this in passing, we will look at the general contention.

The controlling question in the case, which must be answered affirmatively to entitle the complainant to any standing, is whether or not

the written notice above referred to, sent by complainant to defendant, acted as a positive and absolute ending of all contractual relations between complainant and defendant, thereby making it impossible for the court to right the wrong, or to eliminate the wrong attempted.

The complainant insists upon a favorable answer and cites in support of his contention *Hammacher v. Wilson* (C. C.) 26 Fed. 239, and *Platt v. Fire Ex. Co.*, 59 Fed. 897, 8 C. C. A. 357. The latter decision was founded upon the former, and that in turn harked back to *White v. Lee* (C. C.) 3 Fed. 222.

It is a positive shock to my judicial sense as a chancellor to be asked to agree that parties by contract can ride over the judicial power by a bargain of their own in regard to so serious a matter as the one here presented. It would seem that as a matter of public policy courts of equity ought, either by positive or negative action, to relieve persons from the consequences of such an improvident bargain. The case before us portrays one of the kinds of forfeiture which equity ought to and does abhor. It should relieve, if asked to do so, and in such a case as this ought not, by its passivity, to lend its aid to enable the unconscionable one to reap the fruits of his bargaining.

So feeling, I am compelled to examine the authorities which are said to support the doctrine with unusual care.

Hammacher v. Wilson was the usual equity suit, based on a patent, and asking for an injunction and accounting. The respondent pleaded a license. Complainant replied that the license had been revoked and canceled in accordance with its terms, before the bill was brought. This raised a distinct issue, which upon facts found the court decided against the respondent, and thereupon, the sea being smooth and the sailing good, found the patent valid and infringed and ordered the injunction and accounting.

If the complainant in the present suit had brought in his bill, saying nothing about the license, and defendant had justified under it, and complainant had replied that it had been terminated by complainant pursuant to its provisions, prior to the suit, for reasons which would commend themselves to a court of equity, we should have substantially the same case. It may have some bearing upon this case, but, in view of the way the matter came up, cannot be called decisive. Further than that, I do not think it can be said to have been warranted by Judge Lowell's decision in *White v. Lee* (C. C.) 3 Fed. 222.

It is clear that the case before Judge Lowell was not in the least like the case before Judges Carpenter and Colt, and it strikes me that the latter judges, in order that *White v. Lee* might be used to unlock their problem, were forced to stretch almost to the breaking point some thoughts which, perhaps accidentally and certainly incidentally, slipped from Judge Lowell's pen as he wrote on a totally different set of facts.

In *Platt v. Fire Ex. Co.*, the big and only problem here was purely an incident.

Both cases were justly decided, and the equities sustaining them are apparent.

There are numerous decisions which hold that when a license contract contains provisions for reports and payments of royalties at speci-

fied times, and that failure to so report and pay shall work a forfeiture of the license and render the contract null and void, the licensor must seek the aid of the court before he can consider his contract relations with the licensee at an end. I cannot understand how the parties by stating specifically that, in the event of failure to pay, the licensor by written notice may terminate the contract, can take their case out of the hands of a court of equity. If they intended to do so, they were trying to usurp the functions of the court, and, if they did not intend to do so, they have left their contract right in line with the mass of decisions referred to.

If affirmative relief against the forfeiture were asked on the facts presented, it would be granted without question. With the same facts staring the court in the face upon the pleadings, it is my positive duty to find that the bill is without equity and should therefore be dismissed. It is so ordered.

NEENAN v. OTIS ELEVATOR CO.

(Circuit Court, S. D. New York. June 2, 1910.)

1. PATENTS (§ 218*)—CONTRACT OF ASSIGNMENT—CONSTRUCTION—GUARANTY OF ROYALTIES.

In a contract for the assignment of patents relating to elevators in which the assignee agreed to pay a royalty on each of the elevators it constructed, a provision that, beginning on a specified date, the assignee "shall guarantee that the royalty upon elevators erected and constructed by it * * * shall amount to not less than three thousand dollars," did not obligate the assignee to construct elevators each year the royalty on which should amount to \$3,000, but was no more than an agreement to pay that amount if the royalties on the elevators constructed amounted to less.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 218.*]

2. PATENTS (§ 202*)—CONTRACT OF ASSIGNMENT—CONSTRUCTION.

A provision in a contract by which complainant agreed to assign certain patents relating to elevators to defendant that defendant should test the patented apparatus with reasonable diligence, "and, if such test results satisfactorily, within such further reasonable time as is convenient to put such apparatus into practical use," bound the defendant absolutely, having accepted the test as satisfactory, to put the apparatus into some practical use within a reasonable time thereafter, and impliedly to put in all the patented elevators it reasonably could with due regard to its business interests.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 202.*]

3. PATENTS (§ 203*)—CONTRACT OF ASSIGNMENT—RESCISSION.

Under such contract, which provided for the payment of royalties to the assignor a breach of the absolute undertaking to put the apparatus to some practical use, which would have been satisfied by any use, however small, is not ground for rescission of the contract, since such requirement does not go to the whole consideration, but, to entitle the assignor to a rescission in equity, he must show that the implied and substantial part of the stipulation has been violated, and that the assignee has failed to exert itself in good faith to install the patented apparatus whenever in reason it was feasible in view of its business and opportunities.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 203.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by Michael C. Neenan against the Otis Elevator Company. Decision for the defendant, but decree held in abeyance.

This is a bill in equity to compel the defendant to reassign to the complainant certain patents conveyed by him to it on the 24th day of May, 1904. The case turns, almost wholly upon the construction of the contract, which provided, in substance, as follows: First, second, third, and fourth, that the complainant for \$500 should assign to the defendant two existing patents and one patent then applied for, and granted on February 9, 1909; fifth, that on the 1st day of July, 1904, the defendant should pay a further sum of \$500, and upon the issue of the entire patent \$1,000; sixth, that the defendant should likewise pay a specified royalty upon every elevator embodying any of the patents referred to with certain specifications as to the amount of royalties; seventh, that the defendant should further, "if it elects to continue to manufacture the elevators," pay to the complainant \$8,000 within three years from the date of the agreement; eighth, that defendant might at any time cancel the agreement by returning the patents; ninth, that beginning with January 1, 1907, the defendant "shall guarantee that the royalty upon elevators erected and constructed by it * * * shall amount to not less than three thousand dollars;" tenth, that the defendant would test the apparatus with reasonable diligence, "and, if such test results satisfactorily, within such further reasonable time as is convenient to put such apparatus into practical use."

The complainant has assigned all his patents to the defendant, and the defendant has paid the complainant \$500 on the completion of the contract, \$500 on July 1, 1904, \$1,000 subsequently, which was the sum due him upon the issuance of the patent, \$8,000 on April 11, 1907, \$3,000 on January 1, 1907, and the same amount on January 1, 1908. It likewise tendered the sum of \$3,000 on January 1, 1909, but that the complainant refused. The defendant in February or March, 1906, tested the patented apparatus in a testing tower which is a part of its factory at Yonkers, N. Y., and found it to be satisfactory. Subsequently it paid to the complainant, as above stated, the \$3,000 provided in the contract; but it has not put any elevator manufactured under the apparatus into practical use since the contract was made.

The complainant specifies four instances in which the defendant could have put the apparatus into practical use, and which he says it refused to accept. These four are as follows: The Beaver Building, the Metropolitan Tower, the Ritz-Carleton Hotel, and the Park Row Building. In each of these cases the complainant urged the defendant to put in the elevator, but the defendant declined to do so. The first building was the Beaver Building, in April, 1906, at which time the complainant had an interview with Mr. John, one of defendant's engineers, and they went over the Beaver Building together. Both agreed that the change could be made, but the complainant says they agreed it could be readily made, and John says that the work would have had to be rebuilt and would have entailed considerable expense for rebuilding, including the overhead work, the ropes, and the system of counter-balances. There had been a defect in the elevator in the Beaver Building which was improved at less expense without the installation of a new elevator. The next building was the tower of the Metropolitan Life Insurance Company in 1907. The complainant procured of the architect a request for specifications for the use of the elevator for that tower, and on February 1, 1907, one Brown, consulting engineer of the defendant, wrote an unfavorable opinion of the complainant's patent for use in the building in question, referring to it as "an untried and experimental device," and as a "theoretical and erroneous, untried safety device." He was asked for his opinion in this matter not as defendant's engineer, but as an expert. Upon this opinion apparently the architects in charge of the tower declined to install the elevators. The next building was the Ritz-Carleton Hotel. The defendant refuses to submit a proposal or consider putting in the complainant's elevator, giving as a reason that it was unwilling to install a new type of elevator in so important a building, containing as it did 18 or 20 elevators. This matter of the Ritz-Carleton Hotel came up in October, 1908. Toward the end of that year the defendant offered to install at a value below cost the elevator in the Park Row Building. Only one elevator was to be installed in that place and nego-

tiations were pending, but while they remained undecided the complainant returned the guaranty check and demanded back the patents assigned, after which the negotiations were dropped by the defendant. On January 12, 1909, the complainant sent the letter returning the check of \$3,000 and redemanding his patents assigned under the contract.

Harry E. Knight and Martin A. Ryan, for complainant.
Ewing & Ewing, for defendant.

HAND, District Judge (after stating the facts as above). The complainant's contention that the defendant has canceled the agreement under the right reserved in the eighth paragraph is certainly unfounded, and may be dismissed without serious consideration. This leaves as unperformed by the defendant the provision of the ninth and tenth paragraphs, and to determine whether it is in default on those paragraphs their meaning first must be determined. The ninth paragraph does not mean, as the complainant insists, that the defendant shall construct elevators each year whose royalty shall amount to \$3,000. The guaranty is no more than a promise that in any case the complainant shall receive \$3,000. I do not, of course, mean that the complainant has no independent interest in the erection of elevators, or that the defendant could monopolize his patent, and refuse to exploit it mala fide. That situation is covered by the tenth paragraph; but under the ninth the defendant only agrees that, in case its bona fide efforts to exploit the invention shall not result in royalties equal to \$3,000, it will nevertheless pay that amount, and so insure the complainant of a certain minimum of royalties regardless of the success of his invention. This meaning is the usual one attached to the word "guarantee," a word commonly used to cover the default of another upon his own obligation. It should not usually be interpreted as an undertaking by the guarantor to perform the obligation itself. While in this contract the performance guaranteed consisted of certain acts of the guarantor itself, still, if the obligation extended to the performance of those acts, it should have been so written. To omit a direct obligation and to substitute an agreement of guaranty indicated an intention, not to promise to perform the acts guaranteed, but to make a payment in case they were not performed.

There remains, therefore, the question of the tenth paragraph. I agree with the complainant's construction that, if the test was made and proved satisfactory, the defendant by this stipulation agreed actually to put the apparatus into practical use, and that it would be none the less in default on its part if it failed to do so, even though it had done its best to install the invention. The condition of the test could only have been to ascertain in advance whether the apparatus could be used practically, and, as it proved satisfactory and the defendant had signified its election "to continue to manufacture the elevators" by the payment of \$8,000 as was provided in the seventh paragraph, it was certainly too late thereafter to say that it could not find a place for the apparatus. This stipulation in the tenth paragraph is, however, limited by very vague terms as to the time within which performance must be made; and, besides, the degree of performance is also left undetermined. The words are "within such further reasonable time as is

convenient to put said apparatus into practical use." The phrase "within such further reasonable time as is convenient" does not, of course, extend the time during the whole length of the patent. To adopt such a construction would be to deprive the covenant of any meaning. I think there would be no question of this if the words "as is convenient" were omitted; and I do not regard them as contributing any definite extension of the time. Indeed, I can see very little that they add to the words "within such reasonable time." They can hardly be held to signify more than that defendant should not disarrange its ordinary business for the purpose of putting in the complainant's elevators.

Therefore, the tenth paragraph appears to me to bind the defendant to find a place within which it can put the apparatus into practical use within a reasonable time, and the four years which have elapsed since the test proved the apparatus satisfactory is a reasonable time. I must conclude, therefore, that the defendant is in default upon the contract. Before accepting the apparatus, it should have ascertained whether its business opportunities justified it in assuming that it could find a place to install the apparatus, for, although it may honestly and bona fide at the present time find that it was mistaken in its judgment or in the value of the apparatus, that is a mistake the responsibility of which it must bear. In short, I cannot interpret the stipulation as no more than a promise to use the apparatus, if in any case it might from time to time find it useful. But, although this construction puts the defendant in default, it by no means justifies the relief in equity which the complainant demands. As I have already said, the stipulation in no way indicates the number of elevators which the defendant should install, and that omission, indeed, was probably necessary from the nature of the business. Therefore the default in question would have been answered by the installation of a few elevators, because although the defendant promised absolutely to put in some elevators, and impliedly promised to put in all that it reasonably could with due regard to its business interests, still, if it had put in two or three, it would not have been in default upon the absolute part of its covenant, and to show a default upon the implied part the complainant must show that it has unreasonably or in bad faith refused to put in others. In other words, although its obligation was absolute to put the apparatus into some practical use within a reasonable time, the degree of such use necessarily depended upon the opportunities of the defendant's business. Now, in so far as concerns the breach of what I have called the absolute part of the defendant's obligation—that is, the requirement to put the apparatus to some practical use—it is not enough to base a rescission upon. That part of the covenant certainly does not go to the whole consideration as it must if rescission is to be granted. *Kauffman v. Raeder*, 108 Fed. 171, 52 C. C. A. 126; *Howe v. Howe & Owen Ball Bearing Co.*, 154 Fed. 820, 83 C. C. A. 536. It is no doubt true that it is impossible to assess the damages upon that breach, but if I am right in construing the absolute undertaking to be wholly indefinite in degree, and if it would be satisfied by any small performance, obviously it was very far from going to the whole consideration, and the impossibility of assessing damages will not be enough.

To succeed, therefore, the complainant must show that the implied and substantial part of the stipulation has been violated, and that the defendant has failed to exert itself in good faith to install his apparatus wherever in reason it was feasible. That covenant was the real inducement for the assignment of his patents, and it was from the royalties so arising that he was to be paid. In proof of such a default he instances the four buildings which have been mentioned in the statement of facts. There seem to have been good reasons in each case why the defendant should not have put in the complainant's elevators. In the case of the Ritz-Carleton Hotel, I do not think the defendant need have put in 18 or 20 elevators of a type which it had only tested in its factory. As I have said, that test in my judgment bound it to try the elevators practically, but it is one thing to make practical use and another to put in upon one contract a great bank of so many. In the case of the Metropolitan Tower, it cannot be said that Brown's letter which controlled the architect was the act of the defendant at all, and, even if it were, there were obviously good reasons which justified the defendant declining on such an extraordinary building to put in a device necessarily as yet somewhat experimental. In the case of the Beaver Building the needs of the customer were supplied at less expense, and certainly the defendant was required to do the work as economically as it reasonably could. There remains, therefore, the Park Row Building, and the complainant does not contradict the fact that the negotiations were still pending when he attempted to rescind the contract. This absolves the defendant.

Upon the proofs, therefore, I do not think that the complainant has yet shown any such default as would justify his rescission. In saying this I am aware of the difficulties under which the complainant labors, which may be such as prevent him from obtaining justice even when the defendant is in fact doing him injustice. Those difficulties are, however, inherent in the position in which he has placed himself in giving over his patents to the defendant upon an undertaking which did not define the amount of "practical use," to which they must be put. In so doing he necessarily put himself in their control, and he cannot retreat from the position without some affirmative proof that they have abused that control. The degree to which they could in fact exploit his invention depends upon their business opportunities for its use, and, until he can show that they have failed substantially to avail themselves of some such opportunities, his difficulties necessarily arise from the fact that he has chosen unwisely. Therefore I shall be obliged to dismiss this bill.

However, in view of the fact that in my judgment the defendant is in actual, although not serious default, and in view of the fact that a decree speaks from the time when it is filed, if the complainant so wishes, I will enter no decree but hold the suit open, and he may, if so advised, present further proofs at any time upon application to the court, which will show that the defendant's default is such as goes to the substance of the contract. Moreover, if the complainant sees fit to accept a dismissal, I will impose costs on the defendant.

MARVEL BUCKLE CO. et al. v. ALMA MFG. CO. et al.

(Circuit Court, D. Maryland. June 27, 1910.)

1. PATENTS (§ 141*)—REISSUE—IDENTITY OF INVENTION.

A patentee is not entitled to claim in a reissue a feature of the device not claimed in the original patent as a part of his invention, although it was incidentally shown or indicated in the drawings.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 206-213; Dec. Dig. § 141.*]

2. PATENTS (§ 328*)—VALIDITY OF REISSUE—BUCKLE.

The Barabasz reissue patent, No. 12,855 (original No. 877,035), for a single piece sheet metal buckle, is void; the claims being for a different invention from that claimed in the original patent.

In Equity. Suit by the Marvel Buckle Company and M. Barabasz against the Alma Manufacturing Company, H. Kerngood, president, I. Blum, vice president, M. Hecht, of J., secretary, and S. B. Sonneborn, treasurer. Decree for defendants.

Morris A. Soper and A. V. Cushman, for complainants.

Sylvan Hayes Lauchheimer, Livingston Gifford, and Charles F. Jones, for defendants.

ROSE, District Judge. The individual complainant is the inventor to whom reissued letters patent 12,855 were granted September 22, 1908. He still owns them. The Marvel Buckle Company is a corporation. It holds an exclusive license under such patent. The bill says that the defendants infringe its second, fifth, and sixth claims. A number of defenses were set up. The original patent, 877,035, dated January 21, 1908, and its reissue in suit, are each for an improvement in single piece sheet metal buckles.

The respondents have put in evidence 53 prior patents. Forty-nine of these relate to single piece buckles. Numerous witnesses have told about buckles made and used before the application for the original of the patent in suit. Many specimens of such buckles have been filed as exhibits. The respondents say that, in view of the prior state of the art thus shown, there was no invention in anything which Mr. Barabasz claims to have done. They assert that all the new things in his buckles are both obvious and trivial. It is agreed that at the time of his application the buckle art was already overcrowded. I am inclined to believe that Mr. Barabasz's changes and adaptations are not inventions. It is, however, not necessary so to decide, nor indeed to consider, more than one of the defenses relied on.

The invention set forth in the claims in suit, if it be an invention at all, is in my opinion a different invention from that of the original patent. If I am right, the bill must be dismissed. I shall briefly state the reasons which lead me to this conclusion. In the original patent Mr. Barabasz stated that he had invented two things—a peculiarly shaped buckle tooth for the purpose of lessening the wear on the strap used with the buckle; second, a depressed crossbar in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the buckle, the object of which was to prevent a hump in the strap when passed through the buckle. The patent gives no hint that the inventor had anything else in mind. Such a shaped tooth was not new. A depressed crossbar was not new. It is admitted that the respondents never have used the peculiar Barabasz tooth. Indeed, the inventor and his licensee do not appear themselves ever to have used it in the buckles made by them for sale. They certainly no longer use it. Some of the defendants' buckles which the complainants say infringe have neither the peculiar tooth nor the depressed crossbar. In those buckles the teeth still tear the strap. The strap still forms a hump.

The complainants say that such buckles infringe their rights because the real invention is to be found neither in the tooth nor in the bar, but in something else and different. In their brief they assert that Mr. Barabasz had been trying for years to produce a buckle which could be blanked and formed from sheet metal in a single piece, and of such construction that the buckle would "stand the work of finishing in manufacture (tumbling in a rumble); and, second, the action of the power pressing iron such as is used by wholesale clothing manufacturers, without such percentage of breakage as would render their manufacture and use an uncertain commercial venture." Mr. Barabasz, who is a priest of the Roman Catholic Church and the rector of the Church of the Holy Rosary in Baltimore City, has for years, it is true, been working on buckles. The original of the patent in suit is the fifth buckle patent which has been granted him. In not one of the five is there a hint or suggestion that he was seeking a buckle that would withstand the rough usage of the rumble and the pressing iron. This purpose first appears in the application for the reissued patent in suit. Mr. Barabasz then, and not until then, told the Patent Office that a material part of his original invention was a discovery that a buckle could be made in which the tooth and crossbar or bars were all housed within the ends and side bars and within the inturned flanges of such ends and side bars. It is true that in the buckle shown in the drawings of the original patent the teeth and crossbar were housed within the end and side bars and their inturned flanges, but, so far as the patent shows, no importance was attached by the inventor to that detail of the construction. In the reissued patent this feature is made an element of each of the three claims in suit.

Before the application for the reissue, the respondents had put on the market buckles which were very similar to the buckles shown in the original Barabasz patent 877,035, except that none of these buckles had the peculiarly shaped teeth of that patent. Respondents called one of these buckles the "Wonder." As always in this class of cases, they assert that the name was chosen without thought that it was a synonym for "Marvel." Quite as naturally the complainants believed and believe that the name was selected with that thought and none other. For the purposes of this case it may be assumed that the complainants are right in this matter. It does not follow that a reissued patent can be sustained merely because the alleged infringers have done things inconsistent with the maintenance of a

highly ethical standard of conduct. If the fact be that much they have done is open to criticism in a forum of morals, this case in that, as in other respects, much resembles *Parker & Whipple Co. v. Yale Clock Co.*, 123 U. S. 87, 8 Sup. Ct. 38, 31 L. Ed. 100. There, as here, the drawings of the original patent showed the feature upon which were based the new claims first appearing in the reissued patent. There the infringer was the very corporation which had been employed by the owner of the original patent to manufacture the patented clocks. No alleged infringer could well have put itself in a position less likely to appeal to the sympathies of the court. It was, however, held:

"That what was suggested or indicated in the original specifications, drawing, or Patent Office model is not to be considered as a part of the invention intended to have been covered by the original patent unless it can be seen from a comparison of the two patents that the invention which the original patent was intended to cover embraced the things thus suggested or indicated in the original specifications, drawings, or Patent Office model, and unless the original specifications indicated that those things were embraced in the invention intended to have been secured by the original patent."

That case is decisive of this. The subsequent case of *Topliff v. Topliff*, 145 U. S. 170, 12 Sup. Ct. 825, 36 L. Ed. 658, quite as distinctly declares that a reissue must be for the same invention as the original patent, as such invention appears from the specifications and claims of such original.

In this case each of the three claims in suit contain an element which from the specifications and claims of the original patent cannot be said to have formed a part of the invention there described and claimed.

I will sign a decree dismissing the bill of complaint.

CHADELOID CHEMICAL CO. v. DAXE VARNISH CO. et al.

(Circuit Court, E. D. New York. August 2, 1910.)

PATENTS (§ 328*)—INFRINGEMENT.

A preliminary injunction granted against infringement of the Ellis patent, No. 714,880, for paint remover.

In Equity. Suit by the Chadeloid Chemical Company against the Daxe Varnish Company and Mayer Daxe, alias Mayer Goldstein. On motion for preliminary injunction. Motion granted.

Duncan & Duncan (Harry L. Duncan, of counsel), for complainant.
Herman R. Elias, for defendants.

CHATFIELD, District Judge. I see no reason why an injunction should not issue. The Ellis patent has been frequently adjudicated valid in terms broad enough to cover the defendants' composition and process. Infringement seems to be clear, and the only defenses are prior use (which is not satisfactorily shown) and a slightly different composition, procured by the use of petroleum jelly and kerosene.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

These latter ingredients are within the general terms of the Ellis claims as previously held valid, and also within the specified materials of the Ellis patent. The Daxe patent, No. 948,814, of February 8, 1910, seems to have been granted for the particular formula used with petroleum jelly and kerosene in exact quantities or proportions. The kerosene is claimed to be an additional or new element over the Ellis formula, but is in such slight proportion and so plainly indicated in the composition of the Ellis patent as to make no new product, but merely an equivalent variation of the complainant's preparation.

The injunction pendente lite may be issued.

UNITED STATES v. BUTLER BROS.

(Circuit Court, N. D. Illinois. May 27, 1910.)

No. 29,587 (2,080).

CUSTOMS DUTIES (§ 37*)—CLASSIFICATION—"DOLLS"—BATH BABIES—POSITION BABIES.

Bath babies and position babies are "dolls," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 418, 30 Stat. 191 (U. S. Comp. St. 1901, p. 1674), and are dutiable as such, rather than as china toys, under Schedule B, par. 95, 30 Stat. 156 (U. S. Comp. St. 1901, p. 1633).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 37.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The Board of General Appraisers in the decision below sustained the importers' protests against the assessment of duty by the collector of customs at the port of Chicago. The assessment was under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 95, while the importers contended for classification under Schedule N, par. 418, the pertinent provisions of which read as follows:

"95. China * * * ware, including * * * toys * * * decorated or ornamented in any manner."

"418. Dolls, doll heads, toy marbles of whatever materials composed, and all other toys not composed of * * * china, * * * not specially provided for in this act."

The opinion filed by the Board of General Appraisers reads in part as follows:

"HAY, General Appraiser. The appraiser returned the merchandise in question as 'position babies' and 'bath babies.' * * * The samples in the case at bar make it perfectly clear that the merchandise in question must be classified as dolls, to come under the toy paragraph, as they are composed of china or bisque, and toys composed of these materials are expressly excepted from the operation of that paragraph. From the testimony in the case, however, and an examination of the samples, we are convinced that the merchandise in question falls within the definition of the word 'dolls.' In the Century Dictionary it is said that a doll is a 'puppet representing a child, usually a little girl (but also sometimes a boy or a man, as a soldier, etc.), used as a toy by children, especially by girls.' The articles in question, we think, respond to this definition, and the testimony in the case at bar reinforces this conclusion.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The protests are therefore sustained and the collector directed to reliquidate the entries accordingly."

Edwin W. Sims, U. S. Atty., and D. Frank Lloyd, Asst. U. S. Atty. Gen. (William A. Robertson, Special Atty., of counsel), for the United States.

Lester C. Childs, for importers.

CARPENTER, District Judge. Decision affirmed.

UNITED STATES ex rel. FRIEDMAN et al. v. UNITED STATES EXPRESS CO.

(District Court, W. D. Arkansas, Ft. Smith Division. July 13, 1910.)

1. MANDAMUS (§ 133*)—INTERSTATE COMMERCE—EXPRESS COMPANIES—TRANSPORTATION OF INTOXICATING LIQUORS.

Interstate Commerce Act Feb. 4, 1887, c. 104, § 3 (24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]), makes it unlawful for any common carrier subject to the act to make or give any undue or unreasonable preference or advantage to any particular person or locality or description of traffic, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice in any respect whatsoever. *Held* that, where an express company doing interstate business refused shipment of intoxicating liquors offered by petitioners in Arkansas for transportation to purchasers in that portion of Oklahoma formerly called the Indian Territory, petitioners were entitled under such section to mandamus to compel the express company to transport and deliver such liquor as an article of commerce not prohibited by law from being introduced into that part of Oklahoma to which it was consigned.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 268; Dec. Dig. § 133.*]

2. STATES (§ 9*)—ADMISSION INTO UNION—EFFECT.

Since Congress has no power to admit a state into the Union except on an equal footing with the original states in accordance with the rights, powers, and duties defined by the Constitution, the admission of Oklahoma fixed her status and that of her people as that acquired by the other states of the federal Union, under the Constitution, anything in the enabling act (Act June 16, 1906, c. 3335, 34 Stat. 267 [U. S. Comp. St. Supp. 1909, p. 155]) to the contrary notwithstanding; and conferred on such state the exclusive power to enact its own laws, regulating intrastate commerce and in the exercise of its police power regulating the introduction and sale of intoxicating liquors.

[Ed. Note.—For other cases, see States, Cent. Dig. § 4; Dec. Dig. § 9.*]

3. COMMERCE (§ 15*)—INTERSTATE COMMERCE—SUBJECTS—INTOXICATING LIQUORS.

Intoxicating liquors are articles of commerce so far as the interstate commerce law is concerned, and hence no state may prohibit their introduction within its borders.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 15.*]

4. INDIANS (§ 35*)—INTRODUCTION OF LIQUOR INTO INDIAN TERRITORY—STATUTES—NONINTERCOURSE ACT—REPEALED.

Since by the enabling act by which Oklahoma was admitted into the Union (Act Cong. June 16, 1906, c. 3335, 34 Stat. 267 [U. S. Comp. St. Supp. 1909, p. 155]), the state was left with jurisdiction of the introduction of intoxicating liquors from Oklahoma into that part of the state

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

known as Indian Territory, and was authorized to control the sale of liquor through its own courts, the nonintercourse act (Act Cong. Jan. 30, 1897, c. 109, 29 Stat. 506), forbidding the introduction of intoxicating liquors into Indian Territory, was no longer in force in that part of Oklahoma formerly known as Indian Territory after its admission as a state so as to prevent the introduction therein of liquor from Arkansas in interstate commerce.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 61, 62; Dec. Dig. § 35.*]

Petition for mandamus by the United States, on relation of Louis Friedman and another, doing business as Friedman & Co., against the United States Express Company. Demurrer to petition overruled.

The complainants filed their petition for a mandamus to compel the defendant to accept and transport intoxicating liquors to complainants' customers residing in that part of the state of Oklahoma commonly known as the Indian Territory. The petition was filed under section 10 of the act of Congress approved March 2, 1889 (Act March 2, 1889, c. 382, 25 Stat. 862 [U. S. Comp. St. 1901, p. 3172]), which is as follows:

"Sec. 10. That the Circuit and District Courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the act to which this is a supplement and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: Provided, that if any question of the fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: Provided, that the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act or the act to which it is a supplement."

Complainants allege, in substance, the receipt of mail orders from customers residing in that country. Complainants put up the goods in suitable packages for shipment and transportation, marked and branded as required by the laws of the United States for the shipment of intoxicating liquors by common carriers, for shipment to various points in that portion of the state of Oklahoma, formerly called the Indian Territory, and that these packages were offered to the defendant, who is a common carrier and engaged in carrying goods from Ft. Smith, Ark., to points in that part of the state of Oklahoma formerly called the Indian Territory; that complainants had received bona fide orders as stated, and in response to said orders they tendered for shipment to said defendant the package consisting of intoxicating liquors with the amount of money charged by said express company for transportation to their customer at Manford, in that part of Oklahoma known as the Indian Territory; that said express company refused to accept said package for shipment, and refused to transport the same to the point stated; that the package was properly marked and branded, as the United States laws require, and was not refused because it was not so properly marked and branded, but solely because it contained intoxicating liquors. Complainants further allege that such refusal on the part of said defendant to ship any intoxicating liquors into that part of Oklahoma formerly known as the Indian Territory is an undue prejudice and disadvantage to complainants in their business, and by such refusal they will sustain great loss, to remedy which they seek the relief prayed for.

*For other cases see same topic & § NUMBER in Dec. & Am. Dig. 1907 to date, & Rep'r Indexes

There is a demurrer to the petition. An answer has also been filed, accompanied by a stipulation of facts, and the whole case submitted to the court upon its merits. There are no facts in the answer and none in the stipulation which, in the opinion of the court, are not raised also by the demurrer, and therefore they are omitted from the opinion.

Youmans & Youmans, for complainants,
C. E. & H. P. Warner, for defendant.

ROGERS, District Judge (after stating the facts as above). The first question which this demurrer raises is whether the tenth section of the act of March 2, 1889, supra, authorizes this proceeding. That depends upon the further question as to whether the petition brings the case stated within the purview of the provisions of the interstate commerce law. In the third section of an act to regulate commerce, approved February 4, 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]), it is provided:

"Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage, in any respect whatsoever."

A critical examination of that section makes it clear that it is unlawful for any common carrier "to make or give any undue or unreasonable preference or advantage to * * * any particular description of traffic, in any respect whatsoever, or to subject any * * * particular description of traffic to undue or unreasonable prejudice or disadvantage in any respect whatsoever." The allegations of the complaint make it clear that the case made is completely covered by that statute; provided intoxicating liquor is an article of commerce and is not prohibited by law from being introduced into that part of the state of Oklahoma known as the Indian Territory. Whether intoxicating liquor is prohibited by law from being introduced into said territory depends upon the question as to whether or not the act of January 30, 1897 (Act Jan. 30, 1897, c. 109, 29 Stat. 506) is still in force as to that territory.

The purpose of this legislation is obvious. Speaking historically the status of the Indian and that of the Indian Territory were in a transition state. Congress was preparing the Indians for individual allotment, for American citizenship and statehood, and at the same time was endeavoring to guard the Indian from the evil consequences of intoxicating liquor and the sinister designs of unscrupulous people who might take advantage of their weakness for strong drink and despoil them of their properties. While this statute was in force, the act of Congress enabling Oklahoma to become a state was approved June 16, 1906 (Act June 16, 1906, c. 3335, 34 Stat. 267 [U. S. Comp. St. Supp. 1909, p. 155]). It is insisted that the second paragraph of section 3 of that act (34 Stat. 269, 270) repeals the intercourse act of January 30, 1897, supra, which forbade the introduction of intoxicating liquors into the Indian Territory. That section of the enabling act is as follows:

"Second. That the manufacture, sale, barter, giving away, or otherwise furnishing, except as hereinafter provided, of intoxicating liquors within those parts of said state now known as the Indian Territory and the Osage Indian reservation and within any other parts of said state which existed as Indian reservations on the first day of January, nineteen hundred and six, is prohibited for a period of twenty-one years from the date of the admission of said state into the Union, and thereafter until the people of said state shall otherwise provide by amendment of said constitution and proper state legislation. Any person individual or corporate, who shall manufacture, sell, barter, give away, or otherwise furnish any intoxicating liquor of any kind, including beer, ale, and wine, contrary to the provisions of this section, or who shall, within the above-described portions of said state, advertise for sale or solicit the purchase of any such liquors or who shall ship or in any way convey such liquors from other parts of said state into the portions hereinbefore described, shall be punished, on conviction thereof, by fine not less than fifty dollars and by imprisonment not less than thirty days for each offense: Provided, that the Legislature may provide by law for one agency under the supervision of said state in each incorporated town of not less than two thousand population in the portions of said state, hereinbefore described; and if there be no incorporated town of two thousand population in any county in said portions of said state, such county shall be entitled to have one such agency, for the sale of such liquors for medicinal purposes; and for the sale, for industrial purposes, of alcohol which shall have been denaturalized by some process approved by the United States Commissioner of Internal Revenue; and for the sale of alcohol for scientific purposes to such scientific institutions, universities, and colleges as are authorized to procure the same free of tax under the laws of the United States; and for the sale of such liquors to any apothecary who shall have executed an approved bond, in a sum not less than one thousand dollars, conditioned that none of such liquors shall be used or disposed of for any purpose other than in the compounding of prescriptions or other medicines, the sale of which would not subject him to the payment of the special tax required of liquor dealers by the United States, and the payment of such special tax by any person within the parts of said state hereinabove defined shall constitute prima facie evidence of his intention to violate the provisions of this section. No sale shall be made except upon the sworn statement of the applicant in writing setting forth the purpose for which the liquor is used, and no sale shall be made for medicinal purposes except sales to apothecaries as hereinabove provided unless such statement shall be accompanied by a bona fide prescription signed by a regular practicing physician, which prescription shall not be filled more than once. Each sale shall be duly registered, and the register thereof, together with the affidavits and prescriptions pertaining thereto, shall be open to inspection by any officer or citizen of said state at all times during business hours. Any person who shall knowingly make a false affidavit for the purpose aforesaid shall be deemed guilty of perjury. Any physician who shall prescribe any such liquor, except for treatment of disease which after his own personal diagnosis he shall deem to require such treatment, shall, upon conviction thereof, be punished for each offense by fine of not less than two hundred dollars or by imprisonment for not less than thirty days, or by both such fine and imprisonment; and any person connected with any such agency who shall be convicted of making any sale or other disposition of liquor contrary to these provisions shall be punished by imprisonment for not less than one year and one day. Upon the admission of said state into the Union these provisions shall be immediately enforceable in the courts of said state."

In considering this question we are compelled to assume that the Congress understood not only the status of the Indian, but also what would be the effect of admitting Oklahoma into the Union as a sovereign state under the Constitution. The very title of the enabling act shows that Congress intended Oklahoma to "be admitted into the Union on equal footing with the original states"; but, if it had intended otherwise, the result would have been the same. Chief Justice

Taney, in the *Dred Scott* Decision, 19 How. 446, 15 L. Ed. 691, in discussing the duties and powers of the federal government in acquiring additional territory, and the admission of states into the Union, said:

"There is certainly no power given by the Constitution to the federal government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new states. That power is plainly given; and if a new state is admitted, it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers, and duties of the state, and the citizens of the state and the federal government. But no power is given to acquire a territory to be held and governed permanently in that character."

In *Sands v. Manistee River Improvement Co.*, 123 U. S. 289, 8 Sup. Ct. 113, 31 L. Ed. 149, Mr. Justice Field, speaking for the full court, in discussing the respective powers of the state of Michigan and the federal government, as affected by the ordinance of 1787, said:

"There was no contract in the fourth article of the ordinance of 1787 respecting the freedom of the navigable waters of the territory northwest of the Ohio river emptying into the St. Lawrence, which bound the people of the territory, or of any portion of it, when subsequently formed into a state and admitted into the Union.

"The ordinance of 1787 was passed a year and some months before the Constitution of the United States went into operation. Its framers, and the Congress of the confederation which passed it, evidently considered that the principles and declaration of rights and privileges expressed in its articles would always be of binding obligation upon the people of the territory. The ordinance in terms ordains and declares that its articles 'shall be considered as articles of compact between the original states and the people and states in the said territory, and forever remain unalterable unless by common consent.' And for many years after the adoption of the Constitution, its provisions were treated by various acts of Congress as in force, except as modified by such acts. In some of the acts organizing portions of the territory under separate territorial governments, it is declared that the rights and privileges granted by the ordinance are secured to the inhabitants of those territories. Yet from the very conditions on which the states formed out of that territory were admitted into the Union, the provisions of the ordinance became inoperative except as adopted by them. All the states thus formed were, in the language of the resolutions or acts of Congress, 'admitted into the Union on an equal footing with the original states in all respects whatever.' Michigan, on her admission, became, therefore, entitled to and possessed of all the rights of sovereignty and dominion which belonged to the original states, and could at any time afterwards exercise full control over its navigable waters except as restrained by the Constitution of the United States and laws of Congress passed in pursuance thereof. *Permoli v. First Municipality of New Orleans*, 3 How. 589, 600 [11 L. Ed. 739]; *Pollard v. Hagan*, 3 How. 212 [11 L. Ed. 565]; *Escanaba Co. v. Chicago*, 107 U. S. 678, 688 [2 Sup. Ct. 185, 27 L. Ed. 442]; *Van Brocklin v. Tennessee*, 117 U. S. 151, 159 [6 Sup. Ct. 670, 29 L. Ed. 845]; *Huse v. Glover*, 119 U. S. 543, 546 [7 Sup. Ct. 313, 30 L. Ed. 487]."

This principle was approved by Mr. Justice Bradley, speaking for the full court, in *Williamette Iron Bridge Co. v. Hatch*, 125 U. S. 9, 8 Sup. Ct. 815 (31 L. Ed. 629), where this language occurred:

"This court has held that, when any new state was admitted into the Union from the North West Territory, the ordinance in question ceased to have any operative force in limiting its powers of legislation as compared with those possessed by the original states. On the admission of any such

new state, it at once became entitled to and possessed all the rights of dominion and sovereignty which belonged to them. See the cases of *Pollard's Lessee v. Hagan*, *supra*; *Permoli v. First Municipality*, 3 How. 589 [11 L. Ed. 739]; *Escanaba Co. v. Chicago*; *Cardwell v. American Bridge Co.* [113 U. S. 205, 5 Sup. Ct. 423, 28 L. Ed. 959]; *Huse v. Glover*, *qua supra*."

In *Bolln v. Nebraska*, 176 U. S. 88, 20 Sup. Ct. 289 (44 L. Ed. 382), Mr. Justice Brown said:

"Upon the admission of a state it becomes entitled to and possesses all the rights of dominion and sovereignty which belonged to the original states, and, in the language of the act of 1867 admitting the state of Nebraska, it stands 'upon an equal footing with the original states in all respects whatsoever.'"

The same principle is approved in *Ward v. Race Horse*, 163 U. S. 511, 16 Sup. Ct. 1076, 41 L. Ed. 244, where Mr. Justice White, beginning with *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565, reviews a number of cases and upheld the doctrine stated.

It must therefore be conceded that, when Oklahoma was admitted under the federal Constitution into the Union as a state, the act of admission gave to her all the powers and devolved upon her all the duties which belong to the other states under the Constitution, anything in the enabling act to the contrary notwithstanding. She could come into the Union in no other way. By virtue of the Constitution her admission fixed her status and that of her people, to the people of other states, to the other states themselves, and to the federal government. Congress cannot exact of a state—even a state coming into the Union—the surrender or waiver of any of the constitutionally inherent powers of sovereignty under the Constitution or such as belong to the original states; nor can a state either surrender or stipulate away any of its sovereignty or render herself less sovereign than the other states. Bearing these principles in mind, Congress knew that the moment Oklahoma was admitted into the Union as a state that the laws regulating interstate commerce must apply to Oklahoma as to all the other states; it knew that the power over intrastate commerce would inure to the state of Oklahoma by the act of admission; it knew that Oklahoma must enact its own laws regulating intrastate commerce, for the simple reason that the power to enact such laws had not been granted to Congress; it knew that the great body of laws traceable to the police power of the state must be enacted by the state for the same reason. Congress knew that intoxicating liquors were articles of commerce, so far as the interstate commerce law was concerned, and that no state could prohibit their introduction within its borders. *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; *Vance v. Vandercook*, 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100; *Adams Express Co. v. Kentucky*, 214 U. S. 218, 29 Sup. Ct. 633, 53 L. Ed. 972; *Atlantic Coast Line v. Wharton*, 207 U. S. 328, 28 Sup. Ct. 121, 52 L. Ed. 230; U. S. Rev. St. § 5258;¹ sections 238, 239, 240 of the act of March 4, 1909 (Act March 4, 1909, c. 321, 35 Stat. 1136, 1137 [U. S. Comp. St. Supp. 1909, p. 1464]), entitled "An act to codify, revise and amend the penal laws of the United States, wherein regulations for the shipment of intoxicating liquors from one state or territory to another state or territory are provided, and heavy penalties prescribed for violating the same."

¹ U. S. Comp. St. 1901, p. 3564.

Now, let us look a moment to that part of the enabling act quoted above. Its scrutiny discloses that it simply required that Oklahoma should make that part of the enabling act in relation to the manufacture and sale of intoxicating liquors a part of its Constitution. Indeed, the incorporation of that provision of the enabling act into the Constitution of Oklahoma was made a condition precedent to its admission into the Union. Oklahoma complied with it and was admitted. On its face Congress did not undertake to enforce the enabling act; it did not seek to force Oklahoma into the Union. The very last sentence of that part of the act quoted shows that Congress intended that Oklahoma should adopt and then enforce it. It says:

"Upon the admission of the state into the Union these provisions shall be immediately enforceable in the courts of the state."

What was the purport of the provisions which were to be enforceable by the state? They were not provisions forbidding the introduction of intoxicating liquors into the state of Oklahoma. Neither Oklahoma nor any other state has any power to regulate interstate commerce. That power has been confided by all the states to the Congress. It is a plenary power, and all the legislation that is valid relating to interstate commerce is traceable to that power. Congress could not delegate its exercise to a state. To do so would be a violation of its duty to every other state and an abdication of its constitutional functions to that extent. That Congress realized this is manifest from the very terms of the enabling act. The act dealt solely with the manufacture and disposal of intoxicating liquor within that part of Oklahoma known as the Indian Territory, and the shipment and conveyance of intoxicating liquors from other parts of the state of Oklahoma into the Indian Territory and into certain reservations within the state. These were provisions clearly within the police power of the state, and properly enforceable by the state, in the event Congress saw fit to withdraw its jurisdiction from over the Indians. *Matter of Heff*, 197 U. S. 508, 25 Sup. Ct. 512 (49 L. Ed. 848). The court says:

"But it is contended that, although the United States may not punish under the police power the sale of liquor within a state by one citizen to another, it has power to punish such sale if the purchaser is an Indian. And the power to do this is traced to that clause of section 8, art. 1, of the Constitution, which empowers Congress 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.' It is said that commerce with the Indian tribes includes commerce with the members thereof, and Congress having power to regulate commerce between the white men and the Indians continues to retain that power, although it has provided that the Indian shall have the benefit of and be subject to the civil and criminal laws of the state and shall be a citizen of the United States, and therefore a citizen of the state. But the logic of his argument implies that the United States can never release itself from the obligation of guardianship; that so long as an individual is an Indian by descent, Congress, although it may have granted all the rights and privileges of national and therefore state citizenship, the benefits and burdens of the laws of the state, may at any time repudiate this action and reassume its guardianship, and prevent the Indian from enjoying the benefit of the laws of the state, and release him from obligations of obedience thereto. Can it be that because one has Indian, and only Indian, blood in his veins, he is to be forever one of a special class over whom the general government may in its discretion assume the rights of guardianship which it has once abandoned, and this whether the state or the

individual himself consents? We think the reach to which this argument goes demonstrates that it is unsound."

But the act went further: It provided for the sales of intoxicating liquor under certain stringent restrictions in certain towns in the Indian Territory of 2,000 population, and, if there were no such towns in any county, then for one place for the sale of intoxicants in each of such counties, and also for certain other sales not necessary to mention, but which appear in that act. Those parts of the enabling act to which I have just referred do not purport to be enforceable by the federal government, nor were they to be enforceable by Oklahoma until it became a state. If Oklahoma had declined to accept the terms of the enabling act and to become a state of the Union, the provisions referred to would not have been enforceable at all. The logic of the argument to the effect that the enabling act repealed the intercourse act of January 30, 1897, leads to the conclusion that the enabling act, having repealed the intercourse act, left the Indian Territory, from the date of the act until Oklahoma was admitted as a state, without any protection whatever from the introduction of liquor into it. Such a result could not have been in the contemplation of Congress, or it never would have provided the protection for the Indian contained in the enabling act itself.

In *Pickett v. United States*, 216 U. S. 460, 30 Sup. Ct. 267, 54 L. Ed. —, the Supreme Court of the United States said with reference to the construction of a statute that:

"No construction should be adopted, if another equally admissible can be given, which would result in what might be called a judicial chasm."

Moreover, it is clear that the intercourse act was not repealed, as applied to all tribes of Indians. It was so held in *U. S. v. Sutton*, 215 U. S. 291, 30 Sup. Ct. 116, 54 L. Ed. —. But if not repealed by the enabling act, was it repealed otherwise, as to the Indian Territory, by reason of the course of legislation and the admission of the state of Oklahoma into the Union? The investigation of this subject has brought under review the most voluminous and incongruous mass of legislation I remember to have encountered in any one case, not to mention decisions of the courts not altogether harmonious. *Draper v. U. S.*, 164 U. S. 244, 17 Sup. Ct. 107, 41 L. Ed. 419. Because of the importance of the question I have spared no labor to try to reach a sound conclusion. In stating it, no effort will be indulged to review either the decisions or the legislation. A brief historical reference should be made to the political, social, and legal status of the Indians in the Indian Territory, and of the Indian Territory itself. When Oklahoma was admitted as a state in the Union, the whole of Oklahoma Territory, including the Indian Territory, had been surveyed, and allotments had been made except as to certain lands containing minerals and certain forest reservations, which were still held in trust by the United States for the Indian. Individual patents had been issued, or were in process of issuance, to the allottees; their tribal governments had been abolished; many thousands of United States citizens, including foreigners pursuing all the lawful avocations of life, resided there; and towns and cities, with municipal govern-

ments, and general laws, and courts, were in full operation. By the enabling act United States courts were created, and it was provided that:

"The Circuit and District Courts for each of said districts, and the judges thereof, respectively, shall possess the same powers and jurisdiction and perform the same duties required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations."

It was also provided that the laws of the territory of Oklahoma, so far as applicable, "shall extend over and apply to said state until changed by the Legislature." True, the United States imposed certain restrictions as to certain classes of Indians upon the alienation of their lands, and reserved the power to enforce these, and to enact other legislation for the protection of the Indians and their property. They were all citizens of the United States, and citizens of the state of Oklahoma. The United States reserved no power, in express terms, of sole and exclusive jurisdiction over the Indian Territory or the Indians; on the contrary, all the citizens of Oklahoma were made subject to the jurisdiction of the state of Oklahoma, except as to certain reserved powers mentioned in the act, and which in no sense invaded or attempted to invade the police powers of the state. The nature of these reserved powers will be better understood by an examination of the case of *United States v. J. P. Allen et al.*, and 16 other cases disposed of in one opinion by the Eighth Circuit Court of Appeals at the May term, 1910 (179 Fed. 13). The question in those cases was whether the United States could maintain in its own name suits to enforce restrictions upon the alienation by the Indians of their lands, made in violation of certain statutes and treaty stipulations. The case arose in Oklahoma. Among other things the court said:

"Much of the briefs is devoted to arguments deduced solely from the fact that Congress has conferred national citizenship upon the Indians. These arguments have been frequently presented to the courts; but, so far as we are aware, they have never defeated the exercise of national authority over the Indian except in the *Heff Case*, 197 U. S. 488 [25 Sup. Ct. 506, 49 L. Ed. 848]. That decision, however, as now explained by the Supreme Court in *United States v. Celestine*, 215 U. S. 278 [30 Sup. Ct. 93, 54 L. Ed. —], lends no support to the defendants. The case arose under the general allotment act of 1887. That statute provides that upon the completion of the allotments, the Indians 'shall have the benefit of, and be subject to, the laws, both civil and criminal, of the state.' Mr. Justice Brewer carries this feature of the statute through his opinion at every step as the basis of the decision of the court. He has now removed all possible doubt on the subject by his opinion in the *Celestine Case*, where he expressly states that the *Heff* opinion rests upon the fact that under the general allotment act Congress has, by direct provision, entirely renounced its own authority over the Indians, and subjected them to the laws of the state, both civil and criminal. The decision of the *Heff Case* simply gives effect to this positive declaration of the legislative intent. In its dealings with the five civilized nations, Congress has been at great pains to indicate a different purpose. Here it has from time to time down to the organic act admitting Oklahoma, and the provisions which it insisted should be embodied in the Constitution of that state, reserved to itself express authority to pass such laws with respect both to the Indians and their lands, as shall in its judgment seem wise. In the present case, though it conferred citizenship upon the Indians, it accompanied its grant of the allotments to them with an express provision against their alienation. The difference between the present case and the *Heff Case* is this: In the former case Congress

expressly renounced its own authority over the Indians, and subjected them to the laws, both civil and criminal, of the state. Here Congress, with equal explicitness, has imposed a restraint upon the alienation of allotments. It is as much the duty of the courts to give effect to the legislative intent in the present case as in the former. See, also, *U. S. v. Sutton*, 215 U. S. 291 [30 Sup. Ct. 116, 54 L. Ed. —].

The Heff Case, referred to in that opinion, arose in the state of Kansas. Heff was indicted under the act of January 30, 1897, now under consideration, in the United States District Court in Kansas for selling one Butler, a Kickapoo Indian, two quarts of beer. Butler belonged to the Kickapoo Tribe of Indians, was under the charge of an Indian superintendent, and had taken his allotment, and was a citizen of Kansas and of the United States; the Kickapoo reservation being within the state of Kansas. The late Mr. Justice Brewer, in discussing that case, said:

"In this republic there is a dual system of government, national and state. Each within its own domain is supreme, and one of the chief functions of this court is to preserve the balance between them, protecting each in the powers it possesses and preventing any trespass thereon by the other. The general police power is reserved to the states, subject, however, to the limitation that in its exercise the state may not trespass upon the rights and powers vested in the general government. The regulation of the sale of intoxicating liquors is one of the most common and significant exercises of the police power. And so far as it is an exercise of the police power it is within the domain of state jurisdiction."

Later, after discussing different phases of the case, he concludes by saying:

"We are of the opinion that when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject to the laws, both civil and criminal, of the state, it places him outside the reach of police regulations on the part of Congress; that the emancipation from federal control thus created cannot be set aside at the instance of the government without the consent of the individual Indian and the state; and that this emancipation from federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and incumbrance, or the further fact that it guarantees to him an interest in tribal or other property.

"The District Court of Kansas did not have jurisdiction of the offense charged, and therefore the petitioner is entitled to his discharge from imprisonment."

The Heff Case does not offend against the *Allen Case*, *supra*. But it was a case of selling, not introducing. The *Sutton Case*, *supra*, was an indictment for introducing upon a certain Indian allotment within the limits of the Yakima Indian reservation in the state of Washington. The case was tried in the District Court of the United States for the Eastern District of that state, and was also brought under the act of January 30, 1897. A demurrer was interposed to the indictment, and sustained for want of jurisdiction in the District Court. On writ of error the Supreme Court said:

"In this offense neither race or color are significant. The Indians, as wards of the government, are the beneficiaries; but for their protection the prohibition is against all, white man and Indian alike. Legislation of this nature has been for a long time in force. Section 4, c. 174, Act July 9, 1832, 4 Stat. 564; section 2139, Rev. St. If the Yakima reservation were within the limits of a territory, there would be no question of the validity of the statute

under which this indictment was found; but the contention is that the offense charged is of a police nature, and that the full police power is lodged in the state, and by it alone can such offenses be punished. By the second paragraph of section 4 of the enabling act with respect to the state of Washington (chapter 180, 25 St. 677), the people of that state disclaimed all right and title 'to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.' Construing this, in connection with other provisions of the enabling act, it was held in *Draper v. United States*, 164 U. S. 240 [17 Sup. Ct. 107, 41 L. Ed. 419], that it did not deprive the state of jurisdiction over crimes committed within a reservation by others than Indians or against Indians, following in this *United States v. McBratney*, 104 U. S. 621 [26 L. Ed. 869]. But in terms 'jurisdiction and control' over Indian lands remain in the United States, and, there being nothing in the section withdrawing any other jurisdiction than that named in *Draper v. United States*, undoubtedly Congress has the right to forbid the introduction of liquor and to provide punishment for any violation thereof. *Couture, Jr., v. United States*, 207 U. S. 581 [28 Sup. Ct. 259, 52 L. Ed. 350]. It is true that only a per curiam opinion was filed in that case, and the judgment was affirmed on the authority of *United States v. Rickert*, 188 U. S. 432 [23 Sup. Ct. 478, 47 L. Ed. 532]; *McKay v. Kalyton*, 204 U. S. 458 [27 Sup. Ct. 346, 51 L. Ed. 566]. But an examination of the record shows that its facts are similar to those in the present case. See, also, an opinion by Shiras, District Judge, in *United States v. Mullin* [D. C.] 71 Fed. 682, and one by Circuit Judge Van Devanter, speaking for the Circuit Court of Appeals for the Eighth Circuit, in *Rainbow v. Young*, 161 Fed. 835 [88 C. C. A. 653].

"Without pursuing the discussion further, we are of opinion that the District Court erred in its ruling, and the judgment is reversed."

It will be seen that this case turned upon the provision of the enabling act with respect to the state of Washington whereby absolute jurisdiction and control of the courts of the United States was in terms expressly reserved over the Indian land until the title thereto was extinguished. Paragraph 3, § 3 of the Oklahoma enabling act (34 Stat. 270) was evidently in part copied from that, or some similar, enabling act, but is marked by a distinct difference. It disclaims all interest in both the public and Indian lands in Oklahoma, and then in terms expressly reserves jurisdiction, disposal, and control over, not the "Indian lands," but the "public lands," until the title of the United States is extinguished, while in the Washington enabling act (25 Stat. 677) "absolute jurisdiction and control" is reserved over the "Indian lands." Therein lies the difference in the two acts. True, in the first section of the Oklahoma enabling act the right is reserved by the United States to make laws and regulations respecting the Indians, their lands, property, or other rights, etc.; but this provision relates to future legislation, and not to legislation then in force. Moreover, it will be observed that the title of the United States to the lands in the Indian country, except the reservations referred to, has long since been extinguished, and with the exception of lands of certain classes of Indians is made alienable at the pleasure of the allottee, or patentee, among whom are thousands of white people and negroes, and all citizens of the United States, and jurisdiction is expressly conferred in the enabling act upon the state of Oklahoma over the manufacture and traffic in intoxicating liquors in the state of Oklahoma, including the Indian Territory under certain restrictions enforceable by the state.

Is it reasonable to suppose that, if Congress intended to reserve the power to prevent the introduction of intoxicating drinks into the Indian Territory, the state of Oklahoma would have been admitted with the power to introduce, manufacture, and sell liquors in other parts of the state of Oklahoma than the Indian Territory and the Indian reservations referred to in that enabling act, and to control the introduction of intoxicants from other parts of Oklahoma into the Indian Territory? The logic of an affirmative answer to this question may be illustrated in this way: The Indian Territory is bounded by Oklahoma, Texas, Arkansas, and Missouri. Undoubtedly Congress had, by its power to regulate intercourse with the Indian tribes, under repeated decisions, to control absolutely the introduction of intoxicants into the Indian Territory, from the adjoining states and from other parts of Oklahoma as well (*U. S. v. Sutton*, 215 U. S. 296, 30 Sup. Ct. 116, 54 L. Ed. —; *Matter of Heff*, *supra*; *U. S. v. Holliday*, 3 Wall. 407, 18 L. Ed. 182); but by the Oklahoma enabling act the state of Oklahoma is left with jurisdiction over the introduction of intoxicants from Oklahoma into the Indian Territory through its own courts as well as the sales and disposals of intoxicants therein; but, if the act of January 30, 1897, is in force in the Indian Territory, the United States District Court for the Eastern District of Oklahoma has exclusive cognizance of the introduction of intoxicants from the other named states. This is an anomaly in legislation, and it occurs to me approaches the *reductio ad absurdum*. We should have two courts, foreign to each other, created by separate and distinct sovereignties, exercising cognizance over exactly the same offenses, each in the same place and at the same time, and the jurisdiction of the court made to depend on the state from which the liquor was introduced. In the *Heff* Case, *supra*, Mr. Justice Brewer said:

"There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested in either the state or the nation and not divided between the two."

For the reason stated I do not think the *Sutton* Case applicable to the facts of this case, and hence not controlling. In *U. S. v. McBratney*, 104 U. S. 623, 26 L. Ed. 869, approved in the case of *Draper v. U. S.*, 164 U. S., at page 243, 17 Sup. Ct., at page 108 (41 L. Ed. 419), where the Supreme Court said:

"The act of March 3, 1875, c. 139 (the enabling act which provided for the admission of the state of Colorado), necessarily repeals the provisions of any prior statute, or of any existing treaty, which are clearly inconsistent therewith. The *Cherokee Tobacco*, 11 Wall. 616 [20 L. Ed. 227]. Whenever, upon the admission of a state into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words. The *Kansas Indians*, 5 Wall. 737 [18 L. Ed. 667]; *United States v. Ward, Woolw.* 17 [Fed. Cas. No. 16,639]. The state of Colorado, by its admission into the Union by Congress, upon an equal footing with the original states in all respects whatever, without any such exception as had been made in the treaty with the Ute Indians and in the act establishing a territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States. The courts of the United States have, therefore, no juris-

diction to punish crimes within that reservation, unless so far as may be necessary to carry out such provisions of the treaty with the Ute Indians as remain in force. But that treaty contains no stipulation for the punishment of offenses committed by white men against white men."

The precise question now under consideration is more nearly presented in the case of *United States v. Hall* (D. C.) 171 Fed. 214. The facts in that case are very similar to those in the case at bar. The question was raised differently, but in effect is the same. The opinion is marked by careful research, reviewing the decisions applicable, down to and including the *Heff Case*, *supra*. It is clear and strong in its reasoning, and I think controls this case. Hall was an Oneida Indian, the members of which tribe had become allottees, holding trust patents. A large part of the Oneida reservation was held by white men who had obtained titles from the heirs at law of deceased allottees under existing laws. The Oneida reservation had been organized and divided into two townships, and was situate in Wisconsin, with provisions for local government. Under these conditions Hall was indicted in the United States District Court for the Eastern District of Wisconsin, under the act of January 30, 1897, for introducing liquor into the Oneida reservation. The principle of law in the case at bar would not be different if a Choctaw Indian were indicted in the United States District Court for the Eastern District of Oklahoma for introducing intoxicating liquors from Arkansas into the Indian Territory, for if the act of January 30, 1897, is in force as applicable to the Indian Territory, the District Court for the Eastern District of Oklahoma would, in that event, have jurisdiction, and if the same act is in force no mandamus could go in this case. Manifestly no mandamus could go from this court to compel the doing of an act which, when done, is indictable under the laws of the United States in the Eastern District of Oklahoma. The *Hall Case* must be read to get the full force of it. A demurrer was sustained to the indictment in that case for want of jurisdiction.

The substantial facts in the *Hall Case* are strikingly similar to those in the case at bar, and it seems to me it is conclusive of this case. It is to be hoped this case will be carried to the appellate court, and a controlling decision had. If the decision is sound, the common carriers should not be harrassed by vexatious litigation so long as their shipments remain interstate commerce, nor should carriers be subjected to indictment in the United States courts for discharging their duties under the interstate commerce laws. On the other hand, if the decision is erroneous, the Indians are entitled to the protection contemplated by the act of January 30, 1897, and that statute should be enforced by the United States courts. As throwing light upon this subject, see *Crescent Liquor Company v. Platt* (C. C.) 148 Fed. 894.

The demurrer is overruled.

Let the writ of mandamus go.

HITRITZ v. BROWN.

(Circuit Court, D. Connecticut. June 1, 1910.)

No. 725.

1. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—ASSUMED RISK—BURDEN OF PROOF.

Where by the pleadings defendant made the issues of assumed risk and contributory negligence substantive defenses, the burden was on him to establish them by a preponderance of the evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 907, 908; Dec. Dig. § 265.*]

2. MASTER AND SERVANT (§ 280*)—INJURIES TO SERVANT—ASSUMED RISK.

Plaintiff, while clearing away wet "broke" from an alleyway, slipped and got his hand caught and badly injured in the rollers of a machine. On being asked if he did not know at the time of the accident that if he fell while in the alleyway, so that his hand or arm came in contact with the rollers, he would be likely to get caught and hurt, he answered "that he never thought about it," that he knew if he put his hand between the rollers it would be drawn in, because he had seen paper drawn in between the rolls, but denied that his mind carried him any further in that direction at that time. *Held* insufficient to show that plaintiff appreciated the danger and assumed the risk as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 983; Dec. Dig. § 280.*]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

At Law. Action by Albert Hitritz against Howard C. Brown. On motion in arrest of judgment and for a new trial. Denied.

Hyde, Joslyn, Gilman & Hungerford, for plaintiff.

Seymour C. Loomis and William A. Arnold, for defendant.

PLATT, District Judge. The first ground upon which the motion proceeds is that the complaint should have contained allegations that the plaintiff was ignorant of the danger and did not have equal means with the defendant of knowing about it at the time of the accident. I do not so understand the law. By the pleadings the defendant made the issues of assumption of the risk and contributory negligence substantive defenses, which he was bound to establish by a preponderance of the testimony.

The other question raised by the motion is the only one which is worthy of a moment's serious consideration. With the pleadings and testimony as both existed at the close of the plaintiff's case, was the evidence such as to warrant a submission of the case to the jury upon the issues of defendant's negligence and plaintiff's assumption of the risk? As the case stood, was it an open question whether the plaintiff knew or ought to have known of the danger attending the clearing away of wet "broke" from the alleyway? Was the answer a foregone

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

conclusion, or could reasonable minds reach differing results upon the evidence?

When the motion for a direction of verdict for the defendant was made, the plaintiff was, in a certain sense, himself an exhibit before the jury. They saw him on the witness stand for several hours, and had ample opportunity to study him and make up their minds as to the extent of his intelligence and capacity for reasoning. Counsel for defendant knew the turning point of his case, and pursued the plaintiff vigorously about it. He asked him if he did not know at the time of the accident that, if he fell while in the alleyway and his hand or arm came in contact with the rollers, he would be likely to get caught and be hurt. Plaintiff answered that he never thought about it. Counsel asked him if he did not know that, if he put his hand between the rolls, it would be drawn in. He said that he did know that, because he had seen the paper drawn in between the rolls. He denied that his mind carried him any further in that direction at that time.

It is a far cry from knowing that if his hand went between the rollers it would be drawn in, and that the alleyway was slippery, to a knowledge that, while working in there, a combination of circumstances might arise which would produce the situation which resulted in such severe injury to the plaintiff. In other words, he told the jury that at the time of the accident his intelligence had not reached the point where he realized that he might slip on the wet "broke," and that in slipping his hand might get between the rolls, and that he might be so drawn in between them as to be badly hurt.

When I refused to direct a verdict, the testimony had so impressed me that I should have felt bound to find as a fact that he did not know, or realize, or appreciate the danger before he was hurt. Whether he ought to have known, realized, and appreciated it is another question. When the case was over, it is probable that I should have reached the opposite conclusion from the one reached by the jury; but I thought then, as I more strongly think now, that it was an open question, on which honest and intelligent minds might differ. Upon reflection and a fairly exhaustive examination of the testimony, I am not willing to say that I am convinced that my conclusion would have been any better than theirs.

On the whole, this case is an interesting example of the practical workings of our jury system. As long as the system prevails I shall not, of my own free will and accord, arrogate to myself the final decision of such a state of facts as was here presented.

Let the motion be denied, and judgment entered on the verdict.

WAKEM & McLAUGHLIN v. UNITED STATES.

(Circuit Court, N. D. Illinois. May 27, 1910.)

No. 27,205.

CUSTOMS DUTIES (§ 44*)—CLASSIFICATION—"BOK ALE"—SIMILITUDE TO BEER.

"Bok ale" or barley brew base, which is an unfinished nonalcoholic beverage, but which is produced by processes and from materials similar to those employed in the manufacture of beer, is dutiable by similitude at the same rate of duty as beer, under Tariff Act July 24, 1897, c. 11, § 1, Schedule H, par. 297, 30 Stat. 174 (U. S. Comp. St. 1901, p. 1655).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 44.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below, which is reported as G. A. 5,633 (T. D. 25,172), affirmed the assessment of duty by the collector of customs at the port of New York. The opinion filed by the Board of General Appraisers reads as follows:

McClelland, General Appraiser. The merchandise covered by this protest is described in the invoice as "bok ale, nonalcoholic." It was returned for duty under Tariff Act July 24, 1897, c. 11, § 1, Schedule H, par. 297, 30 Stat. 174 (U. S. Comp. St. 1901, p. 1655), as assimilating to beer in casks, and was assessed for duty at 20 cents per gallon. It is claimed by the protestants that the merchandise is nonalcoholic, unmalted, and an unenumerated manufactured article, subject to a duty of 20 per cent. ad valorem under section 6 of the said act, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1627).

It appears from the record that this so-called bok ale is only partially manufactured and is imported in an unfinished state. To fit it for consumption there must be added water and carbonic acid gas, with such other ingredients as may be required by individual tastes as to flavor. It is imported in casks, but it is to be bottled when thus fitted for use. The finished article is used as a nonalcoholic beverage; but in the condition in which it is imported the merchandise could not be used as a beverage. Its composition is described by one of the witnesses for the importer as follows: "The chief ingredient is starchy sugar, the intermediate product between starch and glucose; and these starchy sugars that are used contain a small amount of fermentable matter. The amount of sugar used in the liquor is calculated so that when the whole of the fermentable matter is converted into alcohol it will not exceed 2 per cent. In addition to that, hops are used and a few other flavors."

The paragraph under which the merchandise was classified, in so far as it applies, reads: "Ale, porter, and beer, in bottles or jugs, forty cents per gallon; * * * otherwise than in bottles or jugs, twenty cents per gallon." Duty was assessed under this provision by virtue of the similitude clause in section 7 of said act. 30 Stat. 152 (U. S. Comp. St. 1901, p. 1627): "That each and every article, not enumerated in this act, which is similar either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this act as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned."

In *Stuart v. Maxwell*, 16 How. 160, 14 L. Ed. 883, the United States Supreme Court defined the object of the similitude clause to be "to afford rules to guide those employed in the collection of the revenue, in certain cases likely to occur, not within the letter but within the real intent and meaning of the laws imposing duties." To sustain the collector's classification of this merchandise, it is only necessary to find that it is similar to ale, porter, or beer, as mentioned in said paragraph 297, either in material, quality, texture,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

or the use to which it may be applied. *Hahn v. U. S.*, 100 Fed. 635, 40 C. C. A. 622. One of the protestants' witnesses, when questioned as to the similarity of manufacture and material of bok ale and ale and beer, testified as follows: "Q. Can you state from your own knowledge whether bok ale is manufactured in the same manner as beer or ale? A. In some respects the processes are similar. Q. In what respects do they differ? A. Beer is allowed to contain more alcohol. This is practically a beer without alcohol, or we limit the amount of alcohol so as to bring it within the classification of a nonalcoholic beverage. Q. Will you tell me, so far as the material is concerned, how this article differs from ordinary lager beer—only as to material? A. It does not differ so very much from it. First of all, a kind of ferment is used for lager beer, which imparts a peculiar flavor. Lager beer is potable when finished. This, we claim, is not potable." Thus it appears that the process of manufacture of the merchandise under consideration is practically the same as that by which beer is produced, the only difference being that beer is allowed to contain more alcohol, and this article is practically a beer without alcohol. As to the material of composition, there is little difference. In these two particulars—process of manufacture and material—the merchandise assimilates ale or beer sufficiently to justify the classification made by the collector, and we so find.

The protest is overruled and the decision of the collector is affirmed.

Defrees, Buckingham, Ritter & Campbell (Cyrus Heren, of counsel), for importers.

Edwin W. Sims, U. S. Atty., and D. Frank Lloyd, Asst. U. S. Atty. Gen. (William A. Robertson, of counsel), for the United States.

CARPENTER, District Judge. Decision affirmed.

LUYTIES BROS. v. UNITED STATES.

(Circuit Court, S. D. New York. June 30, 1910.)

No. 5,468.

CUSTOMS DUTIES (§ 36*)—CLASSIFICATION—"LITHOGRAPHIC PRINTS" BOUND.

Calendars composed of lithographic sheets with a metal strip at each end, and having a calendar pad composed of lithographic sheets attached thereto, the lithographic prints being the most important feature of the importation, are dutiable as lithographic prints bound, under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 400, 30 Stat. 188 (U. S. Comp. St. 1901, p. 1672), rather than as printed matter (par. 403, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673]), or as manufactures of paper (par. 407, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673]).

[*Exd. Note.*—For other cases, see Customs Duties, Cent. Dig. § 118; Dec. Dig. § 36.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

Hatch & Clute (Walter F. Welch, of counsel), for importers.

D. Frank Lloyd, Asst. Atty. Gen. (Martin T. Baldwin, on the brief), for the United States.

HAZEL, District Judge. The question presented by the protest involves calendars of a sheet of paper with metal strips at the ends and containing a lithographed illustration and advertising matter, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

having attached thereto lithographed strips of paper composing a calendar pad. They were held dutiable under paragraph 400 (Act July 24, 1897, c. 11, § 1, Schedule M, 30 Stat. 188 [U. S. Comp. St. 1901, p. 1672]) as lithographic prints, less than $\frac{8}{1000}$ of an inch in thickness at 20 cents per pound. The importer claims that the merchandise is assessable for duty at 35 per cent. ad valorem under paragraph 407 of said act, as manufactures of paper not specially provided for, or, under paragraph 403, as printed matter at 25 per cent. ad valorem. It appears that all the advertising matter on the calendars was lithographic, and unquestionably they would have been assessed for duty under paragraph 400 if the prints had been brought into the country loose and not attached in calendar form. That the sheets were attached makes no difference, for the tariff provision is broad enough to cover them whether bound or unbound. They were advanced in condition, and it would be unreasonable to suppose that Congress placed a certain duty on separate sheets of lithographic prints, and intended that such sheets fastened together should be entitled to entry at a lower rate of duty.

The importer relies on the principle of *Knauth, Nachod & Kuhne v. United States* (C. C.) 155 Fed. 144, where it was held that an article composed of cardboard which had a lithographic print upon it was not dutiable as lithographic print under the paragraph in question, but that case seems to me to be inapt. The lithographic prints were used to decorate an article such as a wall pocket, which is hung on the wall as a receptacle for small household articles, and, moreover, the lithographic prints were not the distinctive feature of the articles. They were simply used by the manufacturer to embellish or decorate the cardboard boxes, while in the present case the merchandise consists of lithographic prints which in themselves are the most important feature of the importation.

The decision of the board is affirmed.